No. 129164

In the

Supreme Court of Illinois

CITY OF ROCK FALLS
an Illinois Municipal Corporation,

Petitioner-Appellee,

vs.

AIMS INDUSTRIAL SERVICES, LLC,
An Illinois Limited Liability Company,

Respondent-Appellant,

On Appeal from the Illinois Appellate Court,
Fourth Judicial District, No. 4-22-0208.
There Heard on Appeal from the Circuit Court of the Fourteenth Judicial Circuit
Whiteside County, Illinois, No. 2019 CH 85
The Honorable **Stanley B. Steines**, Judge Presiding.

BRIEF AND ARGUMENT FOR RESPONDENT-APPELLANT

Mr. James W. Mertes, Esq. (ARDC No. 6216546)
Ms. Magen J. Mertes, Esq. (ARDC No. 6283521)
Mr. Mitchel R. Johnston, Esq. (ARDC No. 6322610)
MERTES & MERTES, P.C.
4015 East Lincolnway, Suite D
Sterling, IL 61081
Telephone: 815.626.1500
E-mail: jmertes@mertesandmertes.com

Attorneys for Respondent-Appellant
AIMS INDUSTRIAL SERVICES, LLC.

ORAL ARGUMENT REQUESTED

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CYNTHIA A. GRANT
SUPREME COURT CLERK

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POINTS AND AUTHORITIES

A CITY CANNOT USURP A COURT'S INHERENT POWER TO CONSIDER EQUITABLE PRINCIPLES BY ENACTING AN ORDINANCE AUTHORIZING INJUNCTIVE RELIEF FOR A CLAIMED VIOLATION.

NATURE OF THE CASE

The City of Rock Falls (City) filed a Verified Petition for Injunctive and Other Relief in Whiteside County Circuit Court. The City sought to compel Aims Industrial Services, LLC (Aims) to abandon its private sewage disposal system and directly connect to the City's sewer main pursuant to the Rock Falls Municipal Code. Following a bench trial, the court denied the City's Verified Petition for Injunctive and Other Relief. In denying the City's petition, the court found, *inter alia*, that the $50,000.00 to $150,000.00

cost of compelling a connection to the sewer main was inequitable, relative to the property's 2017 purchase price of $245,000.00. On appeal, the Appellate Court, Fourth District, reversed, finding that the trial court was required to grant the City's request for injunctive relief because "a governmental body seeking injunctive relief need only show that the statute was violated, and that the statute relied upon specifically allowed for injunctive relief." For this reason, the reviewing court held that the trial court improperly "balanced the equities" by considering the potential cost of connection when denying the City's request for injunctive relief. It is from this holding that the instant appeal to the Illinois Supreme Court originates. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

I. Whether a city can usurp a court's inherent power to consider equitable principles by enacting an ordinance authorizing injunctive relief for a claimed violation.

II. Whether trial courts sitting in equity remain empowered to balance the equities when deciding whether an injunction should issue, even if the moving party is not required to establish the traditional elements for obtaining an injunction.

JURISDICTIONAL STATEMENT

Jurisdiction is conferred upon this Court pursuant to Supreme Court Rule 303, as an appeal from a final judgment of the trial court, and Supreme Court Rule 315, upon this Court's allowance of Aims's Petition for Leave to Appeal on January 25, 2023.

STATEMENT OF FACTS

On March 3, 2017, Aims purchased the commercial property located at 2103 Industrial Park Road in Rock Falls, Illinois (property) from Sandra Bright. (R104). Aims purchased the property for $245,000.00. (R104). The property had always been on a private sewage disposal system. (C121). Aims alleged that prior to the sale, the building inspector for the City indicated to both Sandra Bright and Aims that the property could remain connected to the private system. (C63, 121). The building inspector later denied granting such permission. (C54-55). When the property was purchased by Aims in 2017, Section 32-189(g) of the Rock Falls Municipal Code (Code) provided as follows:

> "Upon sale or transfer of property all private sewage disposal systems within the city limits shall connect to the public sanitary sewer when available in accordance with sections 32-186 and 32-190, a direct connection shall be made to the public sewer, and the private sewage disposal system shall be abandoned and shall be cleaned of sludge and filled with granular materials. The county health department shall be notified and inspect the abandoned septic system prior to any remedial actions being taken." Rock Falls Municipal Code, § 32-189(g) (amended July 20, 2010). (C168, A28).

Section 1-41(n) of the Code provided as follows:

> "[v]iolations of this Code that are continuous with respect to time are a public nuisance and may be abated by injunctive or other equitable relief." *Id*. § 1-41(n) (amended Sept. 6, 2016).(A29).

Section 32-186 of the Code provided as follows:

> "No person having his residence or place of business within the territorial limits of the city shall be permitted to dispose of sewage of such residence or place of business located in the city otherwise than through the sewer mains of the city whenever the sewer mains of the sewerage system of the city are adjacent to his property, without the written permission of the council." *Id*. § 32-186. (C170, E4, A30).

Section 32-190 of the Code provided as follows:

> "The owner of each house, building or property used for human occupancy, employment, recreation or any other purpose, situated within the city is required, at his expense, to install suitable toilet facilities therein, meeting the requirements of the state plumbing code, and to connect such facilities directly with the public wastewater treatment system in accordance with the provisions of this division, and within 60 days after official notice to so connect. This provision shall be effective provided that there a wastewater treatment system main located: (i) within 300 feet of the property line of a property utilized for residential purposes; (ii) within 300 feet of the property line of a property utilized for nonresidential purposes which has a daily sewage flow of less than 1,500 gallons per day; or, (iii) within 1,000 feet of the property line of a property utilized for nonresidential purposes which has a daily sewage flow of 1,500 gallons per day or greater." *Id*. § 32-190 (amended Sept. 15, 2015). (C170, E6, A31).

On August 5, 2019, the City filed a Verified Petition for Injunctive and Other Relief alleging Aims was in violation of the ordinances and seeking an order commanding Aims to cure the alleged violations. (C8). Aims filed its Answer denying that the City was entitled to the requested relief. (C17). Aims's First Affirmative Defense asserted that the City should be equitably estopped from enforcing its ordinance due to the building inspector's assurance that the property would be "grandfathered in," and Aims would not need to comply with the ordinance requiring connection upon sale or transfer. (C18). The Second Affirmative Defense asserted that Section 32-189 was inapplicable due to the unavailability of a connection to the sewer main, where the City failed to install lateral hookups to the sewer main due to the depth of the sewer main. (C18).

The City filed a Motion for Summary Judgment alleging that no genuine issue of material fact existed and arguing that it was entitled to summary judgment as a matter of law. (C38). On November 9, 2020, the trial court found that there was no genuine issue of material fact on the issue of estoppel, and the court granted the City's motion for summary judgment on Aims's First Affirmative Defense. (R31). However, the court found that there

was a genuine issue of material fact regarding the availability of the sewer line. (R31-36). The court opined that this issue hinged on the feasibility of connection to the City's sewer system and that the term "feasibility can be based upon a clear showing that the costs outweigh the public interest." (R31-32).

On August 20, 2021, the case proceeded to a bench trial. (R40). At trial, the City called Ed Cox as a witness. (R49). Mr. Cox testified that he was employed as the Superintendent of the City's Sewer Department. (R50). Normally, when a City's wastewater treatment system main is first installed, lateral connections are contemporaneously installed. (R77). These lateral connections allow for direct connection of properties to the wastewater treatment system main. (R77). However, Mr. Cox testified that though there were sewer lines installed near the property, no lateral connections were ever installed for the property. (R77).

The City then called Nathan Simonton, an estimator/contractor for Helm Civil Engineering, to testify. (R80). Mr. Simonton testified that at the request of Aims, he prepared an estimate on October 21, 2020. (R80, 93). Mr. Simonton testified that to correctly connect the Aims property to the City sewer system, a lateral connection must be installed. (R94-95). To do so, the contractor would be required to excavate a trench below the depth of the groundwater table. (R94-95). The contractor would then be required to "de-water" that trench, stabilize it with forms, and install a lateral connection. (R94-95). Mr. Simonton testified that the estimated cost for such a connection would be $157,010.45. (R97).

Mr. Simonton testified that the City also requested that he estimate the cost of connecting the property to the City's sewer system in an unusual manner, through the usage

of an electrical pumping station. (R89, 96, E10). Mr. Simonton testified that the estimated cost for such a connection would be $51,455.00, which did not include expenses for installing electrical connections that such a station would need. (R90, 97, E10).

Next, Aims called the City's Administrator, Robin Blackert, who admitted that in 2020, the City approved an ordinance waiving the requirement of sewer connection for a gun range located within the City. (R115). Blackert confirmed that the City had passed the ordinance, wherein the City waived the requirement that an indoor gun range connect to the City's sewer system, notwithstanding that it purchased the property on February 4, 2019, and was subject to Section 32-189. (R115, E11-13). The City explained its reasons for waiving the sewer connection requirement in the ordinance for the gun range as follows:

"A. a direct connection to the City sewer mains would require [the property owner] to bore underneath 1st Avenue to the East, which connection would come at a cost in excess of $36,000.00; and

B. an alternate connection could be made by connecting the City sewer mains to the North along 14th Street, however, connection would require the grant of an easement for such purposes from the adjacent property owners, which easement cannot be obtained after the diligent effort of [the property owner];

C. there are no other methods of connecting to the sewer mains of the City other than the aforesaid." (E11-13).

The City waived the requirement that the gun range connect to the City's sewer system based upon its finding that to do so would impose upon the gun range "an undue hardship" due to the "prohibitive cost." (E11-13).

The Court also admitted evidence comprised of a Restriction Relating to Private Sanitary Sewer System for the gun range. (R117, E15). Within that Restriction, the first independent reason given for the waiver was "a direct connection to the City sewer mains would require [the gun range] to bore underneath 1st Avenue to the East, which connection would come at a prohibitively expensive cost." (R118). The prohibitively expensive cost that justified the waiver was $36,000.00. (R118). At the close of evidence, the parties were ordered to make written closing arguments. (R125).

On October 7, 2021, the trial court delivered its oral ruling. (R129). The court determined that the City was not surprised by the Defendant's argument that the City had selectively enforced Section 32-189. (R132-33). The trial court ruled that Aims was not required to plead an affirmative defense on that issue. (R133). The trial court found that there is a wastewater treatment system main located within 300 feet of the property line of the property, which has a daily sewage flow of less than 1,500 gallons per day. (R136-38). The trial court found no evidence that the private sewage disposal system was failing, not being used properly, not active and functioning, or a threat to public health. (R140). The court noted that "[it had] a hard time understanding where the sale or transfer of the property is a triggering event that is reasonably related or a rational basis to protecting the public health without more, just that in and of itself, because to put it this way, if the previous owner still owned it, we wouldn't be in court on this because we're dealing with the same system." (R141).

The trial court noted that the cost of $50,000.00 to $150,000.00 to connect Aims's property to the City's sewer system is inequitable when the property itself only sold for $245,000.00, specifically stating "[a] court sitting in equity does have a concern about

that." (R142). The Court determined that once a governmental entity has given some applicants a cost analysis, it is fair to give that same fair and reasonable cost analysis to other applicants. (R144-45). Additionally, the court commented that installation of lateral connections at the time that the sewer was first installed was either the City's responsibility, or it was the City's responsibility to cooperate with the property owner to install the lateral connections, and Aims did not create the circumstances associated with the absence of lateral connections. (R146-47). The court noted that "Aims did not create the circumstances that he finds himself in necessarily and that the City helped create it by not making those laterals readily available." (R147). The trial court stated that it did not make any determinations that the ordinance was "unconstitutional or inappropriate or should be stricken." The trial court stated that it was not taking away the discretion of the city council or prejudicing the city by using a cost analysis to determine if the connection was available. (R149).

On February 16, 2022, the Court entered the Order Denying City's Verified Petition for Injunctive and Other Relief. (C303). The Order attached the transcript of the Court's oral ruling and adopted those findings and rulings as the Order of the Court. (C303). The City filed its Notice of Appeal on March 15, 2022. (C307).

On October 31, 2022, the Appellate Court, Fourth District, issued a Rule 23 non-published opinion reversing the trial court and remanding the case for further proceedings. *City of Rock Falls v. Aims Industrial Services*, LLC, 2022 IL App (4th) 220208-U. In so holding, the Fourth District found, *inter alia*, that the trial court improperly considered the potential cost of connection and the absence of pre-existing lateral connections when determining whether a connection was available pursuant to section 32-189(g) of the Code.

Id. ¶¶ 26-32. The Fourth District further addressed the trial court's consideration of cost and the other landowner's waiver as it related to the trial court's discussion of the appropriate considerations for granting equitable relief. *Id*. ¶ 32. On this point, the Fourth District disagreed with the Second District's holding in *County of Kendall v. Rosenwinkel*, 353 Ill. App. 3d 529 (2004) and held that the trial court improperly balanced the equities when denying the City's request for injunctive relief. *Id*. ¶ 49. Citing *People ex. Rel Sherman v. Cryns*, 203 Ill. 2d 264, 278 (2003), the Fourth District reasoned that the trial court was relegated to granting the City injunctive relief absent any equitable consideration because "a governmental body seeking injunctive relief need only show that the statute was violated, and that the statute relied upon specifically allowed for injunctive relief." *Id*. ¶ 45. It is from this holding that the instant appeal stems.

ARGUMENT

I. A CITY CANNOT USURP A COURT'S INHERENT POWER TO CONSIDER EQUITABLE PRINCIPLES BY ENACTING AN ORDINANCE AUTHORIZING INJUNCTIVE RELIEF FOR A CLAIMED VIOLATION.

STANDARD OF REVIEW

Whether a city can usurp a court's inherent power to consider equitable principles by enacting an ordinance authorizing injunctive relief for a claimed violation presents a pure question of law that is subject to *de novo* review. See *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 850 (2007) (providing that municipal ordinances are interpreted using the same rules of statutory interpretation as statutes and are reviewed *de novo*); see also *Exelon Corporation v. Department of Revenue*, 234 Ill. 2d 266, 275 (2009).

ANALYSIS

The City filed a Verified Petition for Injunctive and Other Relief seeking to compel Aims to abandon its private sewage disposal system and directly connect to the City's

sewer main pursuant to section 1-41(n) of the Code (providing that violations of the Code may be abated by injunctive or other equitable relief) and section 32-189(g) of the Code (providing for the connection of private sewage disposal systems to the public sanitary sewer upon transfer or sale of property within city limits). Rock Falls Municipal Code, §§ 1-41(n) (amended Sept. 6, 2016) and 32-189-(g) (amended July 20, 2010). (C8).

Generally, a party seeking an injunction must establish that it: (1) has no adequate remedy at law; (2) possesses a certain and clearly ascertainable right; and (3) will suffer irreparable harm if no relief is granted. *People v. Keevan*, 68 Ill. App. 3d 91, 96 (1979); *County of Kendall v. Rosenwinkel*, 353 Ill. App. 3d 529, 538 (2004). In addition to these traditional elements, trial courts are empowered to balance the equities and/or hardships when considering whether an injunction should ultimately issue. *Id*.

When the trial court denied the City's request for injunctive relief, it considered Aims's cost of abandoning an active, functioning, private system. The court found that Aims's system was not a threat to the public health. (R140). The court declined to compel a $157,010.45 connection to the sewer main, when the property was purchased for a mere $245,000.00. (R97, R104, R142). The trial court found, in essence, that the cost of injunctive relief outweighed the public interest in ordering it. The court further factored in the City's selective enforcement of its own Code provisions as it pertains to prior variances granted based on similar cost analyses. (R144-45). On appeal, the Fourth District held that any balancing of the equities, cost analysis, or consideration of undue hardship by the trial court was improper. Respectfully, the Fourth District was incorrect.

Citing this Court's decision in *Cryns*, 203 Ill. 2d at 278, the Fourth District held that when a governmental body seeks injunctive relief, all equitable considerations are

improper, and the governmental body need only show that (1) the *statute* was violated; and (2) that the *statute* relied upon specifically allowed for injunctive relief. (Emphasis added.) *Aims Industrial Services, LLC,* 2022 IL App (4th) 220208-U, ¶ 45. Regarding the first element, the court cited *City of Nokomis v. Sullivan*, 14 Ill. 2d 417, 421 (1957) for the proposition that "grave dangers to public health" required that municipalities be empowered to require property owners to discontinue the use of privies, otherwise known as *outhouses*, and to compel connections to municipal sewer systems. *Id*. ¶ 42. Based on this principle, the court flatly concluded that Aims's private system was a public nuisance and that section 11-60-2 of the Illinois Municipal Code empowered "the corporate authorities of each municipality [to] define, prevent, and abate nuisances." *Id*. ¶ 43; 65 ILCS 5/11-60-2 (West 2022) (providing that "the corporate authorities may define, prevent, and abate nuisances.").

Though it remains undisputed that the property's modern private system poses no threat to the public's health, it is more important to note that: (1) one cannot violate section 11-60-2 as written; and (2) section 11-60-2 does not specifically provide for injunctive relief. *Id*. Accordingly, the Fourth District's holding that the City met its burden by establishing a violation of section 11-60-2 and establishing that 11-60-2 allowed for injunctive relief was incorrect. See *Aims Industrial Services*, *LLC*, 2022 IL App (4th) 220208-U, ¶ 43. To the extent that the Fourth District's decision was instead based on a violation of City ordinances, this Court's decision in *Cryns* is inapplicable.

In *Cryns*, this Court addressed violations of the Nursing and Advanced Practice Act (225 ILCS 65/20-75 (West 2000)), a statutory scheme which specifically empowered governmental entities to petition the circuit court to enjoin any violation of or force

compliance with the Act. *Cryns*, 203 Ill. 2d at 267-68. This Court instructed that "[o]nce it has been established that a *statute* has been violated, no discretion is vested in the circuit court to refuse to grant the injunctive relief authorized by that *statute*." (Emphasis added.) *Id*. at 278; See *Keevan*, 68 Ill. App. 3d at 97 (referencing violations of the Illinois Environmental Protection Act); See *Midland Enterprises, Inc. v. City of Elmhurst*, 226 Ill. App. 3d 494, 504 (1993) (referencing violations of the Rivers, Lakes, and Streams Act).

Here, the Fourth District utilized *Cryns* to hold that "[o]nce an *ordinance* violation has been established, no discretion is vested in the trial court to refuse to grant the injunctive relief authorized by statute." (Emphasis added.) *Aims Industrial Services*, *LLC*, 2022 IL App (4th) 220208-U, ¶ 45. The Fourth District subtly substituted the term "ordinance" for "statute." *Id*. Neither *Cryns*, nor *Keevan*, nor *Midland* based their holdings on ordinance violations. These cases grounded their analyses on statutory violations and express provisions within their respective statutes that provided for injunctive relief, not the alleged violation of City ordinances. Therefore, the Fourth District erred when it required disregard for traditional equitable elements to obtain an injunction.

II. TRIAL COURTS REMAIN EMPOWERED TO WEIGH THE EQUITIES WHEN DECIDING WHETHER AN INJUNCTION SHOULD ULTIMATELY ISSUE, EVEN IF THE MOVING PARTY IS NOT REQUIRED TO ESTABLISH THE TRADTIONAL EQUITABLE PRINCIPLES.

STANDARD OF REVIEW

Whether a court sitting in equity may exercise its discretion by balancing the equities when an ordinance authorizes a governmental agency to seek injunctive relief presents a question of law and is thus reviewed *de novo*. See *Leonard v. Department of Employment Security*, 311 Ill. App. 3d 354, 356 (1999).

ANALYSIS

Following this Court's decision in *Cryns*, the Second District issued its decision in *Rosenwinkel*, wherein the court reviewed the grant of a mandatory injunction due to a violation of a Kendall County Zoning Ordinance and injunctive relief authorized by the County's Code (55 ILCS 5/1-1001 *et seq*.)). *Rosenwinkel*, 353 Ill. App. 3d at 532. Though the *Rosenwinkel* court found that the statute at issue supplanted the County's need to establish the three traditional equitable elements necessary to obtain an injunction, the court went on to instruct that a court considering injunctive relief should still balance the equities. *Id*. at 539; See also *Midland Enterprises*, 226 Ill. App. 3d at 505 (balancing the equities after determining that the traditional elements to obtain an injunction not need to be established). See also *Oak Run Property Association, Inc. v. Basta*, 2019 IL App (3d) 180687, ¶ 62 ("Generally, a trial court considering injunctive relief also balances the equities."). Whether a party demonstrates the elements necessary to obtain an injunction is a question separate and apart from whether a court is empowered to balance the equities and/or consider undue hardships when deciding whether an injunction should ultimately issue. See *JL Properties Group B, LLC v. Pritzker*, 2021 IL App (3d) 200305, ¶¶ 58-60 (even if a plaintiff makes a showing as to each of the elements, the court may not issue a preliminary injunction unless the balances of the hardships and public interests weigh in favor of granting the injunction); See also *Granberg v. Didrickson*, 279 Ill. App. 3d 886, 890 (1996) (holding that, in addition to making a *prima facie* showing on the other elements, plaintiffs must establish that "they would suffer more harm without an injunction than defendants will suffer with it."). This balancing of the equities is necessary because a mandatory injunction represents an extraordinary remedy, the granting of which may only

occur through the exercise of "sound judicial discretion in cases of great necessity." *JCRE Holdings, LLC v. GLK Land Trust*, 2019 IL App (3d) 180677, ¶ 20; citing *Taubert v. Fluegel*, 122 Ill. App. 2d 298, 302 (1970); See also *Wilson v. Illinois Benedictine College*, 112 Ill. App. 3d 932, 937 (1983) (mandatory injunctions are not favored and are issued only when the court determines "that the urgency of the situation necessitates such action.")

The *Rosenwinkel* holding does not conflict with this Court's decision in *Cryns* as it pertains to the trial court's discretionary consideration of the costs involved. *Aims Industrial Services, LLC*, 2022 IL App (4th) 220208-U, ¶ 49. Instead, the Fourth District's decision now stands in conflict with the Supreme Court and the Second District's decision in *Rosenwinkel*. The *Cryns* court, analyzing a statutory violation – not an ordinance violation – was silent as to a balancing of the equites and/or hardships.

Ultimately, the Fourth District's decision deprives the trial court of any discretion on remand. Under its rationale, the trial court would be forced to compel Aims, a small business in rural Illinois, to expend $157,010.45 to abandon an active, functioning, private system that was not and is not a threat to the public health. Alternatively, if Aims were to sell the property, to whom could it be sold? The Fourth District's decision would make any prospective sale contingent upon connection, effectively doubling the purchase price. Inequities of this magnitude demand judicial checks on otherwise unbridled municipal power. Trial courts must remain empowered to employ equity and fairness when deciding whether to issue injunctions.

CONCLUSION

For these reasons, the Fourth District's decision should be reversed and the trial court's order denying the City's Request for Injunctive and Other Relief should be affirmed.

AIMS INDUSTRIAL SERVICES, LLC, an Illinois Limited Liability Company, Appellant

/s/ James W. Mertes

Mertes & Mertes, P.C.
Mr. James W. Mertes, Esq.
Attorneys for Appellant

Mr. James W. Mertes, Esq. (ARDC No. 6216546)
Ms. Magen J. Mertes, Esq. (ARDC No. 6283521)
Mr. Mitchel R. Johnston, Esq. (ARDC No. 6322610)
MERTES & MERTES, P.C.
Attorneys for Appellant
4015 East Lincolnway, Suite D
Sterling, IL 61081
Telephone: (815) 626-1500
Email: jmertes@mertesandmertes.com

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief under Rule 342(a) is 16 pages.

/s/ James W. Mertes
James W. Mertes
MERTES & MERTES, P.C.
Attorney for Appellant

CERTIFICATE OF SERVICE

James W. Mertes, Attorney for Respondent/Appellant, states that he has electronically filed the Appellant's Brief with the Illinois Supreme Court with the Clerk of the Court, and has served the foregoing Appellant's Brief to counsel for Petitioner/Appellee on March 1, 2023, by transmitting the same by email to the following named individual, at the email address cole@wmpj.com, on such date.

Mr. Matthew D. Cole, Esq.
Ward, Murray, Pace & Johnson, P.C.
226 West River Street
P.O. Box 404
Dixon, IL 61021

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ James W. Mertes
James W. Mertes
MERTES & MERTES, P.C.
Attorney for Appellant

Mr. James W. Mertes, Esq. ARDC No. 6216546
Ms. Magen J. Mertes, Esq. ARDC No. 6283521
Mr. Mitchel R. Johnston, Esq. ARDC No. 6322610
MERTES & MERTES, P.C.
Attorneys for Appellant
4015 East Lincolnway, Suite D
Sterling, IL 61081
Telephone: (815) 626-1500
Email: jmertes@mertesandmertes.com

APPENDIX

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IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT

WHITESIDE COUNTY, ILLINOIS

CITY OF ROCK FALLS, an Illinois municipal corporation,	)	
Petitioner,	)	2019CH85
vs.	)	No.
AIMS INDUSTRIAL SERVICES, LLC, an Illinois limited liability company.	)	
Respondent.	)	

VERIFIED PETITION FOR INJUNCTIVE AND OTHER RELIEF TO COMPEL COMPLIANCE WITH ROCK FALLS MUNICIPAL CODE GOVERNING THE CITY'S SANITARY SEWER SYSTEM

Petitioner, the CITY OF ROCK FALLS, an Illinois municipal corporation (the "City"), by its attorneys, WARD, MURRAY, PACE & JOHNSON, P.C., and for its petition against Respondent AIMS INDUSTRIAL SERVICES, LLC, an Illinois limited liability company, states as follows:

1. Petitioner is an Illinois municipal corporation lawfully organized under the provisions of the Illinois Municipal Code (65 ILCS 5/1 *et. seq.*).

2. Respondent Aims Industrial Services, LLC, an Illinois liability company, is the owner of certain real property located within the city limits of the City of Rock Falls, commonly known as 2103 Industrial Park Road, Rock Falls, Whiteside County, Illinois 61071 (the "Property"), which is improved with a building used and occupied for industrial business purposes.

3. The Property was purchased by Respondent on or around March 3, 2017.

4. At all times relevant to this Petition, the City had and currently does have in effect an ordinance prohibiting the disposal of sewage from any residence or place of business located within the City limits, other than through the sewer mains of the City, whenever the sewer mains of the City are adjacent to the property. *See*, Rock Falls Municipal Code, Chapter 32, Article IV, Section 32-186.

5. The Rock Falls Municipal Code further requires that, upon the sale or transfer of any property located within the City limits that is serviced by a private sewage disposal system, the private sewage disposal system be abandoned, cleaned and filled, and a direct connection made to the sewerage system of the City.

6. The sewer mains of the City are adjacent to the Property.

7. Upon the sale of the Property to Respondent in March of 2017, and continuing to this date, the Property has been and continues to be serviced by a private sewage disposal system and is not connected to the sewerage system of the City.

8. The City has given notice to Respondent on more than one occasion of the requirement to connect the Property to the sewerage system of the City.

9. As of the filing of this Petition, the Property is not connected to the sewerage system of the City.

10. The Rock Falls Municipal Code provides that a failure to connect to the City sewerage system after the sale or transfer of any property located within the City shall entitle the City to, among other things, impose monetary fines and to seek injunctive relief to prevent and prohibit such violation. *See*, Rock Falls Municipal Code, Chapter 32, Article IV, Section 32-186(h).

WHEREFORE, Petitioner, CITY OF ROCK FALLS, respectfully asks that this court:

A. Enter an order commanding the Respondent to cure the above-described violation by requiring Respondent to abandon the private sewage disposal system on the Property and connect to the City sewerage system by a date certain as determined by the court;

B. Impose a fine of not more than $750.00 per day for each day that the violation continues, pursuant to Section 1-41 of the Rock Falls Municipal Code; and

C. Grant such other and further relief as the court may deem just and proper.

CITY OF ROCK FALLS, an
Illinois municipal corporation.
Petitioner

By WARD, MURRAY, PACE & JOHNSON, P.C..
Its Attorneys

By _____
Matthew D. Cole

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

_____
Ed Cox, Supt.
Waste Water Reclamation Dept.

Matthew D. Cole – ARDC 6326731
WARD, MURRAY, PACE & JOHNSON, P.C.
Attorneys for Petitioner
226 W. River Street | P.O. Box 404
Dixon, IL 61021
P: 815.625.8200
cole@wmpj.com

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT

COUNTY OF WHITESIDE, STATE OF ILLINOIS

CITY OF ROCK FALLS, an Illinois Municipal Corporation, Petitioner, vs. AIMS INDUSTRIAL SERVICES, LLC, an Illinois Limited Liability Company, Respondent	FILED CIRCUIT COURT WHITESIDE COUNTY FEB 16 2022 CIRCUIT CLERK No. 2019 CH 85 Honorable Stanley B. Steines, Judge Presiding.

ORDER DENYING CITY'S VERIFIED PETITION FOR INJUNCTIVE AND OTHER RELIEF

This cause of action comes before the Court for hearing on the City of Rock Falls's Verified Petition for Injunctive Relief to Compel Compliance with Rock Falls Municipal Code Governing the City's Sanitary Sewer System, and the Plaintiff, City of Rock Falls, an Illinois Municipal Corporation, appears by and through its attorneys, Mr. Matthew D. Cole, Esq. and Mr. Timothy B. Zollinger, Esq., and the Defendant, Aims Industrial Services, LLC, an Illinois Limited Liability Company, appears by and through its attorney, Mr. James W. Mertes, Esq., and this Court has heard and considered the evidence admitted and the written closing arguments of respective counsel,

WHEREAS, on October 7, 2021, this Court announced its findings and rulings in open Court. A transcript of this Court's pronouncement of findings and rulings has been prepared. A copy of the transcript has been attached to this Order, and the findings and rulings set forth therein are adopted as the Order of this Court.

WHEREFORE, the Court hereby orders as follows:

1. The City of Rock Falls's Verified Petition for Injunctive Relief to Compel Compliance with Rock Falls Municipal Code Governing the City's Sanitary Sewer System is denied in its entirety.

2. Judgment is entered in favor of the Defendant and against the Plaintiff.

Dated: 2-16-22

ENTERED: _____
Honorable Stanley B. Steines,
Judge Presiding

Approved as to form only:

/s/ Matthew D. Cole
Mr. Matthew D. Cole, Esq.
Attorney for the Plaintiff

Mr. James W. Mertes, Esq.
MERTES & MERTES, P.C.
Attorneys for Respondent
4015 E. Lincolnway, Suite D
Sterling, IL 61081
Telephone: 815.626.1500
Primary E-mail: jmertes@mertesandmertes.com
Secondary E-mail: pleadings@mertesandmertes.com

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL DISTRICT
WHITESIDE COUNTY, ILLINOIS

CITY OF ROCK FALLS, an Illinois municipal corporation Petitioner-Appellant, vs. AIMS INDUSTRIAL SERVICES, LLC, an Illinois limited liability company Respondent-Appellee.	Appeal from Whiteside County Circuit Court No. 2019 CH 85 The Honorable Stanley B. Steines Judge Presiding

NOTICE OF APPEAL

Pursuant to Illinois Supreme Court Rules 301 and 303, Petitioner-Appellant, CITY OF ROCK FALLS, an Illinois municipal corporation, appeals from the judgment order of the Circuit Court of Whiteside County, Illinois dated February 16, 2022, in favor of Respondent-Appellee, AIMS INDUSTRIAL SERVICES, LLC, an Illinois limited liability company, as to all matters subject to the Petitioner-Appellant's request for injunctive and other relief. Petitioner-Appellant respectfully requests that the judgment order entered on February 16, 2022, be reversed and this matter be remanded to the Circuit Court for further appropriate proceedings consistent with any such ruling. A copy of the judgement order is attached as Exhibit A.

CITY OF ROCK FALLS,
Petitioner-Appellant

By WARD, MURRAY, PACE & JOHNSON, P.C.,
Its Attorneys

By _____
Matthew D. Cole

Matthew D. Cole – ARDC #6326731
WARD, MURRAY, PACE & JOHNSON, P.C.
Attorneys for Petitioner-Appellant City of Rock Falls
226 W. River Street | P.O. Box 404
Dixon, IL 61021
P: 815.284.8200
cole@wmpj.com

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NO. 4-22-0208

FILED
October 31, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

CITY OF ROCK FALLS, an Illinois Municipal Corporation, Petitioner-Appellant, v. AIMS INDUSTRIAL SERVICES, LLC, an Illinois Limited Liability Company, Respondent-Appellee	))))))))	Appeal from the Circuit Court of Whiteside County No. 19CH85 Honorable Stanley B. Steines, Judge Presiding.

JUSTICE DOHERTY delivered the judgment of the court.
Justices DeArmond and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment denying a petition for injunctive relief was reversed and the case was remanded.

¶ 2 This appeal centers on ordinances passed by the City of Rock Falls, Illinois (the City) which require, under certain circumstances, the owner of property connected to a private sewage disposal system to abandon that system and connect to the City's public sewage system. The City filed a petition for injunctive relief against respondent, Aims Industrial Services, LLC (Aims), asserting that Aims violated one of these ordinances because it purchased property within the City and with a private sewage system but refused to connect to the City's system. Following a bench trial, the trial court denied the City's petition. The City appeals that judgment, contending that the court erred when it) denied the City's request for injunctive relief after the City proved that Aims was in violation of the relevant ordinance; (2) applied a balance-of-hardships test and considered the cost of compliance as a factor in denying the request for

injunctive relief; (3) allowed evidence that the City granted a different property owner a waiver of the requirement of connecting to the City's sewage system; and (4) substituted its judgment for that of the city council's with regard to Aims's request for a similar waiver. For the reasons that follow, we reverse the decision of the trial court denying the City's petition and remand this case for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 The record establishes that on March 3, 2017, Aims purchased property commonly known as 2103 Industrial Park Road in Rock Falls, Illinois (the Property), which was improved with a building used for industrial purposes. The Property was serviced by a private sewage disposal system and was not connected to the City's public sewage system. At the time Aims purchased the Property, section 32-189(g) of the Code provided:

> "Upon sale or transfer of property all private sewage disposal systems within the city limits *shall connect to the public sanitary sewer when available in accordance with sections 32-186 and 32-190*, a direct connection shall be made to the public sewer, and the private sewage disposal system shall be abandoned and shall be cleaned of sludge and filled with granular materials. The county health department shall be notified and inspect the abandoned septic system prior to any remedial actions being taken." (Emphasis added). Rock Falls Municipal Code, § 32-189(g) (amended July 20, 2010).

Section 32-186 of the Code states:

> "No person having his residence or place of business within the territorial limits of the city shall be permitted to dispose of sewage of such residence or place of business located in the city otherwise than through the sewer mains of the

> city whenever the sewer mains of the sewerage system of the city are adjacent to his property, without the written permission of the council." Rock Falls Municipal Code, § 32-186.

Section 32-190 of the Code states:

> "The owner of each house, building or property used for human occupancy, employment, recreation or any other purpose, situated within the city is required, at his expense, to install suitable toilet facilities therein, meeting the requirements of the [state] plumbing code, and to connect such facilities directly with the public wastewater treatment system in accordance with the provisions of this division, and within 60 days after official notice to so connect. This provision shall be effective provided that there [is] a wastewater treatment system main located: (i) within 300 feet of the property line of a property utilized for residential purposes; (ii) within 300 feet of the property line of a property utilized for nonresidential purposes which has a daily sewage flow of less than 1,500 gallons per day; or, (iii) within 1,000 feet of the property line of a property utilized for nonresidential purposes which has a daily sewage flow of 1,500 gallons per day or greater." Rock Falls Municipal Code, § 32-190 (amended Sept. 15, 2015).

Finally, at the time of purchase, the Code set forth a remedy for a violation of the above sections. Specially, section 1-41(n) of the Code provides:

> "Violations of this Code that are continuous with respect to time are a public nuisance and may be abated by injunctive or other equitable relief. The imposition

> of a penalty does not prevent injunctive relief." Rock Falls Municipal Code, § 1-41(n) (amended Sept. 6, 2016).

Aims declined to connect the Property to the City's public system due to the City's failure to install lateral hookups running from the Property that were necessary to make such a connection and what it claimed was the resulting prohibitive cost of doing so.

¶ 5 On August 25, 2019, the City filed its petition alleging the City had informed Aims that its ordinance required it to connect to the City's sewage system, but Aims had refused. The City requested a fine and an injunction commanding Aims to abandon its private sewage system and connect the Property to the City's system.

¶ 6 In response, Aims admitted that the Property was adjacent to the City's sewer system but asserted two affirmative defenses. The first was that the City should be equitably estopped from enforcing its ordinance because prior to the date of purchase, a City building inspector told Aims that the Property would be "grandfathered in" and would not be required to connect to the City's sewage system. The second defense asserted that the City's ordinance only required that upon the sale of property, a connection be made to the public sanitary system "when available." Aims claimed that no connection was "available" due to the City's failure to include lateral hookups to the sewer main and the depth of the sewer main.

¶ 7 The City subsequently filed a motion for summary judgment. The trial court granted the motion with respect to Aims's first affirmative defense but denied the motion with respect to the second defense. The court found that a genuine issue of material fact existed as to whether it was feasible for Aims to connect to the public sewage system given the cost of such a connection.

¶ 8 Approximately one week prior to trial, Aims requested permission from the city council to continue utilizing the private sewage disposal system at the Property. That request was denied, and no reason for denial is apparent from the record.

¶ 9 A bench trial was held on the City's petition on August 20, 2021. Due to our ultimate resolution of this appeal, we need only summarize the evidence adduced at trial. Testimony from the superintendent of the City's sewage department established that the Property was adjacent to Industrial Park Road, which runs north to south along the western line of the Property. A city sewer system line runs along Industrial Park Road, lying between the Property and the road itself. Approximately three years before trial, the superintendent informed Aims's owner of the ordinance requiring it to abandon its private system and connect the Property to the public sewage system. The superintendent was also present on "two or three" occasions when the City's utility committee met with Aims's owner and explored different options for connecting to the public sewage system. The superintendent also explained that lateral connections run from a property to the main sewage system and are necessary to connect a property to a sewer main. In this case, there were no lateral connections running from the sewer main to the Property. Lateral connections are installed by a property developer, not the City, usually at the time the sewer main is installed.

¶ 10 Nathan Simonton, a project manager and estimator from a civil engineering firm, testified that, at Aims's request, he prepared an estimate of the cost of connecting the Property to the City's adjacent sewer main via a gravity-feed system; he estimated the cost to be $157,010.45. Simonton prepared another estimate at the City's request based on using an alternative connection method using pumps flowing to a manhole box to be placed just outside of the property. The cost estimate for this approach was $51,455, plus costs for electrical work.

Simonton opined that both options would allow for the requisite connection to the City's sewer main. The higher estimate was based on using the general method used to make such a connection, and the lower estimate was based on an "unusual" method.

¶ 11 The City's administrator testified that in 2020, the city council approved an ordinance waiving the requirement that a gun range located within the City connect to the City's sewer system. That ordinance was admitted into evidence and states that the gun range requested a waiver based upon the estimated cost of a direct connection to the City's sewage system of $36,000 and the lack of feasible alternatives. The City granted the waiver and allowed the range to install a private sanitary disposal system because connecting to the City's sewer mains "would constitute an undue hardship *** due to the prohibitive cost and lack of alternative methods of connection." The waiver was only effective until the property was sold or the private sewage system failed. Upon the occurrence of either condition, the range was required to abandon its private sewage system and connect to the City's system.

¶ 12 The trial court denied the City's petition. As relevant to this appeal, the court initially noted that section 32-189(h) of the Code was passed after Aims purchased the property and found that application of that subsection violated the prohibition against *ex post facto* laws. The court stated that injunctive relief was nevertheless "permissible" as an equitable remedy under section 1-41(n) of the Code. The court next addressed whether it should allow the defense of selective enforcement based on the waiver granted to the gun range. The court stated that it was not making a finding as to "whether or not it is an affirmative defense," and that it was "enough for this Court to say that that argument is not a surprise to the City." The court then found that the City had met its burden of proof under section 32-190(ii) of the Code by

establishing that a wastewater treatment system was within 300 feet of the Property which had a daily sewage flow of less than 1,500 gallons per day.

¶ 13 The court then observed that Aims was being treated differently than the previous owner of the Property. The "triggering event" for this case was the purchase of the Property by Aims, and it may not have made that purchase had it known of the requirement and costs associated with connecting to the public sewage system. The court agreed with the City that the relevant municipal code sections did not speak about "financial feasibility" as a prerequisite to connecting to the public sewage system and that the relevant caselaw indicated that such cost concerns should not be considered. The Court stated that nevertheless, based upon the waiver given to the gun range, "the City Council has already decided that cost is something that the city council will look at and will consider." According to the trial court, it was unfair to consider the cost of connecting to the public sewage system for the gun range but to not give that same consideration to Aims. Finally, the court observed the absence of lateral hookups and that it was the City's responsibility to either have those lateral hookups installed when the sewer main is installed or to work with the property owner to have them installed. Ultimately, the court believed that Aims did not create the situation that it found itself in and that the City helped create that situation by not making lateral hookups available. After considering the balance of the equities, the trial court denied the City's petition. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 A. Standard of Review

¶ 16 This court will examine several of the trial court's rulings or findings, and a different standard of review may apply to each inquiry. Factual findings made by the trial court are reviewed under the manifest weight standard. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill.

2d 52, 71 (2006). Interpretation of the Code presents a legal question which is reviewed *de novo*. See *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 850 (2007) (stating that municipal ordinances are interpreted using the same rules of statutory interpretation as statutes and are reviewed *de novo*).

¶ 17 When we are called upon to interpret the Code, we must adhere to the fundamental rule of statutory construction: to ascertain and give effect to the legislature's intent. *Id.* The best indication of legislative intent is the plain and ordinary meaning of the statutory language. *Id.* The plain language of the statute is the best indicator of the legislature's intent, and when that language is clear, its meaning will be given effect without resort to other tools of interpretation. *Id.* A court may not rewrite a statute, and depart from its plain language, by reading into it exceptions, limitations, or conditions not expressed by the legislature. *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81 (2009).

¶ 18 B. Triggering Event Requiring Connection

¶ 19 As noted above, section 32-189(g) triggers a duty to connect to the City's system "[u]pon sale or transfer of the property." It does not appear to be contested, as a matter of fact, that there was a sale of the Property from the prior owners to Aims. The trial court did not specifically articulate a finding that this triggering event occurred; it did, however, express its own sentiments toward section 32-189(g), stating that it had "a hard time understanding where the sale or transfer of the property is a triggering event that is reasonably related or a rational basis to protecting the public." Later, however, the court also stated that it had "not made a finding that Section 32-189, Subsection G is unconstitutional or inappropriate or should have been stricken."

¶ 20 Reading the trial court's decision in its entirety, we believe that the trial court found that the triggering event, *i.e.*, the sale of the property, had taken place. Had it not so found, the balance of the trial court's extensive analysis would have been completely unnecessary. Because the evidence clearly showed this essentially uncontested fact was true, we conclude that the trial court's implicit finding was not against the manifest weight of the evidence.

¶ 21 C. Whether a Connection Was "Available"

¶ 22 Section 32-189(g) of the Code requires, in pertinent part, that after the triggering event of a sale, "all private sewage disposal systems within the city limits shall connect to the public sanitary sewer *when available* in accordance with sections 32-186 and 32-190." (Emphasis added.) Rock Falls Municipal Code, § 32-189(g) (amended July 20, 2010). A central issue in the case is whether a connection to the City system was "available."

¶ 23 There are two other Code provisions which give form to the meaning of "available" under the Code. One is section 32-190, which requires that the City system be "within 300 feet of the property line of a property utilized for nonresidential purposes" with a sewage flow in a particular quantity. Rock Falls Municipal Code, § 32-190 (amended Sept. 15, 2015). The trial court specifically found that the City had "met their burden with regard to the parameters" of section 32-190. We conclude that this finding, which is not in dispute on appeal, is not against the manifest weight of the evidence.

¶ 24 The other Code provision referenced with respect to the definition of what is "available" is section 32-186, which is the City's general requirement for connection to the municipal sewage system. Section 32-186 makes clear that the connection requirement applies only to properties with an "adjacent" municipal sewer main. Aims specifically conceded this requirement was satisfied.

¶ 25 The City argues that satisfaction of sections 32-186 and 32-190 are sufficient to show that a sewer connection is "available" to Aims under section 32-189(g). The trial court, however, essentially read into the Code additional components of what it means for the sewer connection to be "available."

¶ 26 First, the trial court explicitly found that, although public health statutes normally "don't take into account the issue of cost," "the city council has already decided that cost is something that the city council will look at and will consider" when it comes to individual petitions seeking a waiver from the connection requirements. As this represents the trial court's construction of the Code, the matter presented is a legal one which we review *de novo*.

¶ 27 The Code reserves to the city council the authority to determine whether to grant "written permission" to be excluded from the provisions regarding connection to the municipal sewer system. Rock Falls Municipal Code, § 32-186. This authority is what the parties have referred to as a "waiver." Depending on the specific nature of the request, a municipality might be operating in a legislative, administrative, or quasi-judicial role, with different standards of judicial review being appropriate for each. See generally, *People ex rel. Klaeren v. Village of Lisle*, 202 Ill. 2d 164, 183 (2002). The instant case is not, however, a judicial review of the merits of the city council's decision in denying Aims's request for a variance; we are not called upon to evaluate the propriety of the denial of Aims's variance or the granting of some other party's variance. Also, we note that Aims has made no constitutional challenge to the application of the Code to its property.

¶ 28 Furthermore, if the other landowner's waiver had never occurred, the trial court would have had to determine the meaning of "available" in the Code by reference to normal sources, the best of which is always the words used by the drafters. Here, the trial court's

approach concludes, in essence, that the original meaning of the word "available" in section 32-189(g) *changed* because the city council later granted another landowner a waiver. Legislative enactments "are to be construed as they were intended to be construed *when they were passed*." (Emphasis added.) *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 441 (2008). The actions of the city council in late 2020 give no insight into the intentions of the city council when it used the word "available" in initially adopting section 32-189(g). Neither Aims nor the trial court cited any authority for the idea that a municipality's subsequent action on a variance or waiver *changes the meaning* of words utilized in prior versions of an ordinance.

¶ 29 It would be inappropriate to utilize the city council's discretionary decisions on waivers as a basis for interpreting what is required by the Code. The text of the Code sets forth its requirements, and it is the court's role to determine whether those requirements have been satisfied in a particular case. Separately, the Code reserves to the city council the authority to grant waivers from those requirements. The court cannot take upon itself the discretion reserved to the city council. Such an approach ratchets in only one direction: the most permissive waiver becomes the *de facto* standard for the court to apply, if there is any standard at all. As noted above, the city council's decision is not insulated from appropriate judicial review, but this is not a case in which we are asked to review the denial of Aims's request for a waiver.

¶ 30 We conclude that the trial court misconstrued the Code by concluding that the city council's subsequent grant of a waiver introduced cost considerations into the determination of whether a sewer connection was "available."

¶ 31 The trial court also considered the absence of a pre-existing lateral connection in determining whether a connection was "available" under the Code. There is no Code requirement

that a lateral connection must be in place. Furthermore, the Code already speaks to issues of physical proximity to the sewer main, as it applies only to adjacent property within 300 yards of a sewer main. Beyond the legal inapplicability of the inquiry, the trial court's statement that lateral connections should have been installed "at the time that the main was put in" and that it was "the City's responsibility to cooperate with the property owner to get it done" is against the manifest weight of the evidence. It remains completely unclear what cooperation is being referenced or what failure of cooperation occurred at some earlier time before Aims owned the property. It is undisputed that the cost of installing a lateral connection is typically borne by the landowner, and we do not know why no lateral was installed when Aims' predecessor owned the property. As the trial court itself said, "I don't have any evidence with regard to any of that other than I know that in my mind" that the lateral connections should have been installed when the sewer main was installed.

¶ 32 We conclude that the trial court erred in incorporating a comparative cost analysis and in considering the absence of lateral connections when deciding whether a connection to the sewer main was "available" under the Code. This conclusion requires that we reverse the trial court's judgment and remand for the trial court to issue appropriate findings and conclusions under the appropriate Code provisions. However, aspects of the issues just discussed—cost and the other landowner's waiver—were also introduced into the trial court's discussion of the appropriate considerations for giving equitable relief. To completely resolve the issues on appeal, we examine those same matters as they impact issues of equitable relief.

¶ 33 D. Availability of Injunctive Relief

¶ 34 The parties do not dispute that at the time the Property was transferred, section 32-189 of the Code did not include its own provision for equitable remedies; this provision was

added only after Aims's purchase of the property. See Rock Falls Municipal Code, § 32-189(h) (amended Aug. 21, 2018). The trial court correctly found that this later-adopted provision could not be applied to the present case, and neither party contests that ruling.

¶ 35 There is, however, another portion of the Code which applies here. When Aims purchased the property, section 1-41(n) of the Code provided that "[v]iolations of this Code that are continuous with respect to time are a public nuisance and may be abated by injunctive or other equitable relief." Rock Falls Municipal Code, § 1-41(n) (amended Sept. 6, 2016). This section must be read along with other sections of the Code, including section 32-189(g). See *In re Detention of Lieberman*, 201 Ill. 2d 300, 308 (2002) (Since all provisions of a statutory enactment are viewed as a whole, words and phrases should not be construed in isolation, but should be interpreted in light of other relevant provisions of the statute.). By its plain language, the Code specifically authorized injunctive relief as a remedy for a violation of any of its provisions which are continuous over time.

¶ 36 Without any reasoned analysis, Aims asserts that section 1-41(n) of the Code does not "rise to the level of providing a statutory injunctive remedy for the ordinance violation at issue in this case." However, Aims does not explain why this is the case. We find that Aims's cursory argument is insufficient to properly raise this issue. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (stating that points not argued are waived and shall not be raised in the reply brief); see also *Express Valet*, 373 Ill. App. 3d at 855 (an issue not clearly defined and sufficiently presented fails to satisfy the requirements of Rule 341(h)(7) and is, therefore, forfeited).

¶ 37 Even if the issue were properly raised, it is without merit. Aims relies on *Sadat v. American Motors Corp.*, 104 Ill. 2d 105, 109, (1984), in which the relevant statutes allowed customers injured by a breach of warranty to "bring suit for damages and other legal and

equitable relief." The supreme court noted that this "generalized" section was silent as to the types of equitable relief available or the conditions under which such relief is appropriate and therefore did not demonstrate the legislature's intent to dispense with traditional equitable pleading requirements. *Id.* at 113-14. In contrast, section 1-41(n) of the Code is not silent as to the type of equitable relief available or the conditions under which it is appropriate. To the contrary, it specifically identifies injunctive relief as a remedy and sets forth the conditions under which it is appropriate: when the violations of the ordinance are continuous over time.

¶ 38 E. Consideration of Equities or Hardship

¶ 39 The City contends that the trial court erred by applying a balance-of-hardships test and considering factors such as the cost to Aims of connecting to the City's sewage system and the waiver granted to the gun range. The City acknowledges that such considerations are normally appropriate for a court sitting in equity in deciding whether to grant injunctive relief. However, the City asserts that where, as here, an ordinance specifically authorizes injunctive relief to enforce its provisions, a court may not consider equitable factors; the agency seeking the injunction need only show that the ordinance was violated and that the ordinance allows for injunctive relief. Whether a court sitting in equity may balance the hardships when an ordinance authorizes an agency to seek injunctive relief presents a question of law. As such, our review of this issue is *de novo*. See *Leonard v. Department of Employment Security*, 311 Ill. App. 3d 354, 356 (1999).

¶ 40 Aims responds that the City has waived this contention because it was not raised in the City's written closing argument. However, our review of the record establishes that, in the trial court, the City sufficiently contested the court's ability to balance the hardships in deciding whether to grant injunctive relief. In its written closing argument, the City argued that the term

"available," as used in the ordinance, did not include financial considerations. The City asserted that the ordinance itself defined the term "available" without reference to "feasibility" or "financial ability," and that Aims's request to weigh the equities would improperly insert such language into the ordinance. The City also argued that any such considerations are the province of the city council under the ordinance's waiver provision. Similarly, in its reply to Aims's written closing argument, the City again addressed Aims's argument that the cost of connecting to the public sewage system was excessive, arguing that "[i]f consideration of the cost of connection is brought into such an analysis, it would eviscerate a municipality's ability to compel a connection." In other words, at its core, the City's position was that the trial court was not permitted to consider factors such as the cost of compliance when deciding whether to grant the request for injunctive relief.

¶ 41 It is true that an appellate court should not consider different theories or new questions not raised in the trial court if they might have been refuted or overcome had they been presented below. *Hall v. Eaton*, 259 Ill. App. 3d 319, 322 (1994). However, when facts to support a theory have been raised in argument and in affidavits or depositions before the court without objection, an appellant can raise that theory on appeal. *American Apartment Management Co. v. Phillips*, 274 Ill. App. 3d 556, 565 (1995). In this case, the City's position on appeal is not inconsistent with the position it took in the trial court. Moreover, its argument is legal, not factual, so it could not have been refuted by additional evidence at trial. We conclude that the issue of whether the trial court could consider equitable factors when deciding a request for injunctive relief was sufficiently raised below and may be considered here.

¶ 42 Having so found, we next consider whether it was appropriate for the trial court to balance the hardships when deciding whether to grant the City's request for injunctive relief.

Long ago, the United States Supreme Court stated that "[i]t is the commonest exercise of the police power of a state or city to provide for a system of sewers, and to compel property owners to connect therewith." *Hutchinson v. City of Valdosta*, 227 U.S. 303, 308 (1912). Such legislation "is founded upon the right of the public to protect itself from nuisances, and to preserve the general health." *City of Nokomis v. Sullivan*, 14 Ill. 2d 417, 421 (1958). "Because of the grave dangers to public health that are involved in the unsanitary disposition of human excrement, the power of municipalities to require property owners to discontinue the use of privies and to connect water closets with municipal sewer systems has consistently been sustained." *Id.* at 421; see also 65 ILCS 5/11-31-1 (West 2008).

¶ 43 Section 11-60-2 of the Illinois Municipal Code specifically provides that "the corporate authorities of each municipality may define, prevent, and abate nuisances." 65 ILCS 5/11-60-2 (West 2022). Moreover, the Illinois Supreme Court has rejected the argument that a municipality must wait until a particular private sewage system becomes an immediate hazard to the public health before it can require a connection to the public sewage system. The court characterized this argument as "unsound" and, as relevant to Aims's contention that there is nothing wrong with its current private sewage system, the court observed:

> "It has often been pointed out that the benefit to the public health that is afforded by a public sewer system is lost unless all can be required to use it. [Citations.] It is not necessary that the health officer should wait until a nuisance existed and the public health put in jeopardy before requiring the defendant to connect with the sewer. [Citation.]" (Internal quotation marks omitted.) *City of Nokomis*, 14 Ill. 2d at 422.

See also *Houpt v. Stephenson County*, 63 Ill. App. 3d 792, 795 (1978) (stating application of an ordinance requiring connection to the public sewer "was a reasonable exercise of [Stephenson] County's police power," and limiting the ordinance to property presently shown to constitute a nuisance or health hazard "would severely inhibit Stephenson County's ability to engage in comprehensive waste management").

¶ 44 Ordinarily, the party seeking an injunction must establish that it: (1) has no adequate remedy at law; (2) possesses a certain and clearly ascertainable right; and (3) will suffer irreparable harm if no relief is granted. *People v. Keeven*, 68 Ill. App. 3d 91, 96 (1979); *County of Kendall v. Rosenwinkel*, 353 Ill. App. 3d 529, 538 (2004). In addition, a court should generally balance the equities when considering whether to issue an injunction. *Id.*

¶ 45 However, where a governmental agency is expressly authorized by statute to seek injunctive relief, the traditional equitable elements necessary to obtain an injunction need not be satisfied. *Keeven*, 68 Ill. App. 3d at 96; *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 278 (2003). This rule is based on the presumption that harm to the public occurs when an ordinance is violated. *Sadat*, 104 Ill. 2d at 113; *Midland Enterprises, Inc. v. City of Elmhurst*, 226 Ill. App. 3d 494, 504 (1993); *People ex rel. Hartigan v. Stianos*, 131 Ill. App. 3d 575, 580 (1985). In such instances, the state or governmental body seeking injunctive relief need only show that the statute was violated and that the statute relied upon specifically allowed for injunctive relief. *Cryns*, 203 Ill. 2d at 277; *Sadat*, 104 Ill. 2d at 110-12. Once an ordinance violation has been established, no discretion is vested in the trial court to refuse to grant the injunctive relief authorized by statute. *Cryns*, 203 Ill. 2d at 278; *Keeven*, 68 Ill. App. 3d at 97; *Midland*, 226 Ill. App. 3d at 504. The Illinois Supreme Court explained the rational for this rule:

> "[S]tatutes expressly authorizing injunctive relief do so on behalf of either a public official in his capacity as enforcer of a regulatory scheme or, alternatively, provide for the private actions which may be necessary to restrain public officials from acting in a manner inconsistent with that which is prescribed by statute. Thus, the violation of such a statute implies an injury to the general public. Such injury necessitates the statutory authorization for equitable relief and supplants the traditional equitable pleading requirements. As the court in *City of Highland Park v. County of Cook* *** stated in response to the defendant's assertion that the plaintiff's claim for injunctive relief was insufficient for failure to allege irreparable injury: 'While this is a sound theory where a private party is the plaintiff, it is not when a city or another public body brings the action, alleging violation of its ordinances and State statutes, with resulting damage to its residents.' " *Sadat*, 104 Ill. 2d at 113 (quoting *City of Highland Park*, 37 Ill. App. 3d 15, 20 (1975)).

¶ 46 Despite the implication of the above principles, Aims relies upon *Rosenwinkel* for the proposition that it is permissible for a court considering injunctive relief to balance the equities even where a statute expressly authorizes a governmental agency to seek such relief. Thus, according to Aims, it was not error for the trial court in this case to consider equitable factors such as the cost of connecting to the public sewage system.

¶ 47 *Rosenwinkle* is somewhat difficult to decipher. It relies on a variety of cases involving disputes between private parties, not enforcement actions by a unit of government. See *Ariola v. Nigro*, 16 Ill. 2d 46, 48 (1959); *Whitlock v. Hilander Foods, Inc.*, 308 Ill. App. 3d 456, 457 (1999); *Reiter v. Neilis*, 125 Ill. App. 3d 774, 776 (1984). The only municipal case relied

upon in the relevant portion of *Rosenwinkel* is *Midland*. See *Rosenwinkel*, 353 Ill. App. 3d at 539 (citing *Midland*, 226 Ill. App. 3d at 505). However, examination of *Midland* shows that it more directly contradicts, rather than supports, the idea that a general balancing of the equities should take place before a court enjoins a violation of a municipal ordinance.

¶ 48 In *Midland*, the appellate court considered whether the trial court had erred in denying the government statutory injunctive relief concerning three construction projects that the government alleged had encroached on setbacks. As to one of the projects, *Midland* held that the trial court erred by applying general equitable principles in refusing to issue a statutory injunction; in other words, it supported the precise position advocated here by the City. *Midland*, 226 Ill. App. 3d at 505. It is true that *Midland* further found that the specific equitable *defense* of *laches* was properly considered as to one of the projects, but it held that this defense could be utilized against the State only "in extraordinary circumstances." *Id.* at 506. Allowing for a specific equitable affirmative defense in "extraordinary circumstances" does not seem to open the door to an open-ended balancing of the equities in a case seeking enforcement of a municipal ordinance.

¶ 49 *Rosenwinkle*, then, seems to stand alone in suggesting that balancing of the equities should be undertaken in a municipal enforcement case. Such a holding conflicts with valid supreme court precedent establishing that a "governmental body seeking injunctive relief need only show that the statute was violated and that the statute relied upon specifically allowed for injunctive relief." *Cryns*, 203 Ill. 2d at 277 (citing *Midland* in support of this proposition). We choose not to follow *Rosenwinkle*.

¶ 50 Based upon the above principles, the City in this case was required to prove only that Aims violated the ordinance; if it did, injunctive relief was specifically authorized as a

remedy under the Code. Neither Aims's cost of connection nor the fact that another landowner received a waiver had any proper place in the analysis. Because the trial court erred in considering equitable factors in denying the City's request for injunctive relief, the judgment of the trial court must be reversed, and the cause remanded for further proceedings.

¶ 51 III. CONCLUSION

¶ 52 For the reasons stated, we reverse the trial court's judgment and remand this case for further proceedings consistent with this order.

¶ 53 Reversed and remanded.

Sec. 32-189. - Private sewage disposal.

(g) Upon sale or transfer of property all private sewage disposal systems within the city limits shall connect to the public sanitary sewer when available in accordance with sections 32-186 and 32-190, a direct connection shall be made to the public sewer, and the private sewage disposal system shall be abandoned and shall be cleaned of sludge and filled with granular materials. The county health department shall be notified and inspect the abandoned septic system prior to any remedial actions being taken.

(Code 1977, § 13.12.250; Code 1990, § 15-164; Ord. No. 92-1623, 8-10-1992; Ord. No. 2010-2408, § 1, 7-20-2010)

Sec. 1-41. - General penalty; continuing violations.

(n) Violations of this Code that are continuous with respect to time are a public nuisance and may be abated by injunctive or other equitable relief. The imposition of a penalty does not prevent injunctive relief.

(Code 1977, §§ 1.01.09, 1.04.070, 1.04.120, 1.04.050, 1.20.010; Code 1990, §§ 1-7, 1-8, 1-17, 1-21, 1-25; Ord. No. 2010-2421, § 1, 10-5-2010; Ord. No. 2011-2458, §§ 1, 2, 4-5-2011; Ord. No. 2012-2496, §§ 1, 2, 4-3-2012;Ord. No. 2014-2154, § 1, 5-6-2014; Ord. No. 2015-2219, § 1, 7-7-2015; Ord. No. 2016-2264, § 1, 5-17-2016; Ord. No. 2016-2284, §§ 1—5, 9-6-2016; Ord. No. 2017-2319, § 1, 5-16-2017; Ord. No. 2017-2324, § 1, 7-5-2017)

Sec. 32-186. Use of public sewers required.

No person having his residence or place of business within the territorial limits of the city shall be permitted to dispose of sewage of such residence or place of business located in the city otherwise than through the sewer mains of the city whenever the sewer mains of the sewerage system of the city are adjacent to his property, without the written permission of the council.

(Code 1977, § 13.12.230; Code 1990, § 15-162)

Sec. 32-190. Toilet facilities required.

The owner of each house, building or property used for human occupancy, employment, recreation or any other purpose, situated within the city is required, at his expense, to install suitable toilet facilities therein, meeting the requirements of the state state plumbing code, and to connect such facilities directly with the public wastewater treatment system in accordance with the provisions of this division, and within 60 days after official notice to so connect. This provision shall be effective provided that there a wastewater treatment system main located: (i) within 300 feet of the property line of a property utilized for residential purposes; (ii) within 300 feet of the property line of a property utilized for nonresidential purposes which has a daily sewage flow of less than 1,500 gallons per day; or, (iii) within 1,000 feet of the property line of a property utilized for nonresidential purposes which has a daily sewage flow of 1,500 gallons per day or greater.

(Code 1977, § 13.12.260; Code 1990, § 15-165; Ord. No. 2010-2408, § 2, 7-20-2010; Ord. No. 2015-2226, § 1, 9-15-2015)

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
WHITESIDE COUNTY, ILLINOIS

CITY OF ROCK FALLS, AN ILLINOIS MU	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0208
	)	Circuit Court No: 2019CH85
	)	Trial Judge: Stanley B Steines
v	)	
	)	
	)	
AIMS INDUSTRIAL SERVICES, LLC, AN	)	
Defendant/Respondent	)	

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