No. 125017

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

DENNIS TZAKIS, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, A PROPOSED CLASS ACTION,

Plaintiffs/Appellees,

v.

BERGER EXCAVATING CONTRACTORS, INC., ET AL., INCLUDING A PROPOSED DEFNDANTS' CLASS,

(Maine Township, City of Park Ridge and Metropolitan Water Reclamation District of Greater Chicago,

Defendants/Appellants).

On Leave to Appeal from the Appellate Court of Illinois, First Appellate District, Fourth Division, No. 1-17-0859, There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, Circuit Court Case No. 09 CH 6159 Consolidated with 10 CH 38809, 11 CH 29586, 13 CH 10423, and 14 CH 6755, Hon. Sophia H. Hall, Judge Presiding.

JOINT BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS MAINE TOWNSHIP, CITY OF PARK RIDGE, AND METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO

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POINTS AND AUTHORITIES

NATURE OF ACTION

In 2009, Plaintiffs, a proposed class of individuals living in or near the City of Park Ridge, Illinois sued the City of Park Ridge, the Metropolitan Water Reclamation District of Greater Chicago, and Maine Township (collectively the LPEs) and others for alleged overtopping of area waterways and sewer backup flooding into their homes during heavy rainfall between September 12, 2008 and September 14, 2008. (C 10, C 3160.)[1] Ultimately, Plaintiffs filed an Amended Fifth Amended Complaint Amending the Complaint only on its Face (the A5AC) alleging several claims against the LPEs including various forms of negligence, violations of the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101, *et seq*. (West 2018) (the Tort Immunity Act), and a violation of Section 15 of Article I of the Illinois Constitution (the Taking claim). Ill. Const. 1970, art. I, § 15. (C 18, 19, 22, 27, 38, 55.) The LPEs moved to dismiss all claims against them under 735 ILCS 5/2-619.1 (West 2018) arguing, among other things, that the public duty rule barred the claims. (C 3161, C 56–58.)

On April 3, 2015, the circuit court granted the LPEs' Motions to Dismiss under Section 2-615 of the Code of Civil Procedure, 735 ILCS 5/2-615 (West 2018) (Section 2-615), finding the alleged unlawful conduct of the LPEs was a "'governmental service' subject to the Public Duty Rule," that the "Public Duty Rule applied to the allegations of

[1] The record on appeal consists of a three-volume original common-law record and a one volume supplemental record on appeal (limited from the entire record) and one volume of transcripts comprising the Report of Proceedings. "C__" refers to the common-law record. "SUP C ___" refers to the supplemental common-law record. "R. __" refers to the Report of Proceedings.

the [LPEs'] conduct in the A5AC," and that no special duty exception to the rule should be applied. (C 1885–1892.)

While motions regarding the applicability of its decision to the Taking claim and the propriety of issuing Rule 304(a) language were pending in the circuit court, this Court abolished the public duty rule in *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, on January 22, 2016. After the *Coleman* decision was issued, Plaintiffs moved to reconsider the dismissal. After initially granting Plaintiffs' motion, the trial court ultimately determined that *Coleman* should not apply retroactively in this case based on the three-factor retroactivity test used in *Aleckson v. Village of Round Lake Park*, 176 Ill. 2d 82, 87-88 (1997). Plaintiffs timely appealed to the Appellate Court, First District, Fourth Division ("the First District").

This appeal allowed by the Court under Illinois Supreme Court Rule 315 (eff. Oct. 1, 2019) arises from the First District's finding that *Coleman* applied retroactively to this case; that Plaintiffs' negligent nuisance, negligent trespass, and Taking claims in the A5AC were sufficient to withstand dismissal under Section 2-615, and that Tort Immunity Act did not provide an alternate basis for complete dismissal of those counts under Section 2-619 of the Code of Civil Procedure, 735 ILCS 5/2-619.

ISSUES PRESENTED

1. Whether this Court's 2016 abolition of the decades-old "public duty rule" in *Coleman* applies retroactively to cases in which the public duty rule had been consistently asserted and which involve alleged government conduct between the 1960s and 2008.

2. Whether the Illinois Constitution requires local governments to pay owners just compensation for taking their property when the owners allege that: (a) a private actor is at least partially to blame for the property intrusion; (b) the intrusion occurred due to inaction rather than affirmative governmental action, and (c) the intrusion occurred due to conduct for which local governments have been granted immunity under the Tort Immunity Act.

STANDARD OF REVIEW

As this appeal arises from a motion to dismiss under Sections 615 and 619 of the Illinois Code of Civil Procedure, it relates to the sufficiency of Plaintiffs' complaint. Decisions regarding the sufficiency of complaints are reviewed by this Court utilizing a *de novo* standard. See, *e.g.*, *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 26.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal under Illinois Supreme Court Rule 315. (Ill. S. Ct. R. 315 (eff. Oct. 1, 2019))(Rule 315). On May 30, 2019, the First District issued an opinion affirming in part and reversing in part the trial court's dismissal of Plaintiffs' case against the LPEs. No timely petition for rehearing was filed. On July 3, 2019, the LPEs filed their Petition for Leave to Appeal under Rule 315. This Court allowed the LPEs' petition on September 25, 2019.

CONSTITUTIONAL PROVISIONS/STATUTES INVOLVED

Illinois Constitution of 1970, Article I, Section 15:

Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

745 ILCS 10/2-109:

A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.

745 ILCS 10/2-201:

Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

745 ILCS 10/2-104:

A local public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization where the entity or its employee is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

745 ILCS 10/2-105:

A local public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an adequate or negligent inspection, of any property, other than its own, to determine whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

STATEMENT OF FACTS

Plaintiffs, a putative class of homeowners, filed their initial complaint on February 11, 2009 seeking compensation for damages incurred on September 13, 2008

during a heavy rain event.[2] (C 10, C 3160.) After nearly three years of motion practice on amended complaints, Plaintiffs filed a document titled the "Amended Fifth Amended Class Action Complaint Amending the Complaint Only On Its Face" (the A5AC) on January 20, 2012, which became the operative pleading. (C 1135.)[3]

Generally, Plaintiffs claim their properties in the Robin-Dee Community Area were invaded by storm and sewer water during and following a heavy rain event on September 13, 2008. (A5AC ¶¶ 17.3–17.4.) The water allegedly overflowed a drainage system referred to as the "Prairie Creek Stormwater System" or "PCSS." The PCSS consists of (a) the central Main Drain that runs westbound through the Robin and Dee Neighborhoods, (b) the Ballard, Pavilion, and Dempster basins and their tributary sewers, and (c) tributary stormwater sewers "usually under the streets collect[ing] street stormwater runoff[,] which then drain to the Main Drain or its storage components." (A5AC ¶ 26.)

I. Early Pleadings and Motion Practice

Plaintiffs filed an Amended Complaint on August 6, 2009 and a Second Amended Complaint on September 14, 2009. (C 18.) Plaintiffs added The Metropolitan Water Reclamation District ("District"), Maine Township, and the City of Park Ridge

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[2] This matter, 2009 CH 6159, was consolidated for all purposes with the following cases in the Circuit Court of Cook County: 10 CH 38809, 11 CH 29586, 13 CH 10423, and 14 CH 06755. Each consolidated matter was filed after a new flooding event.

[3] The A5AC is 299 pages long. Initially, it was not included in its entirety as part of the record on appeal. Eventually, the First District ordered that Plaintiffs supplement the record with a complete copy of the A5AC. A complete copy of the A5AC (without its exhibits) was made part of the record as page numbers SUP C 30 to SUP C 328 and is made a part of the appendix of this brief. Due to its length, the many repetitions of portions of it in the record and for ease of reference, any further citations to the A5AC are to the A5AC's numbered paragraphs.

(collectively referred to as the "LPEs") as Defendants (along with numerous other public and private entities) to either the Amended Complaint or the Second Amended Complaint. (C 185.) The LPEs were served in September 2009. (C 19.)

Plaintiffs filed a Third Amended Complaint on January 8, 2010. (C 22.) In March 2010, the LPEs filed Motions to Dismiss the Third Amended Complaint that raised the public duty rule, among other arguments. (C 3161; R. 14 at 24:4–18.) The circuit court granted a joint motion to dismiss the Third Amended Complaint, finding that the Plaintiffs failed to plead a legal duty for each Defendant related to ownership or control over the sewer system at issue. (C 202; R. 5–6.)

Plaintiffs filed a Fourth Amended Complaint on September 2, 2010. (C 27.) The LPEs sought leave to file motions to dismiss the Fourth Amended Complaint, and advised the court and the Plaintiffs in open court on September 24, 2010 that the LPEs intended to raise the public duty rule again. (R. 14.) The LPEs filed motions to dismiss again raising the public duty rule.

On March 3, 2011, the LPEs argued their motions to dismiss the Fourth Amended Complaint. The trial court limited the argument to the issue of the public duty rule and Tort Immunity Act. (R. 20–21 at 8:21–9:7.) After argument, instead of ruling on the public duty rule, the court observed that the Fourth Amended Complaint failed to comply with pleadings requirements of the Illinois Code of Civil Procedure. Specifically, the court observed that the Fourth Amended Complaint was 650 pages long (R. 29 at 42:14–16), that Counts I and II improperly suggested that duty arises from the Tort Immunity Act (R. 29–30 at 43:16–45:5), that it was replete with legal argument (R. 30 at 45:10), that it contained footnotes (R. 30 at 46:16), and that it pled conclusions of law (R. 30 at

47:23). The court ordered Plaintiffs to file a Fifth Amended Complaint identifying the causal relationships between the defendant entities and the deficiencies and defects to the system that caused Plaintiffs' damages. (R. 30 at 46:12–22.)

Plaintiffs filed their Fifth Amended Complaint on April 18, 2011. (C 38.) All Defendants were allowed until June 6, 2011 to file motions to dismiss, and a briefing schedule was set on those motions. (C 217.) On October 24, 2011, the court observed that the Fifth Amended Complaint improperly contained allegations and counts that had been previously stricken, dismissed, or withdrawn as to all Defendants. (C 234; R. 48 at 57:1–58:10.) The court had already promised to resolve pending motions to dismiss on threshold issues like the public duty rule before allowing a Sixth Amended Complaint (R. 48 at p.57:10–18). So, the court ordered the Plaintiffs to file an "Amended Fifth Amended Complaint Only Amending on its Face" (the A5AC—which would become the operative complaint) that would strike-through the portions of the Fifth Amended Complaint that were previously stricken, dismissed, or withdrawn, and precluded the Plaintiffs from making any other changes to the Fifth Amended Complaint when preparing the A5AC. (C 239–240.) A "meet and confer" meeting was ordered regarding the proposed A5AC before it was filed. (C 239–240.) The parties then sought court intervention regarding several issues related to the A5AC on December 12, 2011 (C 241, 242), January 13, 2012 (C 244–245), and January 20, 2012 (C 252–253). Plaintiffs filed the A5AC on January 20, 2012. (C 55.)

II. Allegations in the A5AC.

Around 1960, a developer constructed the Robin-Dee Community Area and obtained permits from Park Ridge and Cook County to do so. (A5AC ¶¶ 62, 64, 71, 72.) The development plan granted easements to "the District, Park Ridge, Maine Township,

Glenview and/or the County" to "construct, build, improve, maintain, clean and/or perform any other activity related to or arising out of the ownership" of the "main drain" component to the PCSS, the "tributary stormwater sewers" servicing the PCSS, and the sanitary sewers servicing the PCSS. (A5AC ¶¶ 66.3-66.4, 67.3-67.4, 68.1-68.2.) Plaintiffs allege that Cook County, the District, Park Ridge, Maine Township, and/or Glenview, collectively or alternatively, permitted further construction in the Robin-Dee Community Area over the decades that resulted in a complex, interrelated stormwater system known as the PCSS. (A5AC ¶¶ 82–88.3.) Prior to 1987, the following PCSS structures were constructed and approved by Park Ridge and Cook County: (a) the Robin Neighborhood Main Drain, (b) the twin 60" Robin Alley Culverts; (c) the 60" Robin Alley Stormwater Sewer; (d) the 120" Robin Court Culver; and (e) the 60" Howard Court Culvert, all of which contributed to the flooding. (A5AC ¶¶ 89–90.)

Plaintiffs allege that Park Ridge constructed or caused to be constructed drainage tributaries to the north and south of the main drain. (A5AC ¶¶ 91–97.) Plaintiffs allege that "Cook County, the District, and/or Maine Township" own or operate the storm sewers tributary to the PCSS and upstream storm sewers. (A5AC ¶¶ 98–100.)

In 1976, Advocate acquired and developed contiguous land to the north of the Robin-Dee Community Area, and changed the natural drainage patterns of the PCSS after gaining approval from Park Ridge, Cook County, and the District despite an Illinois Department of Transportation Flood Risk Report indicating that the proposed development would cause a flood risk. (A5AC ¶¶ 102–113.)

In 1987, catastrophic flooding affected the Robin-Dee Community Area after which Park Ridge, Maine Township, and Glenview commissioned Harza Engineering

Services to investigate the flooding. Harza issued a report in 1990 identifying maintenance and design defects in the PCSS that Plaintiff alleges caused the flooding. (A5AC ¶¶ 114–118.)

Between 1987 and 2002, Advocate and its engineer, Gewalt, continued developing Advocate's contiguous property, and obtained permits related to that development from the District and Park Ridge. (A5AC ¶¶ 119–126.)

In 2002, the Robin-Dee Community Area experienced again significant flooding. (A5AC ¶¶ 127–129.) At that time, the Illinois Department of Natural Resources conducted a study of the area and made recommendations to reduce the risk of flooding. (A5AC ¶ 131–134.4.) Thereafter, Advocate and Gewalt submitted plans for further development and those plans were approved by the District and Park Ridge, but they did not cure the flooding risk. (A5AC ¶¶ 132–139.3.) Specifically, Advocate's plans did not remedy bottlenecks that insufficiently drain water from Advocate's contiguous property, (A5AC ¶¶ 139.1–139.3), and Advocate failed to maintain its stormwater storage basins (A5AC ¶¶ 168.4.1.)

Plaintiffs experienced another significant flood on September 13, 2008. (A5AC ¶¶ 181.) Stormwater overflowed the retention basins on Advocate's contiguous property, which were insufficient to retain the rainfall. (A5AC ¶¶ 209.1–209.1.2.) Culverts intended to discharge water from the basins into the PCSS were insufficient to do so because the discharge from the basins bottlenecked to a 60" culvert. (A5AC ¶¶ 209.2–209.3.) Once the bottleneck reached capacity and the basins filled, water discharged over the top of the basins on Advocate's property and flooded the subservient property in the Robin-Dee Community Area. (A5AC ¶¶ 209.4–209.5.) The stormwater drains in the

Robin-Dee Community Area were insufficient to drain water from the streets into the PCSS, and water invaded sanitary sewers. (A5AC ¶ 209.6.)

A. Allegations Specific to the District.

Plaintiffs allege that the District is the regional LPE charged with multi-jurisdiction operation of stormwater management including portions of the PCSS expressly alleged to be owned and operated by Advocate and other LPEs (A5AC ¶¶ 968, 969, 971.1, 978, 980, 981.) Plaintiffs allege that the District improperly approved the private entities' designs. (A5AC ¶967.3.) In addition, Plaintiffs assert during the rain event, the District failed to pump sanitary sewers to tanker trucks, stormwater drains, rivers or other areas to create more capacity for stormwater. (A5AC ¶ 967.4.) Plaintiffs also allege that their residences were serviced by the District's intercepting sewers that receive flow from either Glenview or Park Ridge's local sewer systems, and transport that flow to one of the District's treatment plants and that the interceptors were full which caused sewage backup into their homes. (A5AC ¶¶ 973-974.)

B. Allegations Specific to Park Ridge.

Plaintiffs allege that Park Ridge had "the most actual knowledge of Advocate flooding among the LPEs and [was] in the best position to make changes to the Advocate-Gewalt Plans given the serious repetitive flooding history." (A5AC ¶ 1104.) Plaintiffs further contend "Park Ridge did not compel Advocate and Gewalt to revise their North and South Development Plans to provide more stormwater storage on the North Development or South Development." (A5AC ¶ 1104.) Further, Plaintiffs allege Park Ridge "was well aware of the repetitive invasive flooding into the Robin-Dee Community Area because prior storms had generated sufficient stormwater to produce street flooding including street flooding on Dempster Road and Robin Alley," and that

Park Ridge had previously deployed police and/or public safety personnel to the area during flood events. (A5AC ¶¶ 1105-1107.) Finally, Plaintiffs allege that Park Ridge, along with the other LPEs, owns, operates, and controls the Prairie Creek Main Drain and its various segments, the stormwater, and the real property for stormwater management. (A5AC ¶¶ 342–78.)

C. Allegations Specific to Maine Township.

Plaintiffs allege that Maine Township "mobilized and/or readied" trucks for sand delivery in anticipation of the flooding and sent those trucks to the Robin Dee Community, but that Maine Township sent the trucks with the sand and sandbags too late. (A5AC ¶ 1235.) Plaintiffs allege that "All PCSS Robin-Dee Community Segment Stormwater Improvements (including the Howard Court Culvert and Dee Neighborhood Stormwater Pipe (which was the Robin Dee Community Main Drain) and connected storm water structures and drains) are within the jurisdiction of Maine Township and are public improvements and properties as defined in TIA Article III, Sec. 3-101." (A5AC ¶ 1238.) Plaintiffs allege that Maine Township was responsible for storm water management because it supervised projects to public improvements such as the PCSS's Robin Neighborhood Main Drain and Dee Neighborhood Main Drain. (A5AC ¶ 1239.) The A5AC states, "By its undertaking and/or exercise of control (by statute, ordinance or other act with the force of law besides actual control) and/or other acts of dominion, Maine owned, possessed and/or controlled the PCSS's Howard Court, Dee Neighborhood Stormwater Pipe and other related real property and related estates and interests in the Prairie Creek Stormwater System stormwater improvements within Maine." (A5AC ¶ 1240.) Maine Township is alleged to have planned or caused to be planned the PCSS stormwater structures. (A5AC ¶¶ 1241–1242.) Plaintiffs simultaneously allege and

conclude that multiple Defendants, including Maine Township, own, operate, and control the Prairie Creek Main Drain and its various segments, the stormwater, and the real property for stormwater management. (A5AC ¶¶ 342–378, 686, 1023, 1161–1162, 1238, 1468.)

D. Claims Common to the LPEs in the A5AC.

Although 15 or more counts were initially asserted against each LPE in the A5AC, many were dismissed prior to the final motion practice in this case. (See C 2135–2136 for a summary of claims' dispositions as they pertain to Maine Township. Corresponding claims against the District and Park Ridge were similarly dismissed.) As such, the only claims relevant to this appeal are: (1) Negligence: Dominant Estate Overburdening (Counts 25, 45, 64); (2) Negligent Nuisance (Counts 31, 52, 69); (3) Negligent Trespass (Counts 32, 53, 70); (4) Violation of Tort Immunity Act Article III, § 3-102A Statutory Duty to Maintain Property (Counts 36, 57, 74); (5) Violation of Tort Immunity Act Article III, § 3-103; (6) Statutory Duty to Remedy a Dangerous Plan (Counts 37, 58, 75); (7) Violation of Illinois Constitution Article I, § 15: Taking of Real and Personal Property (Counts 39, 60, 76), and (8) Claim for Equitable Relief per Tort Immunity Act (Counts 42, 63, 79). (A5AC ¶¶ 1244–1339.)

III. Summary of the Proceedings Related to the A5AC.

The LPEs and all other Defendants including the private entity defendants Gewalt Hamilton Associates, Inc. ("Gewalt") and Advocate Health and Hospitals Corp. ("Advocate") filed motions to dismiss in February 2012. The LPEs' motions again raised the public duty rule. (C 56–58.) On the court's own motion, the argument and ruling on the motions were taken in stages, starting with the private entities. While the private

entities' motions were briefed and argued, the LPEs' motions to dismiss were continued without hearing.

On December 20, 2013, the court initially ruled on the private entities' motions. (C 1020, 1022–1046.) Thereafter, Plaintiffs, Gewalt, and Advocate briefed and argued motions for reconsideration and motions for Rule 304(a) findings, until final rulings were issued on July 25, 2014. (C 1058–1070.) Throughout this entire time, the LPEs' motions to dismiss were continued. (C 1070.)

On July 25, 2014, the court ordered the LPEs to file Amended Motions to Dismiss to update the case law, set a briefing schedule on the motions to dismiss, and set an oral argument on the issue of the public duty rule. (C 1070.) On August 15, 2014, the LPEs each filed their own comprehensive motion to dismiss. (Park Ridge at C 1071–1083, 1099–1113; District C 1118–1484; Maine Township at C 1092–1094, 1486–1505.) Plaintiffs filed their response brief on October 22, 2014. (C 1513–1642.) Plaintiffs then filed a "supplemental response" to Park Ridge's motion to dismiss on October 27 (C 1647–1691), a supplemental response to Maine Township's motion to dismiss on October 31 (C 1692–1715), and a supplemental response to the District's motion to dismiss on November 10 (C 1720–1743). On December 5, 2014, the LPEs filed replies in support of their motions to dismiss. (District at C 1744–1758; Maine Township at C 1759–1773; Park Ridge at C 1774–1783.) The issue of the public duty rule was argued on February 2, 2015. (C 1849.)

On April 3, 2015, more than five years after the LPEs first sought dismissal under rule, the court dismissed the LPEs on that basis. (C 1884–1892.) In particular, the circuit court granted the LPEs' Section 2-615 motions to dismiss on the basis of *Alexander v.*

Consumers Illinois Water Co., 358 Ill. App. 3d 774 (3d Dist. 2005) and *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335 (1998). The circuit court found that providing flood control management, including maintenance and improvement of the PCSS and other sewers, is a governmental service to benefit the public at large, and allegations that the LPEs failed to provide that service adequately triggered the public duty rule. (C 1887–1889.)[4] In addition, the court found that the LPEs did not owe a "special duty" to the Plaintiffs which would exempt the claims from the public duty rule. (C 1890-92.) As such, the circuit court concluded that the public duty rule applied, that Plaintiffs had not alleged sufficient facts to impose a duty on the LPEs, and granted the LPEs' motions to dismiss. (C 1892.) After that order, the LPEs moved for a Rule 304(a) finding. (C 1910–1921, C 2130–2162.)

On June 5, 2015, the court requested briefing on the applicability of its April 3, 2015 ruling on the Taking claim brought pursuant to Section 15 of Article 1 of the Illinois Constitution. (C 1924–1925.) That issue was argued on August 25, 2015, after which additional briefing concluded on September 3, 2015, and at which time the LPEs' motions were under advisement. (C 2217.)

On October 29, 2015, Maine Township moved for leave to cite additional authority in support of its motion for a Rule 304(a) finding and its motion to dismiss the Taking claim: *Sorrells v. City of Macomb*, 2015 IL App (3d) 140763. (C 2226–2241.) That motion was briefed, argued, and taken under advisement on January 11, 2016. (C 2305.)

[4] The circuit court footnoted that the First District's unreported decision in *River City Facilities Management Co., LLC v. Metropolitan Water Reclamation District of Greater Chicago*, 2012 IL App (1st) 120464-U, ¶ 25, held that the public duty rule was still viable and applied to a governmental unit's provision of water management and collection.

On January 22, 2016, this Court issued *Coleman* and abolished the public duty rule. Plaintiffs then requested that the circuit court reconsider its April 3, 2015 order that granted the LPEs' motions. (C 2307–2346.) Plaintiffs' motion was briefed and argued and taken under advisement on March 25, 2016. (C 2477.) After the argument, the parties submitted supplemental briefing and additional argument occurred on August 18, 2016. (C 2678.)

On August 18, 2016, the court granted Plaintiffs' motion to reconsider and vacated its April 3, 2015 dismissal of the claims against the LPEs. (C 2698.) The LPEs requested the trial court certify questions for appeal related to whether *Coleman*'s abolition of the public duty rule applied to this case. (C 2700–2704.) That motion was briefed, and argument was heard on January 11, 2017. (C 3075.) Additional briefing was taken after the argument. (C 3075.)

On February 1, 2017, the court vacated its August 18, 2016 order, and reinstated its decision dismissing the LPEs from the lawsuit based on the public duty rule. (C 3159–3163.) In doing so, the circuit court held that the *Coleman*'s abolition of the public duty rule should not apply retroactively in this case based on the factors set out in *Aleckson*, 176 Ill. 2d at 87-88. (C 3160-3163.) This decision applied to the *Tzakis* matter and all consolidated cases. (C 3164.) After the Rule 304(a) finding, the Plaintiffs filed a Notice of Appeal on April 4, 2017. (C 3203–3204.)

On May 30, 2019, the First District affirmed the trial court's ruling in part and reversed it in part. A 2. In its opinion, the First District evaluated the same retroactivity factors as the trial court, but found that *Coleman* applied retroactively to this case because "[i]n considering the three factors there is no clear-cut answer on either side ***

[T]he *Aleckson* factors do not tilt in any one direction." A 30-31. The First District affirmed the trial court's dismissal of certain counts on other grounds, but concluded that Plaintiffs' claim for negligent nuisance, claim for negligent trespass, and the Taking claim were sufficient to withstand dismissal under Section 2-615, and that most of the LPEs' claims of immunity under the Tort Immunity Act did not provide an alternate basis for complete dismissal of those counts under 735 ILCS 2-619. A 52.

ARGUMENT

The trial court correctly granted the LPEs' motions to dismiss brought under Section 2-619.1 of the Illinois Code of Civil Procedure. The circuit court granted the motions to dismiss under Section 2-615 finding that the claims were barred under the public duty rule. The First District reversed that specific ruling and held that *Coleman* applied retroactively, but affirmed dismissal of several counts on alternative grounds. A 34-38.

This Court should affirm the trial court's decision on retroactivity; reverse the appellate court and affirm the trial court's dismissal of all of Plaintiffs' claims against the LPEs under the public duty rule. In addition, the Court should hold that Plaintiffs' A5AC does not state a claim under Section 15 of Article I of the Illinois Constitution (the Taking Clause) because local governments are not liable under that section for intrusions caused in whole or part by private parties, or intrusions allegedly caused by government inaction. Finally, this Court should hold that the Tort Immunity Act provides local governments immunity from claims brought under the Illinois Constitution, including claims under the Taking Clause.

I. *Coleman* Should Not Be Applied Retroactively to this Case, and the Public Duty Rule Bars the LPEs' Liability for Plaintiffs' Claims.

This Court has the inherent power to limit retroactive application of its decisions. See, *e.g.*, *Deichmuller Construction Co. v. Industrial Comm'n*, 151 Ill. 2d 413, 416 (1992). For the past 60 years when deciding whether to use that power, the Court determines whether the decision announces a new principle of law which will cause hardship or inequity if applied retroactively. See, *e.g.*, *Molitor v. Kaneland Community Unit District*, 18 Ill. 2d 11, 28-29 (1959). Accord *Gilbert v. Sycamore Hospital*, 156 Ill. 2d 511, 529-30 (1993). The Court specifically adopted the three-factored analysis set out by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971) to determine when a decision should apply prospectively. *Aleckson*, 176 Ill. 2d at 87-88. Those factors are: (1) whether the decision establishes a new principle of law; (2) whether retroactive application will further the purpose or goal of the new rule, and (3) whether retroactive application would cause inequity or undue hardship. *Exelon v. Department of Revenue*, 234 Ill. 2d 266, 285 (2009). Whether the Court's retroactivity analysis made specific reference to these factors or not, the results have been nearly uniform.

If the Court undertakes a retroactivity analysis and finds that a decision alters the law, the Court nearly always orders that it apply only prospectively. See *Molitor*, 18 Ill. 2d at 28-29; *Bassi v. Langloss*, 22 Ill. 2d 190, 195 (1961); *Flynn v. Kucharski*, 49 Ill. 2d 7, 11 (1971); *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348 (1977); *Skinner v. Reed-Prentice Division Package Machinery*, 70 Ill. 2d 1 (1977); *Kelsay v. Motorola*, 74 Ill. 2d 172 (1978); *Alvis v. Ribar*, 85 Ill. 2d 1, 28 (1981); *Torres v. Walsh*, 98 Ill. 2d 338 (1983); *Bd. of Commissioners of Wood Dale Public Library District v. County of Du Page*, 103

Ill. 2d 422 (1984); *Brown v. Metzger*, 104 Ill. 2d 30 (1984); *Sunich v. Chicago & North Western Transportation Co.*, 106 Ill. 2d 538, 545 (1985); *Elg v. Whittington*, 119 Ill. 2d 344 (1988); *Gibellina v. Handley*, 127 Ill. 2d 122 (1989); *Deichmuller*, 151 Ill. 2d at 416; *Gilbert*, 156 Ill. 2d at 529-30; *Bogseth v. Emanuel*, 166 Ill. 2d 507 (1995); *Aleckson*, 176 Ill. 2d at 92; *Exelon*, 234 Ill. 2d at 285. It does so to avoid undue hardship or injustice. See, e.g., *Molitor*, 18 Ill. 2d at 28-29; *Gilbert*, 156 Ill. 2d at 529-30.

On the other hand, when the Court has undertaken the same analysis and allowed a decision to apply retroactively, it did so almost always because no new principle of law was announced. *Baier v. State Farm Insurance Co.*, 66 Ill. 2d 119, 125-26 (1977); *Nabisco v. Korzen*, 68 Ill. 2d 451, 463 (1977); *Muskat v. Sternberg*, 122 Ill. 2d 41 (1988); *Martinez v. Erickson*, 127 Ill. 2d 112 (1989); *Castaneda v. Illinois Human Rights Comm'n*, 132 Ill. 2d 304 (1989); *Tosada v. Miller*, 188 Ill. 2d 186 (1989); *Heastie v. Roberts*, 226 Ill. 2d 515, 536-37 (2007); *Harris v. Thompson*, 2012 IL 112525, ¶¶ 30-33. The few times that was not the reason given to allow retroactivity, a complete analysis was not undertaken. See *Lannom v. Kosco*, 158 Ill. 2d 535, 538-39 (1994)(previous court had been asked to consider retroactivity in petition for rehearing but denied petition without retroactivity analysis); *John Carey Oil v. W.C.P Investments*, 126 Ill. 2d 139, 148-49 (1989) (without comment on whether new law was announced, court ordered retroactive application because no inequity). Notwithstanding these two decisions, all the remaining cases demonstrate the primary reason retroactive application is ordered is that no new principle of law was announced.

So, the bedrock of the Court's retroactivity analysis is whether the decision announces a new principle of law the retroactive application of which will cause hardship

or inequity. *Gilbert*, 156 Ill. 2d at 529-30. If it does, the decision is only applied prospectively. If it does not, the Court applies its decisions retroactively. A detailed look at several of the Court's decisions confirms the importance of that inquiry.

In *Molitor*, which presents the situation most analogous to *Coleman*'s abolition of the public duty rule, the Court ordered of its abandonment of local government sovereign immunity apply only prospectively. 18 Ill. 2d at 28-29. In limiting the application of that sweeping change, the Court focused on the governments' "reliance upon an overruled precedent." *Id*. The Court recognized its decision could cause "great hardship" to the local governments. *Id*. at 26. And it recognized that by relying on then existing law, the governments may have failed to obtain adequate insurance or failed to investigate earlier accidents. *Id*. at 28-29. To limit that hardship, the Court held that the abolition of sovereign immunity would "apply only to cases arising out of future occurrences." *Id*. at 26-27.

Twenty years later, in *Gilbert*, the Court again focused on the reliance on existing precedent in ordering prospective only application. 156 Ill. 2d 511. In that case, the Court held a plaintiff's settlement with an agent would also extinguish claims against the principal even if there was an express reservation of rights in the settlement agreement. *Id*. at 528-29. This overruled two prior decisions. *Id*. Recognizing that parties had relied on those earlier decisions, the Court found that its ruling should apply only prospectively. *Id*. at 530. It did so to "avert injustice and hardship" based on a justifiable reliance on those prior decisions. *Id*.

In addition, the Court has ordered prospective only application of its decisions when there is a risk of inequity or hardship even if no precedent had been overruled. For

example, in *Renslow*, a plurality of this Court found a child could state a claim based on negligent acts committed against its mother before the child was conceived if those acts caused injuries to the child. *Id*. at 357-59. While this holding did not overturn existing precedent, the Court ordered it would only apply to "cases arising out of future conduct" because it "represents an extension of duty to a new class of plaintiffs." *Id*. at 359.

With nearly six decades of nearly uniform decisions supporting prospective only application of the abolition of the public duty rule announced in *Coleman*, the First District erred in finding it should apply retroactively. Not only did *Coleman* overturn decades of existing precedent relied upon by the LPEs, the First District recognized applying it retroactively would cause the LPEs hardship. A 27-28, ¶ 44. Similar findings have consistently been sufficient for this Court to order only prospective application. *E.g., Molitor,* 18 Ill. 2d at 27. So, while this factor alone warrants applying the decision on a prospective only basis, a detailed analysis of the *Chevron* factors confirms that prospective only application of *Coleman* is the just result.

A. *Coleman*'s Abolition of the Public Duty Rule Significantly Changed Illinois Law.

Coleman's abolition of the public duty rule changed Illinois law. This cannot be disputed. Each of the three *Coleman* opinions noted the significant change in law the decision represented. The lead opinion in *Coleman* explored the history of the public duty rule at length, recognizing that the rule survived the abolition of sovereign immunity and the passage of the Tort Immunity Act. *Coleman*, 2016 IL 117952, ¶¶ 45, 52. The concurring and dissenting justices noted that the court was abandoning or abolishing the rule. *Id.* ¶ 67("the time has come for this Court to abandon the public duty rule and its special duty exception")(Freeman, J., specially concurring, joined by Theis, J.) ¶ 80 ("the

court abandons these well-settled principles and abolishes the public duty rule")(Thomas, J., dissenting, joined by Garman, C.J. and Karmeier, J.). Simply, *Coleman* established a new principle of Illinois law.

It is therefore unsurprising that the First District found the *Coleman* decision represented a significant change in the law. A 21-24, ¶¶ 35-37. After rejecting several arguments raised by Plaintiffs, the Court stated "we find that, under the first factor, the *Coleman* court established a new principle of law by overruling clear past precedent on which litigants have relied." A 23-24, ¶ 37. Based on both existing law and the clear language in each of the *Coleman* opinions, this holding was correct. And based on this Court's 60 years of precedent related to retroactivity, this finding alone strongly supports applying *Coleman* only prospectively.

B. Retroactive Application of the Abolition of the Public Duty Rule Does Not Further Any Purpose of the *Coleman* Decision.

In evaluating the second *Chevron* factor, this Court focuses on whether retroactive application is necessary to further the purposes of the new rule. *E.g.*, *Deichmuller*, 151 Ill. 2d at 417-18 ("retroactive application * * * is not necessary to advance the purpose behind our holding"). Occasionally, it frames the inquiry to be whether prospective application would hinder the rule. *E.g.*, *Gilbert*, 156 Ill. 2d at 529 ("the rule we announce today would not be thwarted by a prospective application"). Utilizing either form of the question, retroactive application is not warranted in this case.

As the First District recognized, because of the two opinions in the *Coleman* majority, "it is difficult to glean any overarching 'purpose and history of the new rule.'" A 24, ¶38. *Coleman*'s lead opinion identified three reasons for abolishing the rule. *Coleman*, 2016 IL 117952, ¶ 54. In particular, the lead justices explained that the rule

should be abolished because: (1) its application was muddled and inconsistent; (2) continued application of the rule was incompatible with the limited legislative grant of immunity for willful and wanton conduct; and (3) public policy is primarily the province of the legislature, and since the general assembly enacted statutory immunities the rule was obsolete. *Id*. On the other hand, the concurrence reasoned that the public duty rule could no longer be applied due to the 1970 Illinois Constitution's abolition of sovereign immunity. *Id*. ¶ 68. These varied reasons do not identify any overarching purpose. Even if they did, none of the potential purposes would be furthered by retroactive application of *Coleman*.

The appellate court incorrectly suggested that prospective application would hinder the purpose of *Coleman* by increasing uncertainty. The First District reached this conclusion because it believed that decision would conflict with the Second District's opinion in *Salvi v. Village of Lake Zurich*, 2016 IL App (2d) 150249. A 26-27, ¶¶ 42-43. This was incorrect. *Salvi* did not undertake a retroactivity analysis at all. *Salvi*, 2016 IL App (2d) 150249, ¶ 37. Instead, the Second District simply noted that the public duty rule had been abolished and continued with its analysis of the Tort Immunity Act. *Id*. *Coleman* was issued on January 22, 2016. While *Salvi* was issued on October 31, 2019, it was argued on November 17, 2015. (audio available at: http://www.illinoiscourts.gov/Media/Appellate/2nd_District_2015.asp). As such, it would have been impossible for the parties in *Salvi* to address the retroactivity of a decision that would not be issued for another two months. Accordingly, applying *Coleman* prospectively could not have created uncertainty by conflicting with *Salvi*'s silence.

There would be no "increase in uncertainty" by limiting *Coleman* to prospective application.

The Court's abolition of the public duty rule is neither furthered by a retroactive application, nor thwarted by a prospective application. *Deichmuller*, 151 Ill. 2d at 417 ("retroactive application of the holding in this case is not necessary to advance the purpose"); *Gilbert* 156 Ill. 2d at 529 ("the rule we announce today would not be thwarted by a prospective application"). Therefore, the second *Chevron* factor supports applying *Coleman* prospectively.

C. The LPEs and Other Municipalities Relied on the Public Duty Rule for Decades and Allowing Them to be Held Liable for Actions Taken When the Rule Existed Would be Inequitable and Cause Them Hardship.

Prior to this Court's decision in *Coleman*, the public duty rule allowed municipalities to "provide needed services for their communities where the risk of potential liability" would otherwise have prevented them from doing so. *Coleman*, 2016 IL 117952, ¶ 98 (Thomas, J. dissenting, joined by Garman, C.J., Karmeier, J.). Earlier, this Court explained that the rule protected municipalities undertaking action for the benefit of the general public from "tremendous exposure to liability" that "would certainly dissuade" them from doing so. *Stigler v. City of Chicago*, 48 Ill. 2d 20, 25 (1971). These protections had been in place for decades.

From 1870 to 1959, municipalities were completely immune from civil damages. *Molitor*, 18 Ill. 2d at 16 (setting out history of municipal sovereign immunity in Illinois). After sovereign immunity was prospectively abolished in *Molitor*, this Court explicitly recognized the public duty rule. *Huey v. Town of Cicero*, 41 Ill. 2d 361, 363 (1968). In doing so, the Court found that the public duty rule was independent of either statutory or common-law concepts of sovereign immunity. *Id*. Shortly thereafter, the Court explained

that rule meant a municipality could not be held liable for injury related to a "governmental function" unless it had a "special duty to the plaintiff or to any particular person different from the public at large." *Stigler*, 48 Ill. 2d at 25.

More recently, the Court recognized the rule acted to prevent units of government "from being held liable for their failure to provide adequate governmental services." *Harinek*, 181 Ill. 2d at 345. The Court explained this protection was premised on the fact "that the duty of the governmental entity to 'preserve the well-being of the community is owed to the public at large rather than to specific members of the community.'" *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 32 (1998) (quoting *Schaffrath v. Village of Buffalo Grove*, 160 Ill. App. 3d 999, 1003 (1987)). Thus, for over 130 years, municipalities have planned and taken actions to benefit the general public without fear that they would be liable for those acts.

This case demonstrates how retroactive application of *Coleman* would create undue hardship for the LPEs and other municipalities that relied on the protection of the public duty rule. In this case, Plaintiffs seek to hold the LPEs responsible for decisions or actions that occurred between eight and 56 years before the public duty rule was abolished. Effectively, Plaintiffs seek to hold the LPEs liable for review, approval, permitting, construction, maintenance, and operation of stormwater and sanitary sewer systems from 1960 through 2008. (A5AC ¶¶ 62, 81-83, 88-89, 91-96, 119-139, 208-212.) So, at the time of any alleged event in the A5AC, the public duty rule existed.

Importantly, Plaintiffs admit that the LPEs' activities were not for the benefit of a particular person or group of persons but for the benefit of the general public. (A5AC ¶¶ 172-177.) Because the public duty had been reaffirmed repeatedly in the preceding

decades, the LPEs and other municipalities could not have anticipated being held liable for providing insufficient government services of flood control, sewer service, or construction review and approval. *Harinek*, 181 Ill. 2d at 345. As the Court found in *Molitor* when it abolished sovereign immunity prospectively, municipalities likely did not procure adequate insurance. *Molitor*, 18 Ill. 2d at 28-29. And they cannot do so now. As was the case 60 years ago when sovereign immunity was abolished, allowing retroactive application of the public duty rule's abolition would cause great hardship to the LPEs and any other municipality forced to defend potentially decades-old decisions.

Beyond these broader inequities universal to all municipal entities, the specific procedural history of this case supports a prospective application of *Coleman*. As the circuit court found, the lengthy history of the case and the LPEs consistent reliance on the public duty rule supports a prospective application to these parties. (C 3160–3163.) In its February 1, 2017 order declining to apply *Coleman* retroactively, the Circuit Court considered the inequities on the LPEs and their taxpayers as well as: (1) the numerous complaints and motions to dismiss between February 11, 2009 and January 20, 2012; (2) the motion practice which had already resulted in two appeals and the case not having progressed beyond the pleadings stage; and (3) the fact the LPEs first raised the public duty rule in a motion to dismiss the Third Amended Complaint, and that the LPEs had continued to raise the public duty rule as a defense to every subsequent complaint. (C 3160–3163.) The trial court was correct in this analysis.

The delay in this case was caused by the Plaintiffs, and they now seek to take advantage of that delay by having *Coleman* apply to these earlier occurrences despite the LPEs' constant assertion of their public duty rule defense. If not for the repeated delays

caused by Plaintiffs, the LPEs would have been dismissed in 2010. Instead, the LPEs endured nine years of litigation. By itself, Plaintiffs' failure to file a competent pleading from the filing of the Third Amended Complaint to the filing of the A5AC took over two years. Once Plaintiffs finally filed the A5AC, other motion practice delayed the trial court's ruling on the merits of the LPEs' motions to dismiss until nearly five years after the LPEs first asserted the public duty rule. Allowing Plaintiffs to be rewarded for their non-compliance would not be fair to the LPEs.

It would be particularly inequitable because, if they are forced to litigate this case, the LPEs will face potential liability without insurance. The LPEs are all self-insured entities for these claims. The hardship placed on the LPEs by this potential liability would be borne by their taxpayers, and that hardship outweighs any prejudice to the Plaintiffs who still have claims pending against private entities for the same alleged injuries. Simply, the LPEs should have been dismissed nine years ago, and the Plaintiffs' conduct and delay has drained the LPEs' resources long enough.

For these reasons and in the interests of fairness, justice, and minimizing hardship to public entities and their taxpayers, this Court should order that *Coleman* applies only to acts or inactions that occur after it was issued. In doing so, the Court should reverse the First District's holding to the contrary and affirm the circuit court's dismissal of all claims against the LPEs based on the public duty rule as it existed prior to 2016.

D. When Applied to This Case, the Public Duty Rule Bars Plaintiffs' Claims Against the LPEs.

The public duty rule precludes LPE liability in this case because the A5AC did not contain any factual allegations showing that the LPEs owed Plaintiffs an individual duty. Under the public duty rule, as it existed prior to *Coleman*—and as should be applied

to this case—a municipality could not be held liable for its failure to provide adequate governmental services. *Harinek*, 181 Ill. 2d at 345. As stated previously, the rationale for the rule was that the duty of a municipality to provide governmental services to the public at large takes precedence over any duty owed to a particular person. *Id.*.

As the First District noted, the public duty rule had long protected the LPEs and other municipal defendants from similar claims. *See* A 22-23 (citing two reported appellate court decisions, unreported decisions, and six trial court rulings). For example, in *Town of Cicero v. Metropolitan Water Reclamation District of Greater Chicago*, 2012 IL App (1st) 112164, the First District noted "the 'public duty rule' would appear to bar" any tort claims for flooding from June and July 2010 heavy rain events. *Id.* ¶ 41 n.4.

Similarly, in *Alexander*, 358 Ill. App. 3d 774, the Third District held that, under the public duty rule, a municipality had no duty to individual plaintiffs to require that sewer lines be maintained to prevent the backup of sewage into the plaintiffs' homes. *Id*. at 779. There, the plaintiffs alleged that the Village of University Park should have required homeowners to keep their sewage lines cleared and maintained. By failing to issue such a mandate, even though it could have, the plaintiffs accused University Park of breaching a duty to the homeowners whose houses suffered sewage backup due to clogged lines. *Id*. at 777–78. The Court found that the public duty rule barred any liability against University Park for failing to prevent the sewer backups. *Id*. at 779.[5]

[5] As the First District referenced, several unreported cases also applied the public duty rule to bar claims arising from flood water or sewer management. *E.g. River City Facilities Management Co. v. Metropolitan Water Reclamation District of Greater Chicago*, 2012 IL App (1st) 120464-U, ¶¶ 25, 30, and *Arezina v. City of Elmhurst*, 2013 IL App (2d) 120572-U, ¶ 24.

Here, Plaintiffs claim that the LPEs failed to manage and control stormwater, to maintain improvements, and to provide flood prevention and relief services. *E.g.* A5AC ¶¶ 1247, 1285, 1290, 1315, 1321, and 1326. These claims are based solely on the performance of ordinary government functions for the benefit of the general public. Just like the District was not liable because of the public duty rule in *Town of Cicero* for failing to "implement and activate procedures of handling excess stormwater before backup flooding occurred," the LPEs had no duty to implement and activate procedures for handling excess stormwater, including designing an adequate drainage system or providing sandbagging. *Town of Cicero*, 2012 IL App (1st) 112164, ¶¶ 39-41 n.4. Further, the LPEs did not have a duty to any individual to maintain or clear stormwater sewers during or before a rainfall, whether the LPEs ordinarily operate and maintain the sewers, or not. *Alexander*, 358 Ill. App. 3d at 779.

Because all of the LPEs' alleged acts or inactions are governmental services owed to the general public that took place prior to January 22, 2016, when this Court issued *Coleman*, the A5AC fails to state a claim against any of them. For that reason, the Court should reverse the First District and affirm the decision of the trial court which dismissed Plaintiffs' claims against the LPEs in their entirety.

E. Even if *Coleman* Applied Retroactively to This Case the A5AC Should Be Dismissed Because the LPEs Do Not Owe Plaintiffs a Duty under the Common Law.

While the public duty rule bars Plaintiffs' claims, they would also fail under this Court's traditional duty analysis. The existence of a duty is a question of law to be determined by the Court. *Bogenberger v. Pi Kappa Alpha Corporation*, 2018 IL 120951, ¶ 21. This analysis is shaped by public policy. *Id.* ¶ 22. In conducting the traditional duty inquiry, this Court emphasizes four factors: (1) the reasonable foreseeability of the injury;

(2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant. *Simpkins*, 2012 IL 110662, ¶ 18.

The third and fourth factors alone strongly weigh against finding that the LPEs owed Plaintiffs any duty of care. The A5AC asserts that to meet the LPEs' alleged duties, the LPE had to take actions that are nothing short of extraordinary. (A5AC ¶¶ 209-215, 287-305, 306-310). Plaintiffs ask this Court to impose a duty on all municipalities throughout Illinois to "plan substantially before" any rain event so that they maximize stormwater storage and to pump excess stormwater away. (A5AC ¶ 287). In addition, the Plaintiffs ask this Court to order municipalities, including the LPEs, to deploy tremendous resources any time a predicted storm could overwhelm an existing system. The efforts Plaintiffs would have this Court require include, but are in no way limited to, the following: (1) making stormwater pumps available to pump water away from one property to another (A5AC ¶ 289); (2) mobilizing tanker trucks to receive extra stormwater (A5AC ¶ 291); (3) pump water out of storm basins prior to every major storm (A5AC ¶¶ 293, 297); (4) purchasing and using a system capable of producing 10,000 sandbags an hour and retaining a workforce capable of creating a sandbag barrier (A5AC ¶¶ 295.1, 296.1); (5) purchasing and making available other "temporary, rapid-erection stormwater barrier systems" (A5AC ¶ 295.2); (6) obtaining permits necessary to allow and actually pumping stormwater and sewage into other sewers and trucks[6] to create

[6] Of note, this action would violate the Clean Water Act, 33 U.S.C. § 1301 *et seq.* (2018) which requires all publicly-owned treatment works who receive and treat sewage to meet limitations based on both primary and secondary treatment of the waste they receive. 33 U.S.C. § 1311 (2019). Pumping sanitary sewers to stormwater systems or tanker trucks

additional capacity for additional rainfall (A5AC ¶¶ 310, 437, 967.4). Even if these steps would stop any possibility of water intrusion on any homeowner's property at risk of flooding—which they could not—and it was physically possible to implement all of them before any rain event—which it is not—the cost to do so would be catastrophic for the LPEs and other municipalities.

The cost of requiring municipalities like the LPEs to have everything necessary to meet these alleged duties for every potential major rain event cannot be overstated. See *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 37 (recognizing imposition of burden on municipalities goes beyond instant case). As detailed above, the LPEs are all units of local government funded by their taxpayers. If the LPEs and other municipalities were forced to take all the Plaintiffs' recommended actions to protect any area that could suffer from flooding before each and every rain event, they would lack resources to provide any other government service.

Simply, the magnitude of the burden to predict, anticipate, and protect all areas subject to flooding against any rain event would be unimaginable, and the consequences of placing that massive burden on municipalities, like the LPEs, would be catastrophic to them and their taxpayers. For this additional reason, even if *Coleman* is applied retroactively, the Court should dismiss Plaintiffs' complaint for failure to state a claim.

II. Plaintiffs Fail to State A Taking Claim Under the Illinois Constitution.

Whether Plaintiffs state a claim under the Taking Clause is a question of law that the Court reviews de novo. See, *e.g.*, *Hampton*, 2016 IL 119861, ¶ 23. Applying that standard of review here requires reversal of the appellate court for a number of reasons:

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would not comply with this requirement unless expressly approved by the United States Environmental Protection Agency.

(1) a Taking claim under the Illinois Constitution requires government action be the only source of invasion; (2) following the limited lockstep approach, this Court should hold that to allege a Taking claim, Plaintiffs must assert affirmative action not simply inaction; and (3) the Tort Immunity Act bars Plaintiffs' Taking claim.

A. Plaintiffs' Taking Claims Fail as a Matter of Law Because They Assert Private Entities Were Partially at Fault for the Intrusion on Their Property.

To state a Taking claim, a plaintiff must allege among other elements that the taking was either an intentional or foreseeable result of an *authorized government action*. *Hampton*, 2016 IL 119861, ¶ 25 (citing *Arkansas Game and Fish Comm'n v. U.S.*, 568 U.S. 23, 38-39 (2012)). This means the complaint must allege "the asserted invasion is the 'direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.'" *Ridge Line, Inc. v. U.S.*, 346 F.3d 1346, 1355 (Fed. Cir. 2003) (quoting *Columbia Basin Orchard v. U.S.*, 132 Ct. Cl. 445, 132 F. Supp. 707, 709 (1955)). Importantly, plaintiffs must also allege the action caused "an appropriation of some interest in his property permanently to *the use of the Government*." (Emphasis added) *Hampton*, 2016 IL 119861, ¶24 (quoting *Hartwig v. United States*, 485 F.2d 615, 619 (Ct. Cl. 1973)). So, in order to state a Taking claim, Plaintiffs were required to allege that their property was taken for the LPEs' use, due to the direct, natural, or probable result of the LPEs' actions. Simply, the Taking claims against the LPEs cannot be premised on the actions of a private entity.

Following this clear direction, the Third District reached the correct conclusion that private action cannot support a taking claim in *Sorrells*, 2015 IL App (3d) 140763. In *Sorrells*, the Third District held that for a property owner to prevail on taking claim, he

must allege the taking was solely the intended or foreseeable result of *government* actions. *Id.* ¶¶ 31-32.

In that case, the plaintiffs were homeowners whose property was flooded when a private company developed the adjacent property into a subdivision and then dedicated the subdivision streets to the City of Macomb. *Id.* ¶ 1. After the streets were dedicated, plaintiffs filed a claim against the City of Macomb for inverse condemnation. *Id*. ¶ 18. Plaintiffs alleged that water from the development, including from the streets, was channeled and directed by the streets to unreasonably discharge from two stormwater detention basins onto their land. *Id*. ¶ 17. As a result, plaintiffs alleged that the City of Macomb discharged surface water from the streets and other locations onto their land that "would not normally flow upon plaintiffs' lands." (Internal quotation marks omitted) *Id*. ¶ 18. The homeowners appealed after the trial court dismissed the claim against Macomb pursuant to Section 2-615 and granted Rule 304(a) language (since the developer remained as a defendant). *Id*. ¶ 19. The Third District found the taking claim failed because the homeowners had alleged "the private development as a whole caused the alleged unreasonable amount of surface water to drain onto their land from the detention and drainage basins." *Id*. ¶ 30. As such, "the flooding as alleged in this case was induced by the private developers, not government action" *Id*. ¶ 31.

The Third District also noted that the plaintiffs' complaint failed to allege that the water intrusion on their land "was the intended or foreseeable result, in whole or in part, of the City's actions rather than that of the development." *Id*. ¶ 32. It sustained the dismissal in part because "condemnation cases traditionally arise from government action alone; not from multiple causes that would include actions of private actors, as in this

case where the water was from the whole development flowing into detention basins." *Id*. ¶ 33.

Instead of following the clear implication of this Court's language in *Hampton* or adhering to the reasoning of the Third District, the First District incorrectly determined the Taking claim allegations in the A5AC were sufficient because Plaintiffs "allege much more hands-on involvement and ongoing responsibility from" the LPEs. A 44, ¶85. The First District was also persuaded because Plaintiffs allege the LPEs were aware of the risk of flooding and "were allegedly negligent, including through the use of undersized drains." A 44-45, ¶85.

Contrary to the First District's holding, flooding cannot constitute a taking by a government if other entities (whether private or public) contribute to it. Cf. *St. Bernard Parish Government v. U.S.*, 887 F.3d 1354, 1362 (Fed. Cir. 2018), *cert. denied,* 139 S. Ct. 796 (2019)(holding causation for a taking claim requires proof of what would have occurred absent government action). It is simply not enough that the LPEs are alleged to have been "more hands-on" or "knew of the increased risk of flooding" or even that they were "negligent." A 44-45, ¶85. These factors are irrelevant to the critical question of whether the LPEs' actions were the sole cause of the alleged intrusion. *Sorrells,* 2015 IL App (3d) 140763, ¶ 18. If they were, a Taking claim could survive. If not, the claim fails. Despite the First District's confusion, the A5AC's allegations make clear Plaintiffs do not allege the LPEs' actions were the sole cause, and as such their Taking claims insufficient as a matter of law.

In this case, as in *Sorrells,* Plaintiffs allege that the flooding was induced, at least in part, by private development. Compare A5AC ¶¶ 620-641, 701-713, 718-723, 725-733

with *Sorrells*, 2015 IL App (3d) 140763, ¶ 31. Specifically, Plaintiffs allege that Advocate developed the property over the course of a few decades, changed the natural drainage patterns, and built insufficient detention basins. (A5AC ¶¶ 102-114, 119-126, 132-139.) The Plaintiffs allege that the flooding initiated from those privately held detention basins and then overwhelmed the entire system. (A5AC ¶¶ 620-641.) Further, like in *Sorrells*, the Plaintiffs here asserted that the original PCSS drainage improvements were constructed by a developer. (A5AC ¶62-83.) Clearly, Plaintiffs assert the flooding that they claim took their properties was caused, at least in part, by private actors. As such, their Taking claims cannot survive.

Accordingly, this Court should reverse the First District's holding and order the Plaintiffs' Taking claims be dismissed for failure to state a claim under Section 2-615 of the Illinois Code of Civil Procedure.

B. Plaintiffs' Taking claims Also Fail Because They are Premised on Government Inaction.

As stated previously, this Court adheres to the limited lockstep approach in interpreting similar provisions of the Illinois and U.S. Constitutions. *Hampton*, 2016 IL 119861, ¶ 10 (citing *People v. Caballes*, 221 Ill. 2d 282, 289 (2006)). Under this approach, if a provision of the Illinois Constitution is similar to a provision of the U.S. Constitution, federal authority on the provision prevails unless something in the debates or reports of the state's constitution suggests it was intended to be construed differently. *Id*. In *Hampton*, this Court found that the slight differences in the Illinois Taking Clause did not warrant a departure from federal law with respect to whether a taking has occurred. *Id*. ¶ 13. Federal courts, including the U.S. Supreme Court, have uniformly held

that government inaction cannot support a taking claim under the U.S. Constitution. Under its limited lockstep approach, this Court should hold the same.

Nearly 80 years ago, the Supreme Court found that government inaction to prevent flooding could not constitute a taking. *U.S. v. Sponenbarger*, 308 U.S. 256, 265 (1939). In that case, plaintiffs sought to hold the government liable for anticipated flooding of their property in the alluvial valley of the Mississippi River. *Id*. at 260. In reaction to a major flood along the River in 1927, Congress authorized a major flood control project. *Id*. at 261-62. Ultimately, the Army Engineers decided that to avoid unpredictable general flooding, they would provide predetermined points for floodwater to escape. *Id*. Plaintiff's property was in the area of one of the escape routes. In denying her claim, the Court suggested that the government cannot be held liable for flooding that "would occur had the Government undertaken no work of any kind." *Id*. at 265. To do so would require the Government "to compensate a private property owner for flood damages which it in no way caused." *Id*. Ultimately, the Court remarked "[w]hen undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect." *Id*. Subsequent decisions by other federal courts have reaffirmed this principle.

For example, in *St. Bernard Parish Gov't*, 887 F.3d at 1357-59, the Federal Circuit found that the federal government cannot be held liable for flooding in the New Orleans area following Hurricane Katrina. Importantly, although the federal government had undertaken a number of acts, the plaintiffs' claims were premised on an alleged failure to maintain or modify a flood protection system. *Id*. at 1360. The court there noted

that "both Supreme Court precedent and our own precedent have uniformly based potential takings claims on affirmative government acts." *Id*. at 1361 (collecting cases). Therefore, based on this Court's limited lockstep approach, Plaintiffs' Taking claims can only survive if they are premised on affirmative government action, not inaction. Because they are not, Plaintiffs' Taking claims fail.

In this case, Plaintiffs specifically assert the LPEs are liable for numerous alleged failures to act. For example, Plaintiffs allege the LPEs failed to use proper models, failed to alter or amend plans to address known flooding risks, and failed to take corrective actions to avoid flooding. (A5AC ¶¶ 137-139, 208-215.) Under the Taking claims, the Plaintiffs assert the LPEs are liable for "actions and/or inactions" and more pointedly that their damages were caused as a result of the LPEs' "failing to redesign its PCSS Properties" and "failing to sand bag a barrier" to protect their homes. (A5AC ¶¶ 588. 1092, 1223, 1327.) Like the claim rejected in *Sponenbarger*, the "actions" Plaintiffs allege amount to nothing more than an alleged failing to protect every property from flooding. As the Supreme Court said, the LPEs do not owe compensation to every landowner "which it fails to or cannot protect." *Sponenbarger*, 308 U.S. at 265. Accordingly, Plaintiffs' Taking claims must be dismissed.

C. The Tort Immunity Act Bars Plaintiffs' Taking claims.

The purpose of the Tort Immunity Act is to protect local public entities and public employees from liability arising from the operation of government. 745 ILCS 10/1-101.1. The Tort Immunity Act defines "Injury" as "death, injury to a person, or damage to or loss of property * * * alleged in a civil action, whether based upon the Constitution of the United States or *the Constitution of the State of Illinois*, and the statutes or common law of Illinois or of the United States." (emphasis added) 745 ILCS 10/1-204. This definition

was added to the Tort Immunity Act in 1986 to explicitly include, within the scope of the Tort Immunity Act, injuries arising from violations of the Illinois Constitution, abrogating a series of earlier cases that held that the Tort Immunity Act did not apply to constitutional violations. Public Act 84-1431, Art. 1, § 2(eff. Nov. 25, 1986)(amending 745 ILCS 10/1-204).

Based in part on that language and the intent of the General Assembly it evidences, the Second District has previously held that the Tort Immunity Act bars claims for damages arising from alleged violations of the Illinois Constitution. *Rozsavolgyi v. City of Aurora*, 2016 IL App (2d) 150493, ¶ 112 ("Having determined that plaintiff's claims are constitutionally grounded, we next address whether the City may assert immunity as to plaintiff's claims for damages. We answer that question in the affirmative."), *vacated on other grounds*, 2017 IL 121048. Although the decision was vacated on jurisdictional grounds, the appellate court's reasoning demonstrates that the Tort Immunity Act bars claims for damages arising under the Illinois Constitution that fall within its protections.

In reaching that conclusion, the Second District relied on this Court's decision in *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248 (2004). In *Raintree Homes*, this Court declined to "adopt or approve the appellate court's reasoning that the Tort Immunity Act categorically excludes actions that do not sound in tort[.]" *Raintree Homes*, 209 Ill. 2d at 261. See also *Pleasant Hill Cemetery Ass'n. v. Morefield*, 2013 IL App (4th) 120645, ¶ 23 ("Plaintiffs quote the appellate court's reasoning in [*Raintree Homes*], that 'the Tort Immunity Act * * * applies only to action in tort.' That case,

however, went to the supreme court, and the supreme court was unconvinced by the appellate court's reasoning that the Tort Immunity Act applied only to tort actions.").

Based on the plain language of the Tort Immunity Act, it protects municipalities like the LPEs from claims brought under the Illinois Constitution. So, to the extent they are encompassed by any of the enumerated provisions of the Tort Immunity Act, the LPEs are immune from liability on Plaintiffs' Taking claims under Section 15 of Article I of the Illinois Constitution.

In particular, the Tort Immunity Act immunizes the LPEs for any injuries caused by their discretionary acts, inspection or lack thereof, and any permits they may have issued. Section 2-109 of the Tort Immunity Act immunizes a municipality from liability if its employees would not be liable. 745 ILCS 10/2-109. Section 2-201 immunizes government employees from liability from any injury caused by an act or omission in determining policy when exercising discretion. 745 ILCS 10/2-201. Municipalities and units of government are also immune from liability for any improper or inadequate inspection of any property they do not own. 745 ILCS 10/2-105. Finally, the LPEs are also immune from any injury caused by their issuance of any permit. 745 ILCS 10/2-104. Plaintiffs' complaint is replete with allegations that clearly fall within these protections. *Inter alia*, A5AC ¶¶ 71, 80-82, 88.3, 90, 93, 96, 104.2.2, 106, 124-125, 136-137, (permitting/approval of plans); 162-168, 218, 277, 320, 347, 358 (inspections); 208-212 (discretionary acts).

Because claims brought under the Illinois Constitution are subject to the Tort Immunity Act, and the LPEs cannot be held liable for injuries caused by their

discretionary acts, inspection or lack thereof, and any permits they may have issued, the LPEs are immune from liability on Plaintiffs' Taking claims.

CONCLUSION

For all of the foregoing reasons, the LPEs, Maine Township, City of Park Ridge, and the Metropolitan Water Reclamation District of Greater Chicago pray that this Court reverse the Illinois Appellate Court, First District, Fourth Division's decision that this Court's holding in *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, should be applied retroactively and affirm the decision of the Circuit Court of Cook County, Illinois dismissing Plaintiffs' claims against the LPEs. In addition, LPEs pray that this Court reverse the Illinois Appellate Court's holding that the Amended Fifth Amended Complaint Amending the Complaint Only on Its Face only properly stated a claim for a taking under Section 15 of Article I of the Illinois Constitution.

Dated: October 29, 2019

Respectfully Submitted,

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SUPREME COURT RULE 341(c)
CERTIFICATE OF COMPLIANCE

I, Susan T. Morakalis, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 40 pages.

Dated: October 29, 2019

By: /s/Susan T. Morakalis
Susan T. Morakalis, General Counsel
Attorney for Defendant-Appellant Metropolitan Water Reclamation District of Greater Chicago

CERTIFICATE OF SERVICE

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, and that she is one of the attorneys for Defendant/Appellant Metropolitan Water Reclamation District of Greater Chicago and that, on October 29, 2019, she electronically filed the Joint Brief and Appendix of Defendants-Appellants Maine Township, City of Park Ridge and Metropolitan Water Reclamation District of Greater Chicago with the Clerk of the Illinois Supreme Court and will send copies of said filing to the following attorney(s) of record:

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APPENDIX

TABLE OF CONTENTS TO THE APPENDIX

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APPENDIX

Document 2

Lawyer

2019 IL App (1st) 170859

No. 1-17-0859

Fourth Division
May 30, 2019

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DENNIS TZAKIS, ZENON GIL, CATHY PONCE, ZAIA GILIANA, JULIA CABRALES, and JUAN SOLIS, on Behalf of Themselves and All Other Persons Similarly Situated, a Proposed Class Action, Plaintiffs-Appellants, v. BERGER EXCAVATING CONTRACTORS, INC.; ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a Advocate Lutheran General Hospital; COOK COUNTY; GEWALT HAMILTON ASSOCIATES, INC.; THE VILLAGE OF GLENVIEW; MAINE TOWNSHIP; THE METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO; THE VILLAGE OF NILES; and THE CITY OF PARK RIDGE, Defendants (The Metropolitan Water Reclamation District of Greater Chicago, The City of Park Ridge, and Maine Township, Defendants-Appellees).	Appeal from the Circuit Court of Cook County. Nos. 2009 CH 6159 10 CH 38809 11 CH 29586 13 CH 10423 14 CH 6755 (cons.) The Honorable Sophia H. Hall, Judge Presiding.

JUSTICE GORDON delivered the judgment of the court, with opinion.
Presiding Justice McBride and Justice Reyes concurred in the judgment and opinion.

OPINION

¶ 1 The instant appeal arises from a lawsuit filed by plaintiffs concerning property damage to their homes resulting from storm water flooding. Plaintiffs, who reside in Maine Township,

allege that defendant, Advocate Health and Hospitals Corporation (Advocate), which operates a hospital adjacent to plaintiffs' neighborhood, constructed its hospital in such a way that the hospital's storm water drainage system discharged onto plaintiffs' properties and caused flooding. Plaintiffs further allege that the local public entities, namely, the Village of Glenview (Glenview), Maine Township, the Metropolitan Water Reclamation District of Greater Chicago (District), the Village of Niles (Niles), and the City of Park Ridge (Park Ridge),[1] breached a variety of duties owed to the homeowners with respect to the drainage system. The defendants participating in the instant appeal—Park Ridge, the District, and Maine Township—sought dismissal of the complaint on the basis of the public duty rule, claiming that they did not owe a duty to any individual plaintiff but only to the community at large. In 2015, the trial court dismissed the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615.(West 2014)), finding that the public duty rule applied. However, in 2016, the Illinois Supreme Court abolished the public duty rule in *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, and the trial court granted plaintiffs' motion to reconsider. Six months later, however, the trial court vacated its order and reinstated the dismissal. Plaintiffs now appeal, arguing that the supreme court's decision should be applied retroactively and the public duty rule is not available to defendants, and further arguing that no other basis existed for dismissing their complaint. For the reasons that follow, we affirm in part and reverse in part.

[1]Cook County was also named as a defendant, but plaintiffs voluntarily dismissed the counts aimed at the county without prejudice on April 25, 2013. Glenview was voluntarily dismissed from the case with prejudice on December 12, 2014. Niles is not a party to the instant appeal, but the trial court's dismissal expressly encompassed Niles, as well.

¶ 2 BACKGROUND

¶ 3 We considered the complaint with respect to defendant Advocate in *Tzakis v. Advocate Health & Hospitals Corp.*, 2015 IL App (1st) 142285-U. As it is the same complaint at issue in both appeals—plaintiffs' "amended fifth amended complaint"—we incorporate our prior description of the allegations where applicable in the instant appeal.

¶ 4 Plaintiffs filed their amended fifth amended complaint on January 20, 2012. According to the complaint, Park Ridge, Cook County, Maine Township, and the District, "among other local public entities," in coordination with private partners, developed the Prairie Creek Stormwater System, which was a manmade storm water system of drains, retention basins, and storm water sewers, and the local public entities controlled the development of the system beginning with the original 1960 plat approvals. The Prairie Creek Stormwater System received most of the storm water runoff within the Prairie Creek Watershed, a watershed of over one mile, extending upstream from plaintiffs' homes. Advocate acquired a parcel of real property adjacent to plaintiffs' neighborhood some time prior to 1976, which was also located within the watershed; as one of the parties admitted in oral argument, the property was on a flood plain. In 1976, Advocate submitted a development plan to Park Ridge that proposed modifications to Advocate's drainage system. Park Ridge approved the plans and they were subsequently implemented. In October 1976, the Illinois Department of Transportation issued a report stating that "a large portion of the subdivision set out in [Advocate's development plan]," including plaintiffs' neighborhood, "was and is subject to flood risks."

¶ 5 According to the complaint, in 1987, plaintiffs' neighborhood sustained catastrophic flooding, in response to which Park Ridge, Maine Township, and Glenview, "along with

other entities," hired Harza Engineering Services (Harza) to investigate the flooding. In 1990, Harza issued a report that identified design and maintenance defects in Advocate's drainage system, including the portions adjacent to plaintiffs' properties. The report indicated that these defects impaired the system's drainage capacity to a level "substantially below any reasonably safe standard." Plaintiffs allege that Harza's report placed Park Ridge, Maine Township, and Glenview and "possibly other [defendants]" on actual or constructive knowledge of the flood risk to plaintiffs' homes.

¶ 6 The complaint alleges that sometime after 1987 but before 2002, Advocate hired Gewalt Hamilton Associates, Inc. (Gewalt), an engineering firm, to draft and implement a development plan for the hospital property that included modifications to the drainage system and topography that altered the property's "natural drainage areas." In August 2002, a rainstorm caused storm water to accumulate within the hospital's drainage system. Plaintiffs allege that an "undersized" discharge component caused water to build up and "catastrophically overflow" the drainage system, again flooding plaintiffs' homes.

¶ 7 The complaint alleges that in 2002 or 2003, the Illinois Department of Natural Resources conducted a study in response to the 2002 flooding in conjunction with local municipal authorities, including Park Ridge, Maine Township, and Glenview. The study found "numerous bottlenecks and obstructions to flow as the causes of the invasive flooding." The study also detailed potential remedies, including specific improvements to Advocate's drainage system. After 2002 but before September 13, 2008, Advocate and Gewalt developed plans to modify the hospital property's drainage system, including components identified as problematic in the 2002 study. However, plaintiffs allege that, on information and belief, Advocate's plan did not include modifications to three undersized components of the

drainage system, despite Advocate's knowledge of the flood risk these components posed to plaintiffs. On September 13, 2008, storm water overwhelmed the hospital's drainage system and caused the flooding in plaintiffs' homes and property, leading to the instant lawsuit.[2]

¶ 8 With respect to the District, the complaint alleged that the District was the regional local public entity charged with multijurisdiction operation of storm water management and "owns and/or controls all drains, basins, structures, components and other stormwater improvements" within the Prairie Creek Stormwater System. The complaint further alleged that the District owned and operated the interceptors that received sewage from local sanitary sewers owned and controlled by Glenview and Park Ridge and transported it for treatment to one of the District's wastewater treatment plants. With respect to Park Ridge, the complaint alleged that Park Ridge had the most actual knowledge of Advocate flooding and was in the best position to make changes to Advocate's plans for its drainage system but failed to demand that Advocate make the necessary changes. The complaint further alleged that Park Ridge did not advise the District of the flooding problems and that Park Ridge deployed its police and/or department of public safety to the area during instances of flooding. With respect to Maine Township, the complaint alleged that the Maine Township Highway Department had mobilized and readied trucks for sand delivery to plaintiffs' neighborhood in anticipation of the September 13, 2008, flooding and had provided sandbags "[o]n many prior occasions" when there had been catastrophic flooding. The complaint further alleged that Maine Township was responsible for storm water management within its jurisdiction and supervised all storm water management projects and that, through its exercise of control,

[2]While the lawsuit at issue in the instant appeal is limited to the September 13, 2008, flooding, four other lawsuits were filed after subsequent flooding events; these four lawsuits were consolidated for all purposes with the instant lawsuit, and the trial court's dismissal expressly applied to all of the lawsuits.

Maine Township "owned possessed and/or controlled" the portions of the Prairie Creek Stormwater System within its jurisdiction.

¶ 9 The complaint alleged similar causes of action against all three defendants.[3] Counts XXV (against the District), XLV (against Park Ridge), and LXIV (against Maine Township) were for "negligence: dominant estate overburdening stormwater" and alleged that defendants knew or should have known of the foreseeable harm of invasive flooding into plaintiffs' neighborhood given the history of flooding, and that defendants owed nondelegable duties to properly manage the storm water so as to prevent harm to plaintiffs from excess storm water overburdening the drainage system. Counts XXXI (against the District), LII (against Park Ridge), and LXIX (against Maine Township) were for "negligent nuisance" and alleged that defendants negligently caused an accumulation of water from the drainage system to invade and interfere with plaintiffs' property. Counts XXXII (against the District), LIII (against Park Ridge), and LXX (against Maine Township) were for "negligent trespass" and alleged that, due to defendants' failure to properly manage the storm water systems, water invaded plaintiffs' property. Counts XXXVI (against the District), LVII (against Park Ridge), and LXXIV (against Maine Township) were for "statutory duty to maintain property" and alleged that section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-102(a) (West 2012)) set forth a duty for a local public entity to exercise ordinary care to maintain its property in a reasonably safe condition, which defendants did not do. Counts XXXVII (against the District), LVIII (against Park Ridge), and LXXV (against Maine Township) were for "duty to remedy dangerous plan" and alleged that section 3-103 of the Tort Immunity Act (745 ILCS 10/3-103 (West

[3]The complaint also contained a number of additional counts against defendants, but plaintiffs voluntarily dismissed several of them and, in response to defendants' motions to dismiss, indicated that they would be "proceeding only upon" the counts we discuss herein.

2012)) set forth a duty for a local public entity to correct known unsafe conditions related to the design and/or engineering of an approved plan, which defendants did not do. Counts XXXIX (against the District), LX (against Park Ridge), and LXXVI (against Maine Township) were for "taking real and personal property" and were based on article I, section 15, of the Illinois Constitution (Ill. Const. 1970, art. I, § 15), which prohibited the taking of private property for public use without the payment of just compensation.

¶ 10 On August 15, 2014, Park Ridge, the District, and Maine Township each filed motions to dismiss plaintiffs' amended fifth amended complaint.[4] Each of the motions to dismiss claimed that the complaint should be dismissed under section 2-615 of the Code because plaintiffs' claims were barred under the public duty rule and plaintiffs had failed to allege the existence of any duties owed to them. Each of the motions to dismiss further claimed that the complaint should be dismissed under section 2-619 of the Code because defendants were immune from liability pursuant to several sections of the Tort Immunity Act.

¶ 11 On April 3, 2015, the trial court granted defendants' motion to dismiss pursuant to section 2-615 based on the public duty rule. The court found that the public duty rule applied to all of defendants' alleged conduct, and that no special duty exception applied. Accordingly, the court found that plaintiffs had not alleged sufficient facts to infer the existence of an actionable duty on the part of defendants and granted the motions to dismiss.

¶ 12 On May 4, 2015, defendants filed a motion for a finding that there was no just reason to delay enforcement or appeal from the trial court's April 3, 2015, order. In response, plaintiffs

[4]The District and Maine Township each filed a combined motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)), while Park Ridge filed two separate motions to dismiss, one based on section 2-615 (735 ILCS 5/2-615 (West 2012)) and one based on section 2-619 (735 ILCS 5/2-619 (West 2012)).

claimed that the trial court's order did not encompass its counts concerning the takings clause, and the parties engaged in briefing and oral argument on the issue.

¶ 13 On January 22, 2016, the Illinois Supreme Court issued a decision in *Coleman*, 2016 IL 117952, in which it abolished the public duty rule. On February 8, 2016, plaintiffs filed a motion for reconsideration of the dismissal of the complaint based on *Coleman*. Plaintiffs claimed that, as an interlocutory order, the trial court was permitted to review, modify, or vacate such an order at any time. In response, defendants argued that the new law established in *Coleman* should not be applied retroactively.

¶ 14 On August 18, 2016, the trial court granted plaintiffs' motion for reconsideration and vacated its April 3, 2015, order. Defendants filed a motion requesting that the trial court certify the issue for interlocutory appeal. On February 1, 2017, in its order on that motion, the trial court "on its own motion, reconsider[ed] its order of August 18, 2016." The court noted that, in their briefing on the issue of certification, defendants included arguments that had not been presented in the briefing on plaintiffs' motion to reconsider and found that "[t]hose additional arguments have persuaded this Court to vacate paragraph 1 of the August 18, 2016 order and reinstate its decision of April 3, 2015 dismissing [defendants]." The court found that the new law set forth in *Coleman* should not be retroactively applied to the instant case. The court noted that defendants had been raising the public duty rule since their initial motion to dismiss in 2010 and continued to raise the issue in subsequent motions to dismiss and found that retroactive application of the law would involve substantially more litigation preparation than could have been predicted. The court found that "[t]his is a hardship on the [defendants] and their taxpayers considering the unpredictable and unexpected reversal of longstanding law, the complexity of the case, and the passage of time."

¶ 15 On February 14, 2017, defendants filed a motion for a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that there was no just reason for delaying enforcement or appeal of the February 1, 2017, order reinstating the dismissal of plaintiffs' complaint with respect to defendants; this motion was granted on March 10, 2017. Plaintiffs filed a notice of appeal on April 4, 2017, and this appeal follows.

¶ 16 ANALYSIS

¶ 17 On appeal, plaintiffs claim that the trial court erred in finding that *Coleman* should not apply retroactively to their claims. Additionally, plaintiffs claim that, in the absence of the public duty rule, there was no alternate basis for dismissing their complaint.

¶ 18 I. Standard of Review

¶ 19 The trial court's dismissal of plaintiffs' complaint was based on section 2-615 of the Code. A motion to dismiss under section 2-615 of the Code challenges the legal sufficiency of the complaint by alleging defects on its face. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004); *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003). The critical inquiry is whether the allegations in the complaint are sufficient to state a cause of action upon which relief may be granted. *Wakulich*, 203 Ill. 2d at 228. A cause of action will not be dismissed on the pleadings unless it clearly appears that the plaintiff cannot prove any set of facts that will entitle it to relief. *Board of Directors of Bloomfield Club Recreation Ass'n v. The Hoffman Group, Inc.*, 186 Ill. 2d 419, 424 (1999). In making this determination, all well-pleaded facts in the complaint and all reasonable inferences that may be drawn from those facts are taken as true. *Young*, 213 Ill. 2d at 441. In addition, we construe the allegations in the complaint in the light most favorable to the plaintiff. *Young*, 213 Ill. 2d at 441. We review *de novo* an order granting a section 2-615 motion to dismiss. *Young*, 213 Ill. 2d at 440; *Wakulich*, 203

Ill. 2d at 228. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). Additionally, even if the trial court dismissed on an improper ground, a reviewing court may affirm the dismissal if the record supports a proper ground for dismissal. See *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004) (we can affirm "on any basis present in the record"); *In re Marriage of Gary*, 384 Ill. App. 3d 979, 987 (2008) ("we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper ground").

¶ 20 Additionally, each defendant also filed a motion to dismiss the amended fifth amended complaint pursuant to section 2-619 of the Code. A motion to dismiss under section 2-619 admits the legal sufficiency of all well-pleaded facts but allows for the dismissal of claims barred by an affirmative matter defeating those claims or avoiding their legal effect. *Janda v. United States Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 83 (citing *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006)). When reviewing a motion to dismiss under section 2-619, "a court must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiffs' favor." *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). Additionally, a cause of action should not be dismissed under section 2-619 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 277-78 (2003). For a section 2-619 dismissal, our standard of review is *de novo*. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006); *Morr-Fitz, Inc.*, 231 Ill. 2d at 488. As noted, *de novo* consideration means we perform the same analysis that a trial judge would perform. *Khan*, 408 Ill. App. 3d at 578.

¶ 21 II. Public Duty Rule

¶ 22 In the case at bar, as noted, the trial court's dismissal was based on its finding that defendants owed no duties to plaintiffs due to the public duty rule. Accordingly, it is helpful to begin with an overview of the public duty rule and the impact of the supreme court's 2016 decision in *Coleman*. The common law public duty rule provides that local governmental entities do not owe any duty to individual members of the general public to provide adequate governmental services, such as police and fire protection. *Coleman*, 2016 IL 117952, ¶ 37. "The long-standing public duty rule is grounded in the principle that the duty of the governmental entity to preserve the well-being of the community is owed to the public at large rather than to specific members of the community." (Internal quotation marks omitted.) *Coleman*, 2016 IL 117952, ¶ 38. An exception to this rule is the "special duty exception," where the local governmental entity owes a special duty of care to a particular individual that is different from the duty it owes to the general public. *Coleman*, 2016 IL 117952, ¶ 41.

¶ 23 In its analysis, the *Coleman* court traced the origins of the public duty rule to either an 1855 United States Supreme Court case or to an 1880 treatise on tort law. *Coleman*, 2016 IL 117952, ¶¶ 39, 40. The court further noted that the doctrine "was widely accepted in most jurisdictions." *Coleman*, 2016 IL 117952, ¶ 41. The *Coleman* court noted that the Illinois Supreme Court first acknowledged the public duty rule and its special duty exception in 1968. *Coleman*, 2016 IL 117952, ¶ 42. The court further noted that the public duty rule "existed '[i]ndependent[ly] of statutory or common-law concepts of sovereign immunity.' " *Coleman*, 2016 IL 117952, ¶ 44 (quoting *Huey v. Town of Cicero*, 41 Ill. 2d 361, 363 (1968)). The court, thus, noted that "[w]e have consistently held that the public duty rule survived the abolition of sovereign immunity and passage of the Tort Immunity Act."

Coleman, 2016 IL 117952, ¶ 52. Nevertheless, the *Coleman* court held that "the time has come to abandon the public duty rule and its special duty exception."[5] *Coleman*, 2016 IL 117952, ¶ 52. Accordingly, the court held that "in cases where the legislature has not provided immunity for certain governmental activities, traditional tort principles apply." *Coleman*, 2016 IL 117952, ¶ 61.

¶ 24 As an initial matter, in the case at bar, plaintiffs present shifting arguments concerning the applicability of the public duty rule to the creation and operation of municipal sewer and drainage systems. We note that most of these arguments are raised for the first time in plaintiffs' reply brief and, in some cases, at oral argument. It is well settled that points not argued in the appellant's brief are forfeited. *Lebron v. Gottlieb Memorial Hospital,* 237 Ill. 2d 217, 253 (2010); Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued [in the appellant's brief] are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Accordingly, any arguments not raised in plaintiffs' initial brief are not properly before this court. Nevertheless, we will briefly address some of those arguments below.

¶ 25 In their briefs, plaintiffs argue that the public duty rule is inapplicable because it is preempted by the Tort Immunity Act. However, our supreme court has repeatedly maintained that the public duty rule and the Tort Immunity Act may properly coexist. See, *e.g.*, *Coleman*, 2016 IL 117952, ¶ 52; *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 45 (1998); *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 346 (1998); *Huey*, 41 Ill.

[5]While we refer to the "*Coleman* court," the decision in *Coleman* was a split one, with no majority opinion. Four justices concurred in the judgment, agreeing to abolish the public duty rule. However, the lead opinion was joined by the author and another justice, with two other justices joining in a special concurrence. Three justices dissented, believing that the public duty rule should not be abolished. For purposes of this appeal, however, the only relevant fact is that the public duty rule has been abolished.

2d at 363. Additionally, in their reply brief, plaintiffs argue that the public duty rule has "never been applied to [a local public entity] which actually owned the sewer or drain." (Emphases omitted.)[6] Even assuming *arguendo* that plaintiffs are correct, plaintiffs fail to explain the relevance of defendants' ownership of the pipes. We note that our supreme court has found that the distinction between a governmental unit's governmental and proprietary functions was abandoned upon the abolishment of sovereign immunity. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 192 (1997). Accordingly, we cannot find that the ownership of the pipes would have any impact on the applicability of the public duty rule.[7] Plaintiffs then argue that operation of storm water sewer systems is not considered " 'flood prevention' or 'flood relief' services." Again, even assuming *arguendo* that plaintiffs are correct, it is irrelevant to the question of whether the public duty rule applies, as the rule is not limited to flood prevention or flood relief services. See, *e.g.*, *Harinek*, 181 Ill. 2d at 345 ("the public duty rule *** prevents [governmental] units from being held liable for their failure to provide adequate governmental services").

¶ 26 In their reply brief, plaintiffs next claim that the 1897 supreme court case of *City of Chicago v. Seben*, 165 Ill. 371 (1897), provides that "a [local public entity] acts ministerial without immunity when constructing, maintaining and operating sewers in executing its plan." However, whether a governmental entity's action is discretionary or ministerial is an issue with respect to application of the Tort Immunity Act, as plaintiffs themselves implicitly

[6] In their opening brief, plaintiffs also argue that the supreme court has never applied the public duty rule to "trespassory water invasion" as part of their argument for retroactive application of *Coleman*. We discuss that argument later in our analysis on the retroactivity issue.

[7] We note that our supreme court has suggested that an exception to the public duty rule may apply where the government is acting in a private, as opposed to a governmental, capacity. *Burdine v. Village of Glendale Heights*, 139 Ill. 2d 501, 508 (1990), *overruled in part on other grounds*, *McCuen v. Peoria Park District*, 163 Ill. 2d 125 (1994). However, plaintiffs do not claim that defendants in the case at bar were acting in a private capacity.

recognize through their reference to "immunity." Our supreme court has made clear that "[t]he existence of a duty and the existence of an immunity *** are separate issues." *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 490 (2001); see also *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 370 (2003); *Harinek*, 181 Ill. 2d at 346; *Zimmerman*, 183 Ill. 2d at 46. The court first determines whether a duty exists, then addresses whether the governmental entity is immune from liability for a breach of that duty. *Village of Bloomingdale*, 196 Ill. 2d at 490; *Harinek*, 181 Ill. 2d at 346 ("the question of whether the City owed plaintiff a duty under the special duty doctrine has no bearing on the separate question of whether the [Tort Immunity] Act immunizes the City from liability for plaintiff's injuries"); *Zimmerman*, 183 Ill. 2d at 46 ("The distinction between an immunity and a duty is crucial, because only if a duty is found is the issue of whether an immunity or defense is available to the governmental entity considered ***."). Thus, whether an action is discretionary or ministerial has no impact on whether a duty exists in the first instance.

¶ 27 Moreover, plaintiffs' reliance on *Seben* shifted during oral argument. There, plaintiffs' counsel stated that "the public duty rule has been rejected by the supreme court explicitly in *Seben* in 1898 [*sic*] when they rejected the Michigan rule." As noted, points not argued in the appellant's brief are forfeited. *Lebron,* 237 Ill. 2d at 253; Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued [in the appellant's brief] are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Consequently, the argument plaintiffs raised for the first time at oral argument is not properly before this court. Furthermore, plaintiffs' counsel vastly overstated the *Seben* court's findings. In that case, the supreme court affirmed the trial court's refusal to give jury instructions providing that the City of Chicago could not be held liable for an injury caused by the plaintiff's stepping into a

sewer inlet where the sewer was constructed as part of a plan that was devised through no error in judgment. *Seben*, 165 Ill. at 383. The court found that the proposed jury instructions focused on only the initial construction of the sewer, and not on whether it was properly maintained. *Seben*, 165 Ill. at 383. In its discussion, the supreme court rejected the city's reliance on the "Michigan doctrine," which provided that where an injury was caused by the implementation of a plan that would render the work dangerous when completed, the fault lay with the legislature and that a "suit grounded upon it is grounded upon a wrong attributable to the legislative body itself." *Seben*, 165 Ill. at 380. The court further noted that Michigan had adopted the public duty rule—although it did not use that term—and did not draw a distinction between the liability of cities and the liability of towns and counties. *Seben*, 165 Ill. at 380.

¶ 28 The *Seben* court's discussion of these latter two points highlights the flaws with plaintiffs' characterization of the case at oral argument. As noted, *Seben* was decided in 1897, and the law in Illinois at that time was significantly different than it is today. As the *Coleman* court explained, the public duty rule originated in either 1855 or 1880, and our supreme court first expressly recognized the rule in 1968. *Coleman*, 2016 IL 117952, ¶¶ 39-40, 42. Thus, at the time that the *Seben* court issued its decision, the public duty rule itself was comparatively recent law, and the supreme court had never discussed it, much less "rejected" it "explicitly," as plaintiffs' counsel suggested at oral argument. Additionally, at that time, Illinois still retained local governmental tort immunity, which remained the state of the law until it was abolished in 1959. See *Coleman*, 2016 IL 117952, ¶¶ 30-33 (discussing the history of local governmental tort immunity). Thus, the liability of a local governmental entity established by the State differed from the liability of a municipality. *Coleman*, 2016 IL

117952, ¶¶ 33.[8] In its analysis, the *Seben* court appropriately made note of these differences from Michigan law, which recognized the public duty rule and did not maintain local governmental tort immunity, in determining that the appellant's arguments advocating for the "Michigan doctrine" were not persuasive. *Seben*, 165 Ill. at 380. This in no way suggests, however, that the *Seben* court was considering the issue of the public duty rule—or local governmental tort immunity, for that matter—and "reject[ing]" it. Furthermore, even if the case could be interpreted in that way, any "reject[ion]" of the public duty rule would have only lasted until 1968, when the supreme court expressly recognized the rule in *Huey v. Town of Cicero*, 41 Ill. 2d 361, 363 (1968).

¶ 29 Finally, plaintiffs' counsel at oral argument also claimed that the public duty rule has never been applied to a "public improvement." Again, as this argument was first raised at oral argument, it is not properly before this court. Moreover, as we noted with respect to plaintiffs' earlier arguments, plaintiffs' focus on whether a particular category of governmental service has or has not been considered with respect to the application of the public duty rule is not dispositive of the issue. Our supreme court has made clear that "[t]he public duty rule is a long-standing precept which establishes that a governmental entity and its employees owe no duty of care to individual members of the general public to provide governmental services, such as police and fire protection." *Zimmerman*, 183 Ill. 2d at 32. Courts have applied this rule to a variety of "governmental services." See *DeSmet v. County of Rock Island*, 219 Ill. 2d 497, 508 (2006) (noting that the rule has been applied "in various contexts" (citing *Sims-Hearn v. Office of the Medical Examiner*, 359 Ill. App. 3d 439, 443-46

[8] The *Coleman* court suggested that the existence of local governmental tort immunity explained the lack of earlier cases discussing the public duty rule—while the immunity existed, the public duty rule "remained in abeyance," since the immunity stood as an absolute bar to the enforcement of any civil liability arising from a breach of any duty. *Coleman*, 2016 IL 117952, ¶ 42.

(2005), and *Alexander v. Consumers Illinois Water Co.*, 358 Ill. App. 3d 774 (2005))). For instance, the public duty rule has been applied to bar liability for "a general duty to the public to prevent *** sewer back-ups" (*Alexander*, 358 Ill. App. 3d at 779), for performance of autopsies (*Sims-Hearn*, 359 Ill. App. 3d at 445), for administration of a 911 emergency telephone system (*Donovan v. Village of Ohio*, 397 Ill. App. 3d 844, 850 (2010)), for failure to administer a vaccine (*Taylor v. Bi-County Health Department*, 2011 IL App (5th) 090475, ¶ 36), and for failure to properly inspect a porch that subsequently collapsed (*Ware v. City of Chicago*, 375 Ill. App. 3d 574, 581 (2007)). Thus, it is apparent that the public duty rule has been found applicable to a wide variety of governmental services.

¶ 30 Nevertheless, based on our research, plaintiffs' counsel appears to be correct in the claim that the public duty rule has not been considered in the context of a public improvement. The closest analogue would be in *Alexander*, where the court applied the public duty rule in the context of the village's duty to prevent sewer back-ups. *Alexander*, 358 Ill. App. 3d at 779. We also note that the Seventh Circuit, applying Illinois law, has observed in *dicta* that there is no duty to provide uninterrupted water service for firefighting purposes. *Remet Corp. v. City of Chicago*, 509 F.3d 816, 820 (7th Cir. 2007). Thus, there are arguments to be made concerning whether the public duty rule is appropriate in considering the governmental entity's duty with respect to such improvements, given the lack of case law on the issue, and the issue could have been further developed by both parties had plaintiffs properly raised it on appeal. However, we have no need to reach an answer to the question of the applicability of the public duty rule because our conclusion on the issue of retroactivity is dispositive. We turn, then, to consideration of that question.

¶ 31 We note that this appears to be a case of first impression, as we have discovered no case law expressly considering the retroactive applicability of *Coleman*. There is one case, involving storm water runoff and flooding, in which the public duty rule has been raised post-*Coleman*. See *Salvi v. Village of Lake Zurich*, 2016 IL App (2d) 150249. However, after noting that the defendant village had invoked the public duty rule, the court in that case simply noted that "our supreme court has recently abolished the public duty rule" and proceeded to consider the defendant's arguments under the Tort Immunity Act without any discussion of whether the new law should apply retroactively. *Salvi*, 2016 IL App (2d) 150249, ¶ 37. Thus, from our research, we are the first court to consider whether *Coleman* should apply retroactively.

¶ 32 Generally, when a court issues an opinion, its decision is presumed to apply both retroactively and prospectively. *Tosado v. Miller*, 188 Ill. 2d 186, 196 (1999). However, our supreme court has set forth two ways for that presumption to be overcome. *Aleckson v. Village of Round Lake Park*, 176 Ill. 2d 82, 86 (1997). First, the presumption is overcome when a court expressly states that its decision will be applied prospectively only. *Tosado*, 188 Ill. 2d at 196-97. Second, "a later court may, under certain circumstances, override the presumption by declining to give the previous opinion retroactive effect, at least with respect to the parties appearing before the later court." *Aleckson*, 176 Ill. 2d at 86. This authority is not limited to the supreme court; an appellate court has the authority to determine whether a previous decision should be applied prospectively with respect to a case before it. *Aleckson*, 176 Ill. 2d at 91; see also *Aleckson*, 176 Ill. 2d at 89 (noting that the supreme court had previously implicitly recognized this authority when it cited an appellate court's prospective application of Illinois Supreme Court and United States Supreme Court case law).

¶ 33 Our supreme court has identified three factors in determining the question of prospective application:

> "(1) whether the decision to be applied nonretroactively established a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether, given the purpose and history of the new rule, its operation will be retarded or promoted by prospective application; and (3) whether substantial inequitable results would be produced if the former decision is applied retroactively." *Tosado*, 188 Ill. 2d at 197 (citing *Aleckson*, 176 Ill. 2d at 92-94).

¶ 34 In the case at bar, the *Coleman* court did not expressly address whether its decision would be prospective only. Plaintiffs claim that, because the *Coleman* dissent made reference to a case in which the court considered the retroactive application of a statutory amendment, the fact that the *Coleman* court did not specifically address the prospective application of the new law "buttresses the conclusion that the *Coleman* Court intentionally chose not to give prospective only effect." We find this argument unpersuasive. First, the case was one of nine cases cited in a string cite to support the dissenting justice's argument that the supreme court routinely engaged in an " 'even if' approach to decisionmaking" by deciding dispositive issues first in the interests of judicial expediency. *Coleman*, 2016 IL 117952, ¶ 85 (Thomas, J., dissenting, joined by Garman, C.J., and Karmeier, J.). Additionally, the case cited by the dissent concerned the retroactive effect of a statute, not a court decision, which is subject to an entirely different analysis. See, *e.g.*, *People v. Hunter*, 2017 IL 121306 (discussing standards to be applied in determining retroactive effect of statutory amendment). Thus, we cannot find that the mere use of the words "prospectively" and "retroactively" in a

parenthetical in this string cite in any way indicates that "certainly bells went off in the minds of the seven justices as to whether prospective only application of *Coleman* should be given." The court was silent on the issue. All that this silence indicates is that the presumption of retroactivity has not been overcome by an express statement by the court.

¶ 35 Thus, we must consider whether the factors set forth in *Aleckson* lead us to give the law announced in *Coleman* retroactive effect. As noted, the first factor is whether the decision established a new principle of law, either by overruling clear past precedent on which litigants have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. *Aleckson*, 176 Ill. 2d at 92. We agree with defendants that *Coleman* clearly established a new principle of law. The court was explicit in the fact that it was doing so and was overruling past precedent; the lead opinion contains a discussion of *stare decisis* and the dissent also focuses its analysis on that issue. See *Coleman*, 2016 IL 117952, ¶¶ 53-54 (lead opinion); *Coleman*, 2016 IL 117952, ¶¶ 84-96 (Thomas, J., dissenting, joined by Garman, C.J., and Karmeier, J.). Most clearly, all three opinions in that case refer to the outcome as "abandon[ing]" or "abolish[ing]" the public duty rule. See *Coleman*, 2016 IL 117952, ¶ 52 (lead opinion) ("the time has come to abandon the public duty rule and its special duty exception"); *Coleman*, 2016 IL 117952, ¶ 54 ("We believe that departing from *stare decisis* and abandoning the public duty rule and its special duty exception is justified for three reasons ***."); *Coleman*, 2016 IL 117952, ¶ 61 ("we hereby abolish the public duty rule and its special duty exception"); *Coleman*, 2016 IL 117952, ¶ 64 ("We abolish the public duty rule and its special duty exception."); *Coleman*, 2016 IL 117952, ¶ 67 (Freeman, J., specially concurring, joined by Theis, J.) ("the time has come for this court to abandon the public duty rule and its special duty exception"); *Coleman*, 2016 IL 117952, ¶ 77 ("I agree

that the public duty rule and its special duty exception must be abolished"); *Coleman*, 2016 IL 117952, ¶ 80 (Thomas, J., dissenting, joined by Garman, C.J., and Karmeier, J.) ("Today the court abandons these well-settled principles and abolishes the public duty rule."); *Coleman*, 2016 IL 117952, ¶ 96 ("I find no compelling legal rationale to overrule this precedent and abolish the public duty rule.") There is no way to read *Coleman* without concluding that the supreme court was making new law by overturning longstanding precedent.

¶ 36 Plaintiffs argue that *Coleman* did not announce a new rule because the supreme court had never previously applied the public duty rule to water-damage litigation and because the supreme court in *Coleman* described the jurisprudence concerning the rule to be "muddled and inconsistent," meaning that the past precedent was not "clear." We do not find these arguments persuasive. First, the question we must answer is not whether *Coleman* established a new principle of law in the specific context of water-damage litigation; the question is whether *Coleman* established a new principle of law, period. As noted, the *Coleman* court clearly and expressly overruled what it termed "a long-standing common-law rule" (*Coleman*, 2016 IL 117952, ¶ 42 (lead opinion)). Additionally, the fact that the supreme court has not spoken on a particular issue does not mean that litigants are acting in a vacuum; appellate court and trial court decisions can provide guidance as to the current state of the law even in the absence of a supreme court ruling on a particular factual scenario. For instance, in the case at bar, several appellate court cases, both reported and unreported,[9] supported defendants' claim that the public duty rule would apply to water-damage litigation.

[9]While, of course, unreported decisions cannot be cited by the parties and have no precedential value, even unreported cases are publicly available and their existence can guide attorneys seeking to draft the best arguments to advance their clients' positions and permits them to view analysis found persuasive by other courts.

See, *e.g.*, *Town of Cicero v. Metropolitan Water Reclamation District of Greater Chicago*, 2012 IL App (1st) 112164, ¶ 41 n.4 (suggesting without deciding that the public duty rule would appear to bar claims concerning adequacy of storm management against the District); *Alexander*, 358 Ill. App. 3d at 779 (finding that the public duty rule would bar village's liability for sewage system back-ups); *Remet Corp.*, 509 F.3d at 820 (in *dicta*, observing that the public duty rule meant that the city had no duty to provide uninterrupted water service for firefighting purposes). Additionally, in support of its motion to dismiss, the District attached six trial court decisions in storm management and sewer-backup cases in which it had been a defendant, all of which dismissed the plaintiffs' claims against the District due to the public duty rule. Thus, it was eminently reasonable for defendants to rely on the public duty rule in challenging plaintiffs' claims against them, and there is no basis for claiming that *Coleman* did not represent a change in law by "overruling clear past precedent on which litigants have relied." *Aleckson*, 176 Ill. 2d at 92.

¶ 37 We are also unpersuaded by plaintiffs' argument that past precedent was not "clear" because the primary opinion in *Coleman* referred to the jurisprudence concerning the public duty rule as "muddled and inconsistent." First, we note that the opinion in which this language appears was joined by only one justice in addition to the author, meaning that it does not carry the weight of a majority—or even a plurality—opinion. Additionally, the reason the opinion characterized the jurisprudence in that way was based on the interaction between the public duty rule and statutory immunities. See *Coleman*, 2016 IL 117952, ¶¶ 55-57. The opinion did not indicate that the *existence* of the public duty rule itself was not

"clear." Accordingly, we find that, under the first factor, the *Coleman* court established a new principle of law by overruling clear past precedent on which litigants have relied.[10]

¶ 38 The second factor we must consider is "whether, given the purpose and history of the new rule, its operation will be retarded or promoted by prospective application." *Tosado*, 188 Ill. 2d at 197. As noted, the ultimate holding of *Coleman*—the abolition of the public duty rule—was the result of two opinions, each of which was joined by two justices. Thus, it is difficult to glean any overarching "purpose and history of the new rule" (*Tosado*, 188 Ill. 2d at 197). The primary opinion provided three reasons for abolishing the public duty rule:

> "(1) the jurisprudence has been muddled and inconsistent in the recognition and application of the public duty rule and its special duty exception; (2) application of the public duty rule is incompatible with the legislature's grant of limited immunity in cases of willful and wanton misconduct; and (3) determination of public policy is primarily a legislative function and the legislature's enactment of statutory immunities has rendered the public duty rule obsolete." *Coleman*, 2016 IL 117952, ¶ 54.

By contrast, the specially concurring opinion reasoned that the public duty rule should be abolished because it was predicated on the same basis as the concepts underlying local governmental immunity and, when the constitution was amended to abolish all forms of

[10]Plaintiffs also argue that *Coleman* did not establish new law because the Tort Immunity Act "foreshadowed the abolition" of the public duty rule. Leaving aside the fact that *Coleman* court expressly recognized that "[w]e have consistently held that the public duty rule survived the abolition of sovereign immunity and passage of the Tort Immunity Act" (*Coleman*, 2016 IL 117952, ¶ 52), we have no need to address this argument. The first factor asks whether the new decision established a new principle of law "*either* by overruling clear past precedent on which litigants have relied *or* by deciding an issue of first impression whose resolution was not clearly foreshadowed." (Emphases added.) *Aleckson*, 176 Ill. 2d at 92. As noted, we have determined that the first applies—the court overruled clear past precedent on which litigants had relied—and so we have no need to discuss the second, other than to observe that it would appear almost impossible for something to be "an issue of first impression" when it is expressly overruling long-standing law.

nonstatutory governmental immunity, "the judiciary's power to apply the public duty doctrine ceased to exist as a means of assessing municipal tort liability." *Coleman*, 2016 IL 117952, ¶ 68 (Freeman, J., specially concurring, joined by Theis, J.).

¶ 39 In the case at bar, defendants argue that, under the facts of the instant case, a prospective application of the new law set forth in *Coleman* would not frustrate the concerns set forth by the *Coleman* court. First, they note that the litigation history of this case renders it unique—the flooding occurred in 2008, and defendants first asserted the application of the public duty rule in 2010 and continued asserting it through the filing of a number of amended complaints, culminating in the amended fifth amended complaint. They finally obtained a dismissal on that basis on April 3, 2015, five years after they first asserted the applicability of the public duty rule. Had they obtained a dismissal when they first sought it in 2010, the judgment would have been final and appealable well prior to the supreme court's January 22, 2016, decision in *Coleman* and we would not be considering the applicability of the public duty rule today.[11]

¶ 40 Our supreme court in *Aleckson* found that where the court below "noted that it was applying [the new law] prospectively to the parties because the facts of the instant case and its timing *vis a vis* [the case establishing the new law] are so unique" that "the nonretroactive application was expressly limited to the facts of the case and could not have 'retarded' the future operation of" the new case. (Internal quotation marks omitted.) *Aleckson*, 176 Ill. 2d at 93. Similarly, in the case at bar, the facts of the instant case and its timing *vis-à-vis Coleman* is unique; it is only through an accident of timing that *Coleman* was decided while this case

[11]However, we note that a decision normally has retroactive application to any causes pending at the time the decision is announced, including cases on appeal in the appellate court. *Heastie v. Roberts*, 226 Ill. 2d 515, 535 (2007). Thus, if the case had been pending on appeal, plaintiffs could have conceivably raised the retroactivity issue at that point.

was still active before the trial court. This would weigh in favor of a nonretroactive application of *Coleman*.

¶ 41 Defendants further argue that a nonretroactive application of *Coleman* in the instant case would also have limited impact due to the statute of limitations. Under the Tort Immunity Act, any civil action against a local governmental entity must be commenced within one year from the date that the cause of action accrued.[12] 745 ILCS 10/8-101(a) (West 2016). Thus, any claim against a local governmental entity that is filed subsequent to our opinion must have accrued no earlier than May 2018. By May 2018, *Coleman* and its abolition of the public duty rule was settled law. A finding that the new law does not apply to the instant action would have no impact on such a lawsuit, which would be filed well after the date the law had changed. Thus, the only impact a nonretroactive finding could have would be upon cases that are currently pending before the trial or appellate courts, which would be a small subset of cases at most, if any.

¶ 42 However, we must also note the existence of *Salvi*, in which the Second District applied the new law set forth in *Coleman* retroactively. *Salvi*, 2016 IL App (2d) 150249, ¶ 37. There, the flooding at issue occurred in 2013 (*Salvi*, 2016 IL App (2d) 150249, ¶ 13), the plaintiff's amended complaint was filed in 2014 (*Salvi*, 2016 IL App (2d) 150249, ¶ 3), and the defendant village raised the issue of the public duty rule in a motion to dismiss (*Salvi*, 2016 IL App (2d) 150249, ¶ 20). Thus, as in the case at bar, the flooding, the lawsuit, and the motion to dismiss based on the public duty rule all predated *Coleman*.[13] Despite these facts,

[12]The exception is for actions for damages based on injury or death arising out of patient care, which have a two-year statute of limitations. 745 ILCS 10/8-101(b) (West 2016).

[13]Although the opinion does not indicate the date of the defendant village's motion to dismiss, we know that the motion was also filed prior to the 2016 *Coleman* decision because the appeal in *Salvi* was filed in 2015, as evidenced by the appeal number. Thus, *Coleman* would have been decided while the *Salvi* appeal was pending.

the *Salvi* court applied the new law retroactively. *Salvi*, 2016 IL App (2d) 150249, ¶ 37. As noted, the *Salvi* court did not engage in a discussion of whether the law should be applied retroactively or prospectively; thus, we have no way of knowing what arguments were raised before it by the defendant village. Nevertheless, the fact remains that the *Salvi* court did expressly apply *Coleman* to the case before it. *Salvi*, 2016 IL App (2d) 150249, ¶ 37 ("[O]ur supreme court has recently abolished the public duty rule. [Citation.] Thus, we will proceed to the Tort Immunity Act.").

¶ 43 The existence of *Salvi* is relevant to the instant discussion because a prospective application of *Coleman* to the instant case would mean that two cases with similar facts would be applying two different versions of the law. We are not obligated to follow the *Salvi* court's decision if we disagree with it. See *Deutsche Bank National Trust Co. v. Iordanov*, 2016 IL App (1st) 152656, ¶ 44. However, in considering the second factor of the retroactivity analysis, reaching a decision that would lead to conflicting case law would appear to feed into the "muddled and inconsistent" jurisprudence surrounding the public duty rule that was of concern to several justices in deciding *Coleman*. See *Coleman*, 2016 IL 117952, ¶ 54. Thus, while it would not hinder the operation of the new law, a prospective application of *Coleman* in the instant case would certainly not promote the operation of the new law and could even lead to an increase in the uncertainty surrounding the application of the rule.

¶ 44 The final factor to be considered is "whether substantial inequitable results would be produced if the former decision is applied retroactively." *Aleckson*, 176 Ill. 2d at 93. In the case at bar, the trial court found that "[t]he retroactive application of the *Coleman* decision dramatically changes the considerations concerning the possible course of litigation of the

instant case in the future." On appeal, defendants focus on similar considerations in arguing that the equities favor a prospective application of the new law. Defendants claim that they have "endured nine years of litigation and risk exposure, waiting patiently for their time to be heard on the Public Duty Rule, and now must contend with the Supreme Court's abolishment of the Public Duty Rule altogether," which they argue is "not fair." Defendants further claim that if *Coleman* applies retroactively, they will be forced to reevaluate defense and indemnity exposure and will endure significant litigation costs and time commitments that they otherwise would not have needed to endure. Certainly, if *Coleman* is applied to their case, defendants will undergo significant hardship. Any additional litigation necessarily involves additional time and expense. This additional expense is especially fraught when dealing with a governmental entity, as it is taxpayers, not a private party, who are responsible for the expenses. As the trial court noted:

> "The consequence to the [defendants] of the abolition of the Public Duty Rule as a defense is financial. Every public entity has a responsibility to its taxpayers to estimate budgets and to tax its citizens reasonably. Predicting legal expenses is difficult because the entity does not know whether litigation will be filed. Once filed, the entity then must budget for the potential expenses of the litigation based on a prediction of the legal and factual issues which might be involved. Legal issues, to be determined based on facts alleged in pleadings taken as true, such as the application of the Public Duty Rule, involve different legal expenses than the expenses necessary to prepare for class certification, prove the availability of immunities under the Tort Immunity Act, and defend against assertions of wrongdoing."

¶ 45 In the case at bar, at the time of the flooding, at the time of the filing of the complaint, and at the time of dismissal of the amended fifth amended complaint, defendants were operating in a legal universe that included the availability of the public duty rule and governed their actions accordingly. Then, the supreme court overruled long-standing precedent—which it had expressly reaffirmed as recently as 1998—and abolished that rule, shifting the legal ground on which defendants stood. "Local government officials, like other people, are entitled to rely on [existing law] when 'making decisions and in shaping their conduct.' " *Board of Commissioners of the Wood Dale Public Library District v. County of Du Page*, 103 Ill. 2d 422, 429 (1984) (quoting *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973)). By applying the new law retroactively, defendants and their taxpayers would be forced to incur additional unexpected expenses in litigating this case, which could prove substantial, as it has been pending for 10 years to date and has yet to proceed beyond the pleading stage.

¶ 46 However, we note that these additional expenses and time commitments are not necessarily predicated solely on *Coleman*. Defendants' argument presupposes that their actions were, in fact, covered by the public duty rule. Under defendants' argument, in the absence of *Coleman*, the public duty rule would apply, marking the end of litigation. However, that overlooks the fact that it is not beyond dispute that the public duty rule would, in fact, apply. Plaintiffs likely would have appealed the trial court's April 3, 2015, dismissal even in the absence of *Coleman*, and we would have been asked to determine whether the public duty rule applies to the circumstances present in the case at bar. As discussed earlier in our analysis, this is not a question that has been considered by our supreme court, nor is it an area that has a clear answer at the appellate level. If plaintiffs had prevailed in that appeal,

defendants would find themselves in exactly the same position as they are now—forced to litigate the remainder of the case. Thus, while we recognize defendants' understandable frustration at the unexpected change in the legal universe, the additional expenses that would be incurred by continuing to litigate the instant case should not have been entirely unexpected, as defendants should have been prepared for the contingency of a loss on appeal.

¶ 47 Plaintiffs, by contrast, argue that a prospective application of *Coleman* would be inequitable to them because they would lose the ability to have their day in court. We note that, unlike in the case relied on by plaintiffs, *Oak Grove Jubilee Center, Inc. v. City of Genoa*, 347 Ill. App. 3d 973 (2004), this is not a case in which the plaintiff had a viable cause of action that would be lost by retroactive application of the new law. Here, plaintiffs had a cause of action that had already been dismissed, which would be revived by the retroactive application of the new law. In either case, though, the question is the same: applying the new law one way results in an active lawsuit, while applying it the other way results in the termination of that lawsuit. Thus, our decision has very real consequences to plaintiffs, as well as to defendants. We also note that, in some respects, plaintiffs are a victim of timing in much the same way as defendants are—if the supreme court had abolished the public duty rule earlier, defendants would not have been able to raise the rule in response to plaintiffs' complaint and the complaint would not have been dismissed on that basis. Thus, there are equitable arguments to be made on both sides of the equation.

¶ 48 In considering the three factors, there is no clear-cut answer on either side. The only clear answer is with respect to the first factor: *Coleman* made new law by abolishing the public duty rule. With respect to the second factor, prospective application of the new rule would have minimal impact on the rule's future applicability, as the unique facts of the instant case

and the Tort Immunity Act's statute of limitations necessarily limit the scope of our holding. However, prospective application would result in a direct conflict with the Second District, given its retroactive application of *Coleman* in *Salvi*, which would further muddy the jurisprudence concerning the applicability of the public duty rule. Finally, with respect to the third factor, retroactive application of the new law would cause hardship to defendants and their taxpayers, as defendants relied on the long-standing law concerning the existence of the public duty rule and their taxpayers would be forced to absorb the additional litigation costs. On the other hand, such additional litigation costs should not be entirely unexpected, as defendants should have been prepared for the contingency of a loss on appeal even if the public duty rule remained in effect. By contrast, prospective application of the new law would result in plaintiffs being prevented from pursuing their claims against defendants. Thus, there are equitable considerations in favor of both parties.

¶ 49 As noted, when a court issues an opinion, its decision is presumed to apply both retroactively and prospectively, unless that presumption is overcome by either an express statement by the court or through the consideration of the factors set forth in *Aleckson. Tosado*, 188 Ill. 2d at 196-97. Here, there is no express statement by the supreme court and the *Aleckson* factors do not tilt in any one direction. Consequently, we cannot find that the presumption of retroactivity has been overcome, and therefore, the new law set forth in *Coleman* should have been applied retroactively to the instant case. Accordingly, the trial court erred in limiting the new law set forth in *Coleman* to apply only prospectively to the instant case, and we must reverse the trial court's dismissal of plaintiffs' complaint based on the public duty rule.

¶ 50 III. Alternate Bases

¶ 51 Our decision concerning the public duty rule does not end our analysis, however, because we may affirm the trial court's dismissal on any basis supported by the record, even if the trial court did not base its decision on that ground. See *Raintree Homes*, 209 Ill. 2d at 261 (we can affirm "on any basis present in the record"); *In re Marriage of Gary*, 384 Ill. App. 3d at 987 ("we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper ground"). In the case at bar, plaintiffs alleged causes of action based on the Tort Immunity Act, based on the common law, and based on the Illinois Constitution. We consider each of these counts in turn, discussing whether they should have been dismissed under section 2-615 of the Code. If any of these counts should have survived dismissal based on section 2-615, we then consider whether they should have been dismissed under section 2-619.

¶ 52 As an initial matter, defendants make an overarching argument concerning all of plaintiffs' counts that are based on negligence—they claim that plaintiffs failed to plead that defendants' conduct proximately caused plaintiffs' damages. Since this argument applies to many of plaintiffs' causes of action, we address it first. "To recover damages based upon a defendant's alleged negligence, a plaintiff must allege and prove that the defendant owed a duty to the plaintiff, that defendant breached that duty, and that the breach was the proximate cause of the plaintiff's injuries." *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 256 (1999) (citing *Thompson v. County of Cook*, 154 Ill. 2d 374, 382 (1993)). Our supreme court has explained the proximate cause element as follows:

> "The proximate cause element is a factual question for the jury to decide and has two components: cause in fact and legal cause. [Citations.] 'Cause in fact' is

> established where there is reasonable certainty that the injury would not have occurred 'but for' the defendant's conduct or where a defendant's conduct was a 'substantial factor' in bringing about the harm. [Citation.] Legal cause, however, is essentially a question of policy, *i.e.*, 'How far should a defendant's legal responsibility extend for conduct that did, in fact, cause the harm?' (Internal quotation marks omitted.) [Citation.] Legal cause, therefore, is established only when it can be said that the injury was reasonably foreseeable. [Citations.]" *Stanphill v. Ortberg*, 2018 IL 122974, ¶ 34.

¶ 53 In the case at bar, defendants claim that plaintiffs failed to allege the "cause in fact" component of proximate cause. In support, they point to the trial court's dismissal of a negligence count against Gewalt, the engineering firm that worked with Advocate to develop a drainage plan in 2002; in that dismissal, the court found that plaintiffs had not alleged that Gewalt's conduct after 2002 was a cause in fact in bringing about the September 2008 flooding. However, Gewalt's position in the litigation differs quite significantly from defendants' position. Indeed, in its dismissal, the trial court specifically pointed to the fact that "plaintiffs alleged a host of other components of the [Prairie Creek Stormwater System] that contributed to the 2008 flooding, all of which existed prior to Gewalt's post-2002 designs on the Dempster Basin." Plaintiffs' allegations against defendants go far beyond the 2002 allegations against Gewalt. They allege that plaintiffs were involved in approving the drainage and sewer systems as far back as the 1960s and were aware of the undersized drainage capacity of certain portions of the systems. They further allege that defendants approved of Advocate's flawed plans for its drainage system and that defendants nevertheless approved them. Finally, they allege that defendants were aware of the serious design and

maintenance defects with the Prairie Creek Stormwater System based on the persistent flooding and failed to remedy those defects or to take measures to prevent the flooding. Thus, we cannot agree with defendants that plaintiffs have failed to allege sufficient facts that defendants' conduct was a "cause in fact" of plaintiffs' damages. Instead, at least at this stage of the proceedings, plaintiffs' allegations are sufficient to withstand a motion to dismiss. We turn, then, to consideration of each of plaintiffs' causes of action individually.

¶ 54 A. Tort Immunity Act Counts

¶ 55 With respect to the Tort Immunity Act, plaintiffs set forth causes of action for statutory duties pursuant to sections 3-102(a) and 3-103 of the Tort Immunity Act. Plaintiffs alleged that defendants breached a duty to maintain their property in a reasonably safe condition pursuant to section 3-102(a) and that defendants breached their duty to correct known unsafe conditions relating to the design of the Prairie Creek Stormwater System pursuant to section 3-103 by not compelling Advocate to redesign its drainage plans.

¶ 56 1. Section 3-102(a)

¶ 57 Section 3-102(a) of the Tort Immunity Act provides:

> "Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." 745 ILCS 10/3-102(a) (West 2012).

In counts XXXVI (against the District), LVII (against Park Ridge), and LXXIV (against Maine Township), plaintiffs alleged that defendants breached a "statutory duty to maintain property" pursuant to this section. Defendants argue that these counts were properly dismissed because there is no such "statutory duty to maintain property."

¶ 58 Defendants are correct that the Tort Immunity Act does not create any new duties. Our supreme court has made clear that "[t]he Tort Immunity Act grants only immunities and defenses; it does not create duties." *Village of Bloomingdale*, 196 Ill. 2d at 490; see also *Barnett v. Zion Park District*, 171 Ill. 2d 378, 386 (1996) ("It is settled that the Tort Immunity Act does not impose on a municipality any new duties."). Instead, "the [Tort Immunity] Act merely codifies those duties existing at common law, to which the subsequently delineated immunities apply." *Barnett*, 171 Ill. 2d at 386; *Monson v. City of Danville*, 2018 IL 122486, ¶ 24 ("the courts of this state have uniformly held that section 3-102(a) merely codifies the common-law duty of a local public entity to maintain its property in a reasonably safe condition"). Thus, a court must look to the common law and other statutes to determine whether the defendant owes the plaintiff a duty. *Barnett*, 171 Ill. 2d at 386. Once the court determines that a duty exists, then it examines whether the Tort Immunity Act provides immunity for a breach of that duty. *Village of Bloomingdale*, 196 Ill. 2d at 490. "In other words, because the Act implicitly recognizes duties which already exist at common law, we may refer to the common law to determine the duties a local public entity holds. But to determine whether that entity is liable for the breach of a duty, we look to the Tort Immunity Act, not the common law." *Village of Bloomingdale*, 196 Ill. 2d at 490.

¶ 59 In the case at bar, plaintiffs have styled these counts as arising under a "statutory duty to maintain property," which suggests that the basis of the duty is the statute, not the common

law. It is on this basis that defendants argue that the counts should be dismissed. However, our supreme court "has emphasized that 'the character of the pleading should be determined from its content, not its label.' " *In re Parentage of Scarlett Z.-D.*, 2015 IL 117904, ¶ 64 (quoting *In re Haley D.*, 2011 IL 110886, ¶ 67). Thus, the title of the count does not control over the substance of its claim. *Papadakis v. Fitness 19 IL 116, LLC*, 2018 IL App (1st) 170388, ¶ 32. Here, the substance of these counts of the complaint can be interpreted as alleging negligence based on a breach of defendants' common-law duty to maintain their property in a reasonably safe condition.

¶ 60 However, plaintiffs have foreclosed this interpretation by making it clear in their reply brief that they are asserting a "separate, independent, stand-alone cause-of-action imposing [a] duty owing to individual citizens for [a local public entity] to maintain its property." Plaintiffs further claim that "[c]odified duty is still enforceable, individual duty separate from common law." Thus, plaintiffs have expressly stated that they believe that there are two separate, independent, duties: a common-law duty and a statutory duty. This is simply not the case. Even *Wagner v. City of Chicago*, 166 Ill. 2d 144, 150 (1995), a case relied on by plaintiffs, makes this clear: " 'Th[e] limitation on the scope of the duty in section 3-102(a) is in keeping with the scope of that duty as it existed at common law. The Tort Immunity Act creates no new duties but merely codifies those existing at common law. [Citations.] At common law, a municipality had a duty to maintain its property in a safe condition ***.' " (quoting *West v. Kirkham*, 147 Ill. 2d 1, 14 (1992)). The statutory duty *is* the common-law duty, simply published in statutory form. Plaintiffs' insistence otherwise requires us to affirm the trial court's dismissal of these counts.

¶ 61 2. Section 3-103

¶ 62 Similarly, counts XXXVII (against the District), LVIII (against Park Ridge), and LXXV (against Maine Township) were for "duty to remedy [a] dangerous plan" and allege that section 3-103 of the Tort Immunity Act set forth a duty for a local public entity to correct known unsafe conditions related to the design and/or engineering of an approved plan, which defendants did not do. Section 3-103(a) provides:

> "A local public entity is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property where the plan or design has been approved in advance of the construction or improvement by the legislative body of such entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved. The local public entity is liable, however, if after the execution of such plan or design it appears from its use that it has created a condition that it is not reasonably safe." 745 ILCS 10/3-103(a) (West 2012).

¶ 63 Again, as with section 3-102(a), section 3-103(a) "codifies [the] common-law duty of care in the making of public improvements." *Salvi*, 2016 IL App (2d) 150249, ¶ 43; see also *O'Brien v. City of Chicago*, 285 Ill. App. 3d 864, 871 (1996) ("Sections 3-102(a) and 3-103(a) codify [common law] duties but do not impose any new obligations on local governments."); *Horrell v. City of Chicago*, 145 Ill. App. 3d 428, 435 (1986) ("[T]he 'duties' *** that are found in section 3-103(a) regarding the execution of a plan[ ] are derived from the basic common law duty articulated in section 3-102."). At common law, a municipality had a duty to maintain its property in a safe condition, but this duty did not extend to creating

or erecting public improvements. *West v. Kirkham*, 147 Ill. 2d 1, 14 (1992). Once a public improvement was actually constructed, however, the municipality has a duty to maintain it in a reasonably safe condition. *West*, 147 Ill. 2d at 14.

¶ 64 In the case at bar, again, while the substance of these counts could be interpreted as alleging negligence based on a breach of defendants' common-law duty in the making of public improvements, plaintiffs have foreclosed this interpretation in their reply brief by making clear that they are alleging that section 3-103(a) "declare[s] [a] separate and independent dut[y]" and that this "statutory dut[y] [is a] separate and independent, individual dut[y] from the common law." Accordingly, we must affirm the trial court's dismissal of these counts.

¶ 65 B. Common Law Counts

¶ 66 Next, plaintiffs alleged several counts based on common law negligence.

¶ 67 1. Dominant Estate Overburdening

¶ 68 Counts XXV (against the District), XLV (against Park Ridge), and LXIV (against Maine Township) were for "negligence: dominant estate overburdening stormwater" and alleged that defendants knew or should have known of the foreseeable harm of invasive flooding into plaintiffs' neighborhood given the history of flooding and that defendants owed nondelegable duties to properly manage the storm water so as to prevent harm to plaintiffs from excess storm water overburdening the drainage system. On appeal, plaintiffs "abandon their Dominant Estate Overburdening claim" but argue that the facts alleged in these counts give rise to an "adjacent property owner" claim.

¶ 69 Generally, a landowner owes no duty to adjoining landowners for dangerous natural conditions present on the land, but may owe a duty if the condition is artificial or where a

natural condition is aggravated by the owner's use of the area. See *Dealers Service & Supply Co. v. St. Louis National Stockyards Co.*, 155 Ill. App. 3d 1075, 1079 (1987); *Choi v. Commonwealth Edison Co.*, 217 Ill. App. 3d 952, 957 (1991). Additionally, a local public entity bears a common law duty not to increase the natural flow of surface water onto the property of an adjacent landowner. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 369 (2003). Defendants claim that, because they were not "adjacent landowners," these counts should be dismissed. We agree.

¶ 70 In the case at bar, plaintiffs have not alleged that defendants are landowners, much less landowners adjacent to plaintiffs' property. Plaintiffs have alleged that defendants own the sewers and the drains, but have not alleged that defendants own the real property under which those sewers and drains run. Instead, they allege that defendants were the holders of easements for the purpose of drainage and sewers, which ran through plaintiffs' neighborhood, and that it was these systems that overflowed and damaged plaintiffs' property. The only adjacent landowner plaintiffs identify in their complaint is Advocate.

¶ 71 Given the status of defendants as easement holders, not landowners, the appropriate cause of action would be for the overburdening of their easement. However, plaintiffs have expressly abandoned that claim on appeal. In the absence of that legal framework, we find no basis for applying "adjacent property owner" liability to defendants; plaintiffs have cited no authority applying such a duty without first establishing that the defendant was actually a landowner. Accordingly, we must affirm the dismissal of these counts.

¶ 72 2. Negligent Nuisance

¶ 73 Counts XXXI (against the District), LII (against Park Ridge), and LXIX (against Maine Township) were for "negligent nuisance" and alleged that defendants negligently caused an

accumulation of water from the drainage system to invade and interfere with plaintiffs' property. "A private nuisance is a substantial invasion of another's interest in the use and enjoyment of his or her land. The invasion must be: substantial, either intentional or negligent, and unreasonable." *In re Chicago Flood Litigation*, 176 Ill. 2d at 204. The standard for determining if particular conduct constitutes a nuisance is its effect on a reasonable person. *In re Chicago Flood Litigation*, 176 Ill. 2d at 204. Our supreme court has explained the difference between the type of invasion that nuisance protects as compared to the type of invasion that trespass protects:

> " 'A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. *** A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession.' " *In re Chicago Flood Litigation*, 176 Ill. 2d at 204 (quoting Restatement (Second) of Torts § 821D cmt. d, at 101 (1979)).

¶ 74 In the case at bar, the complaint alleges that defendants negligently permitted an accumulation of storm water runoff in their drainage and sewage systems due to their management of the systems, which caused flood water to invade and interfere with plaintiffs' property on September 13, 2008. The complaint further alleges that such interference was substantial and unreasonable. These allegations are sufficient to state a cause of action for negligent nuisance so as to withstand dismissal pursuant to section 2-615.

¶ 75 3. Negligent Trespass

¶ 76 Counts XXXII (against the District), LIII (against Park Ridge), and LXX (against Maine Township) were for "negligent trespass" and alleged that, due to defendants' failure to properly manage the storm water systems, water invaded plaintiffs' property. A trespass is an

invasion in the exclusive possession and physical condition of real property. *Millers Mutual Insurance Ass'n of Illinois v. Graham Oil Co.*, 282 Ill. App. 3d 129, 139 (1996). "[O]ne can be liable under present-day trespass for causing a thing or a third person to enter the land of another either through a negligent act or an intentional act." *Dial v. City of O'Fallon*, 81 Ill. 2d 548, 556-57 (1980).

¶ 77 In our prior decision concerning Advocate, we found that the complaint adequately alleged that Advocate could be liable for intentional trespass based on its conduct with respect to its drainage system. See *Tzakis*, 2015 IL App (1st) 142285-U, ¶ 74. We found:

> "Taken as a whole, [plaintiffs'] allegations are far from mere conclusory allegations. Plaintiffs identify numerous examples that suggest [Advocate] was aware of the flooding problem, and knowingly took inadequate measures to correct it. Plaintiffs' allegations identify specific components of [Advocate's] drainage system as deficient, and demonstrate multiple instances where [Advocate] had occasion to address the problems and failed to do so adequately. As with the examples of piling sand adjacent to another's property, or erecting a dam to alter the flow of a stream, plaintiffs' allegations regarding [Advocate's] conduct are sufficient to show that [Advocate] acted with a high degree of certainty that its modifications to the drainage system would cause or fail to prevent flooding to plaintiffs' homes." *Tzakis*, 2015 IL App (1st) 142285-U, ¶ 74.

¶ 78 In the case at bar, plaintiffs are not alleging intentional trespass as they did against Advocate.[14] Thus, they are not required to allege the high degree of certainty required by an intentional trespass claim. However, the allegations against Advocate, which we found

[14]We note that plaintiffs did, in fact, originally include counts for intentional trespass, but those counts were voluntarily dismissed and are not at issue on appeal.

satisfied such a high bar, also apply in large part to defendants, as they are alleged to have approved all of Advocate's plans. Thus, our prior decision is certainly instructive to the analysis in the instant appeal. In the case at bar, plaintiffs have alleged that there was an invasion in their properties due to the excess storm water runoff. Plaintiffs have further alleged that this invasion was caused by defendants' negligent design and operation of their drainage and sewer systems. These allegations adequately set forth causes of action for negligent trespass against defendants so as to withstand a section 2-615 motion to dismiss.[15]

¶ 79 C. Takings Clause

¶ 80 Finally, plaintiffs claimed that the flooding of their property was an unconstitutional taking that violated the Illinois Constitution. The takings clause of the Illinois Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law." Ill. Const. 1970, art. I, § 15. Our supreme court has defined a "taking" as "a physical invasion of private property or the radical interference with a private property owner's use and enjoyment of the property." *Hampton v. Metropolitan Water Reclamation District*, 2016 IL 119861, ¶ 24. The supreme court has further indicated that "a taking occurs when real estate is physically invaded 'by superinduced additions of water *** so as to effectually destroy or impair its usefulness.' " *Hampton*, 2016 IL 119861, ¶ 24 (quoting *Horn v. City of Chicago*, 403 Ill. 549, 554 (1949)). Our supreme court has recently made explicit that a temporary flooding may constitute a taking. *Hampton*, 2016 IL 119861, ¶ 22; see also

[15]At the end of their brief, plaintiffs include a brief paragraph concerning "equitable relief." It is not apparent what argument they are attempting to make, and plaintiffs do not tie this request into any particular cause of action. As it has not been properly developed, we do not consider this argument. See *Lebron*, 237 Ill. 2d at 253; Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued [in the appellant's brief] are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

Pineschi v. Rock River Water Reclamation District, 346 Ill. App. 3d 719, 727 (2004) (temporary flooding caused by backup of sewer system may constitute a taking).

¶ 81 Our supreme court has also found instructive additional factors set forth by the United States Supreme Court in determining whether a temporary flooding constitutes a taking; "[t]hese factors include the time and duration of the flooding, whether the invasion of the property was intentional or whether it was a foreseeable result of an authorized government action, and the character of the land and the owner's reasonable investment-backed expectations regarding the land's use." *Hampton*, 2016 IL 119861, ¶ 25 (citing *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 38-39 (2012)).

¶ 82 In the case at bar, defendants claim that plaintiffs' takings clause claims must fail because the water overflow was the result of Advocate's conduct, not theirs. "To constitute a government taking or compensable government action, the water overflow must be the result of a structure or action imposed by the governmental entity ***." *Sorrells v. City of Macomb*, 2015 IL App (3d) 140763, ¶ 33. In *Sorrells*, the plaintiff homeowners filed suit against a developer who was developing adjacent property in a way that the plaintiffs alleged altered the natural drainage of surface waters and caused an increase of water drainage onto their property. *Sorrells*, 2015 IL App (3d) 140763, ¶ 4. The plaintiffs also included an inverse condemnation claim against the defendant city, which the plaintiffs alleged had approved the construction and design of the developer's plans, and to whom the streets and drainage system had been dedicated. *Sorrells*, 2015 IL App (3d) 140763, ¶¶ 17-18. The plaintiffs alleged that the city's actions constituted a taking under the takings clause of the Illinois Constitution. *Sorrells*, 2015 IL App (3d) 140763, ¶ 18.

¶ 83 On appeal, the *Sorrells* court affirmed the trial court's dismissal of the counts aimed at the city. The court first noted that the plaintiffs alleged that the private development as a whole caused the allegedly unreasonable surface water drainage, not the streets that belonged to the city. *Sorrells*, 2015 IL App (3d) 140763, ¶ 30. The court found that the complaint "makes clear that the water allegedly invading the plaintiffs' property was drainage from two [private] storm water detention basins or other drainage basins." *Sorrells*, 2015 IL App (3d) 140763, ¶ 31. The court further found that the plaintiffs failed to allege that this unreasonable water draining from the development onto their land "was the intended or foreseeable result, in whole or in part, of the City's actions rather than that of the development." *Sorrells*, 2015 IL App (3d) 140763, ¶ 32.

¶ 84 The *Sorrells* court also noted that condemnation cases "traditionally arise from government action alone; not from multiple causes that would include actions of private actors, as in this case where the water was from the whole development flowing into detention basins." *Sorrells*, 2015 IL App (3d) 140763, ¶ 33. In the case before it, the court found that "the alleged flooding of the plaintiffs' land was from the overflow of drainage and detention basins, not from the City's actions." *Sorrells*, 2015 IL App (3d) 140763, ¶ 33. Consequently, the court affirmed the dismissal of the inverse condemnation claim.

¶ 85 In the case at bar, contrary to defendants' claim, we cannot agree that the situation is analogous to that present in *Sorrells*. The instant case is not one in which Advocate developed its property, then later dedicated the streets and drainage system to defendants. Instead, plaintiffs allege much more hands-on involvement and ongoing responsibility from defendants. Additionally, plaintiffs allege a history of flooding prior to the 2008 flooding at issue, indicating that defendants knew of the increased risk of flooding. Finally, plaintiffs

point to numerous areas in which defendants were allegedly negligent, including through the use of undersized drains. We note that we are not asked to determine whether plaintiffs will be successful in ultimately proving their takings claim—at this stage of the proceedings, a cause of action will not be dismissed on the pleadings unless it clearly appears that the plaintiff cannot prove any set of facts that will entitle it to relief. *Board of Directors of Bloomfield Club Recreation Ass'n*, 186 Ill. 2d at 424. Under the facts as alleged by plaintiffs, their claims under the takings clause are sufficient to satisfy this hurdle.

¶ 86 D. Section 2-619 Motions to Dismiss

¶ 87 As explained above, we have determined that the counts concerning negligent nuisance, negligent trespass, and the takings clause (1) should not have been barred by the public duty rule and (2) are sufficient to withstand dismissal under section 2-615 of the Code. However, these counts were also subject to motions to dismiss pursuant to section 2-619 of the Code. Thus, we must consider whether they should have been dismissed under that section in order to determine whether there remains an alternate basis for affirming the trial court's judgment.

¶ 88 On appeal, defendants claim that plaintiffs' causes of action against them should have been dismissed pursuant to several sections of the Tort Immunity Act. The Tort Immunity Act was enacted in 1965 in response to the supreme court's abolition of sovereign immunity. *Monson*, 2018 IL 122486, ¶ 15. It protects local public entities and their employees from liability arising from government operations. *Monson*, 2018 IL 122486, ¶ 15; 745 ILCS 10/1-101.1(a) (West 2006). The purpose of the Tort Immunity Act "is to prevent the dissipation of public funds on damage awards in tort cases." *Monson*, 2018 IL 122486, ¶ 15. "Since the [Tort Immunity] Act was enacted in derogation of the common law, it must be strictly construed." *Van Meter*, 207 Ill. 2d at 368; *Monson*, 2018 IL 122486, ¶ 15. "Unless an

immunity provision applies, municipalities are liable in tort to the same extent as private parties." *Van Meter*, 207 Ill. 2d at 368-69; *Monson*, 2018 IL 122486, ¶ 15. "Because the immunities afforded to governmental entities operate as an affirmative defense, those entities bear the burden of properly raising and proving their immunity under the [Tort Immunity] Act. It is only when the governmental entities have met this burden that a plaintiff's right to recovery is barred." *Van Meter*, 207 Ill. 2d at 370.

¶ 89 1. Sections 2-109 and 2-201

¶ 90 Defendants first rely on sections 2-109 and 2-201 of the Tort Immunity Act. Section 2-109 provides:

> "A local public entity is not liable for any injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109 (West 2006).

Section 2-201 provides:

> "Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2006).

Our supreme court has observed that "[s]ection 2-201 extends the most significant protection afforded to public employees under the [Tort Immunity] Act." *Van Meter*, 207 Ill. 2d at 370. Read together, sections 2-109 and 2-201 immunize a public entity from liability for the discretionary acts or omissions of its employees. *Monson*, 2018 IL 122486, ¶ 16.

¶ 91 In order for immunity to attach, a court must conduct a dual-prong inquiry. See *Van Meter*, 207 Ill. 2d at 373. First, a defendant claiming immunity under section 2-201 must establish that its employee held either a position involving the determination of policy or a

position involving the exercise of discretion. *Monson*, 2018 IL 122486, ¶ 29. Additionally, "immunity will not attach unless the plaintiff's injury results from an act performed or omitted by the employee in determining policy *and* in exercising discretion." (Emphasis in original.) *Harinek*, 181 Ill. 2d at 341 (1998). Thus, while under the statute, the employee's position may be one which involves either determining policy or exercising discretion, in order for immunity to apply, the act or omission itself must be both a determination of policy and an exercise of discretion. *Harinek*, 181 Ill. 2d at 341.

¶ 92 Our supreme court has defined " 'policy decisions made by a municipality' " as " 'those decisions which require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests.' " *Harinek*, 181 Ill. 2d at 342 (quoting *West*, 147 Ill. 2d at 11). With respect to discretionary decisions, "the distinction between discretionary and ministerial functions resists precise formulation, and *** the determination whether acts are discretionary or ministerial must be made on a case-by-case basis." *Snyder v. Curran Township*, 167 Ill. 2d 466, 474 (1995). Our supreme court has defined the terms as follows:

> "[D]iscretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." *Snyder*, 167 Ill. 2d at 474.

Additionally, discretionary decisions " 'involve the exercise of personal deliberation and judgment in deciding whether to perform a particular act, or how and in what manner that act

should be performed.' " *Monson*, 2018 IL 122486, ¶ 30 (quoting *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 395 (2000)).

¶ 93 In the case at bar, plaintiffs have alleged a number of actions and omissions that they claim subject defendants to liability. While defendants are undoubtedly correct that at least some of these actions would fall under the purview of section 2-201 immunity, we cannot agree with their position that they are wholly immune from liability such that dismissal is warranted.

¶ 94 For instance, one of the allegations against defendants is that the drainage and sewer systems represented a dangerous condition and that defendants failed to correct that condition by, *inter alia*, not pumping down the retention basins prior to the September 2008 storm. Our supreme court has recognized that decisions involving repairs to public property can be a discretionary matter subject to immunity under section 2-201. *Monson*, 2018 IL 122486, ¶ 33. However, "a public entity claiming immunity for an alleged failure to repair a defective condition must present sufficient evidence that it made a conscious decision not to perform the repair. The failure to do so is fatal to the claim." *Monson*, 2018 IL 122486, ¶ 33. Here, there has been no showing that it was a conscious decision not to pump down the basins prior to the storm. Accordingly, that decision would not be subject to section 2-201 immunity.

¶ 95 As noted, "[s]ection 2-201 extends the most significant protection afforded to public employees under the [Tort Immunity] Act." *Van Meter*, 207 Ill. 2d at 370. Thus, we must be especially careful when speaking broadly about sweeping all of defendants' alleged conduct with the same brush. In the case at bar, plaintiffs have alleged acts and omissions by defendants that would not be subject to section 2-201 immunity. Accordingly, it is inappropriate to wholly dismiss the counts aimed at defendants on the basis of that immunity

and we cannot find that section 2-201 immunity serves as an alternate basis for dismissal of plaintiffs' complaint at this time.

¶ 96 2. Section 2-105

¶ 97 Defendants next claim that they are immune under section 2-105 of the Tort Immunity Act, which provides:

> "A local public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its own, to determine whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety." 745 ILCS 10/2-105 (West 2006).

¶ 98 In the case at bar, plaintiffs allege that all three defendants own and operate various portions of the drainage and sewer systems at issue. We agree with defendants that, under section 2-105, each defendant is immune from liability for a failure to inspect any property that is not determined to belong to that defendant. However, at this point in the litigation, we must take the allegations of the complaint as true (*Morr-Fitz, Inc.*, 231 Ill. 2d at 488), and therefore must accept plaintiffs' allegations that defendants own the property at issue. Accordingly, section 2-105 does not provide an alternate basis for dismissal of the complaint.

¶ 99 3. Section 2-104

¶ 100 Next, defendants Park Ridge and the District claim that they are immune under section 2-104 of the Tort Immunity Act.[16] Section 2-104 provides:

[16]While the three defendants filed a joint brief on appeal and do not specify which defendants are making this argument, the motion to dismiss filed by Maine Township before the trial court does not list section 2-104 as a basis for dismissal. Accordingly, we consider this section with respect to Park Ridge and the District alone.

> "A local public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization where the entity or its employee is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked." 745 ILCS 10/2-104 (West 2006).

¶ 101 In the case at bar, plaintiffs allege that these defendants should be held liable for plaintiffs' flooding damage in part because they approved Advocate's plans for its drainage system. We agree with defendants that, to the extent that plaintiffs claim that their injury was caused by defendants' approval of Advocate's plans, the plain language of section 2-104 immunizes defendants from liability for such claims. However, such immunity is limited to injuries caused by the approval itself—where defendants' actual actions or omissions are at issue, section 2-104 immunity would not apply. See *Salvi*, 2016 IL App (2d) 150249, ¶ 46 (denying section 2-104 immunity where the village's actions in reconstructing a pond and developing a parcel were at issue, as opposed to its issuance of permits or approvals). Therefore, dismissal at this time is not warranted.

¶ 102 4. Section 3-110

¶ 103 Finally, defendants Maine Township and Park Ridge claim that they are immune from liability under section 3-110 of the Tort Immunity Act.[17] Section 3-110 provides:

> "Neither a local public entity nor a public employee is liable for any injury occurring on, in, or adjacent to any waterway, lake, pond, river or stream not owned,

[17]The District's motion to dismiss did not raise section 3-110 as a basis for dismissal, and accordingly, we consider the section with respect to Maine Township and Park Ridge alone.

supervised, maintained, operated, managed or controlled by the local public entity." 745 ILCS 10/3-110 (West 2006).

¶ 104 In the case at bar, these defendants argue that all injury resulted from flooding that came from a waterway—the Prairie Creek Stormwater System—and that plaintiffs did not allege facts supporting their claim that Maine Township or Park Ridge owned, supervised, maintained, operated, managed, or controlled any component of that system. We do not find this argument persuasive. First, the Prairie Creek Stormwater System as a whole would not be considered a "waterway" for purposes of section 3-110. As defined in the complaint, the Prairie Creek Stormwater System is a system of public improvements consisting of (1) open drains, (2) enclosed pipes, (3) retention basins, and (4) tributary storm water sewers that run under the streets. While the retention basins would arguably fall under section 3-110's definition of a "pond," the remainder of the system would certainly not be considered a "waterway." See Black's Law Dictionary 1623 (8th ed. 1999) (defining "waterway" in the same way as "watercourse": "A body of water, [usually] of natural origin, flowing in a reasonably definite channel with bed and banks. The term includes not just rivers and creeks, but also springs, lakes, and marshes in which such flowing streams originate or through which they flow."); American Heritage Dictionary 1367 (2d College ed. 1985) (defining "waterway" as "[a] navigable body of water, such as a river, channel, or canal"); Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/waterway (last visited May 10, 2019) [https://perma.cc/NU2H-LWKW] (defining "waterway" as "[a] river, canal, or other route for travel by water"). Thus, section 3-110 immunity would not apply.

¶ 105 Furthermore, plaintiffs' complaint alleges that both defendants bore responsibility for the portions of the system falling within their jurisdictions. While defendants point to a comment

by plaintiffs' counsel that they claim constitutes an admission that Maine Township did not "own" the system, even if that comment is read in the way defendants wish, section 3-110 limits immunity not only for owners but also for those who "supervise[ ], maintain[ ], operate[ ], manage[ ] or control[ ]" such waterways. 745 ILCS 10/3-110 (West 2006). As noted, the complaint alleges that defendants bore such responsibility over the system. In the case at bar, then, section 3-110 does not serve as an alternate basis for dismissal of plaintiffs' complaint.

¶ 106 CONCLUSION

¶ 107 For the reasons set forth above, the trial court erred in applying *Coleman* prospectively and, accordingly, erroneously granted defendants' section 2-615 motion to dismiss on the basis of the public duty rule. However, the counts based on violations of the Tort Immunity Act and for adjacent property owner liability were nevertheless properly dismissed under section 2-615 because plaintiffs failed to state causes of action with respect to each of those counts. The counts based on negligent nuisance, negligent trespass, and the takings clause were sufficient to withstand dismissal under section 2-615, and most of defendants' claims of immunity under the Tort Immunity Act do not provide an alternate basis for dismissal of those counts under section 2-619. Accordingly, we reverse the trial court's dismissal of plaintiffs' complaint with respect to defendants Park Ridge, Maine Township, and the District on those counts.

¶ 108 Affirmed in part and reversed in part.

APPENDIX

Document 3

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DENNIS TZAKIS, ZENON GIL, CATHY PONCE, ZAIA GILIANA, JULIA CABRALES, and JUAN SOLIS, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, A Proposed Class Action, Plaintiffs, v. BERGER EXCAVATING CONTRACTORS, INC., ADOVCATE HEALTH AND HOSPITALS CORPORATION D/B/A/ ADVOCATE LUTHERAN GENERAL HOSPITAL, COOK COUNTY, GEWALT HAMILTON ASSOCIATES, INC., VILLAGE OF GLENVIEW, MAINE TOWNSHIP, METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, and CITY OF PARK RIDGE, Defendants.	Case No. 09 CH 6159 (Consolidated with 10 CH 38809, 11 CH 29586, 13 CH 10423) Hon. Sophia H. Hall

DECISION

This matter comes on to be heard on the § 2-619.1 Motions to Dismiss filed by defendants Metropolitan Water Reclamation District, Maine Township and Park Ridge, hereinafter referred to as defendants or movants, unless designated by name. The parties have agreed that, at this time, this Court will only address the arguments that the claims against movants should be dismissed under § 2-615 because the Public Duty Rule applies to the allegations in plaintiffs' Amended Fifth Amended Complaint ("A5AC"). The Public Duty Rule provides that a public entity is not liable for its failure to provide adequate "governmental services," because the duty to provide such services is owed to the general public at large, and not to any particular plaintiff or plaintiffs. *Harinek v. 161 N. Clark St./Ltd Partnership*, 181 Ill. 2d 335, 345-47 (1998).

Plaintiffs allege that they experienced significant flooding to their homes after heavy rainfall in September 2008. Plaintiffs generally allege that movants' connection to and activities regarding the "Prairie Creek Stormwater System" (PCSS), over which they had jurisdiction and control, caused the flooding. Movants argue that the Public Duty Rule applies to the allegations

in the A5AC because, when considered in the light most favorable to plaintiffs, those allegations describe the provision of governmental services to the public at large.

A.
Applicable Law

Plaintiffs, first, argue that the law applicable to the motions to dismiss the A5AC is stated in *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359 (2003). The court in *Van Meter* did not discuss the Public Duty Rule. Rather, to address the defendant Park District's motion to dismiss, the court applied section 2-201 of the Illinois Tort Immunity Act, 745 ILCS 10/2-201, to the allegations in the complaint.

Section 2-201 provides that a public employee is immune from liability if the employee is exercising discretion in determining policy.

> Except as otherwise provided by statute a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

In *Van Meter*, the plaintiffs alleged that the defendant Park District owned land upon which it was building a park. Its contractors constructed a storm water drainage and detention system to prevent flooding of the park, and so diverted the water from flowing in its natural course. The plaintiffs claimed that the Park District's system, designed to protect the park, caused water to back up and flood plaintiffs' adjacent real estate and residence. The Park District moved to dismiss, asserting that it was entitled to immunity under section 2-201 of the Tort Immunity Act. It asserted that its conduct was an exercise of discretion while it was engaging in a policy decision.

The Illinois Supreme Court found that the complaint failed to allege facts to show that the Park District's construction of the park and drainage system involved a section 2-201 policy decision, which the court defined as decision-making by a public employee weighing competing interests. *Id.* at 379-80. The court, however, did not discuss the application of the Public Duty Rule to the facts alleged in the complaint. Accordingly, this Court finds that the *Van Meter* case does not provide any guidance as to the application of the Public Duty Rule to the allegations in the A5AC.

Plaintiffs, second, argue that the Public Duty Rule no longer applies after passage of the Illinois Tort Immunity Act. The Tort Immunity Act abolished the doctrine of sovereign

immunity, and provided that government entities are liable in tort just like private tortfeasors. The Act then enumerated a number of exceptions to that general rule of liability.

The Illinois Supreme Court, in *Harinek v. 161 N. Clark St./Ltd Partnership*, 181 Ill. 2d 335 (1998), addressed the question of the continued viability of the Public Duty Rule after the passage of the Tort Immunity Act. The court found that the Public Duty Rule still applies to a public entity's provision of governmental services. The court found that the Act did not conflict with the Public Duty Rule, because the rationale for the Public Duty Rule is that the duty of a municipality to provide government services is owed to the public at large, not to any particular plaintiff.

> According to the public duty rule, a municipality could not be held liable for its failure to provide adequate governmental services such as police and fire protection. *Huey v. Cicero*, 41 Ill. 2d 361 (1968). The rationale for this rule was that the duty of a municipality to provide governmental services was owed to the public at large and therefore took precedence over any duty owed to a particular plaintiff ...
>
> As the court explained in *Huey*, the public duty rule exists "independent of ... common law concepts of sovereign immunity" *Huey*, 41 Ill. 2d at 363. Therefore, although, absent a statutory immunity, governmental units are now liable in tort on the same basis as private tortfeasors, the public duty rule nevertheless prevents such units from being held liable for their failure to provide adequate governmental services. *Id.* at 345.

The *Harinek* court went on to discuss the "special duty" exception to the Public Duty Rule. It acknowledged that if a particular plaintiff was under the direct control of the public entity at the time of actions or omissions causing damage, then the public entity might still be liable. The court cited its decision in *Huey v. Cicero*, 41 Ill. 2d 361, 363 (1968): "Exceptions to the [public duty] rule have been found only in instances where the municipalities were under a special duty to a particular individual..."

Though the *Harinek* court discussed the Public Duty Rule, the court did not ultimately apply it to the facts in that case. The affirmance of the dismissal of the complaint was determined by applying section 2-201 of the Tort Immunity Act to the alleged conduct of the defendant City of Chicago's Fire Marshal in conducting a fire drill.

The Public Duty Rule has been applied to the governmental service of maintaining sewers for the public at large. The court in *Alexander v. Consumers Ill. Water Co.*, 358 Ill. App. 3d 774, 779 (3d Dist. 2005), cited *Harinek*'s discussion of the Public Duty Rule and the special

duty exception, in deciding an appeal from summary judgement for the defendant Village on the plaintiffs' claim for damages from a sewer backup. Plaintiffs sued the Consumers Ill. Water Co. and the Village of University Park. Plaintiffs claimed that the Village was aware of the possibility of sewer backups and took no action. In affirming the trial court, the appellate court relied on *Harinek* for the proposition that the Public Duty Rule provides that a public entity cannot be held liable for its failure to provide adequate government services. It applied the Rule to the plaintiffs' sewer backup claim.

The court then set forth the framework for analyzing whether the special duty exception applied to the facts in the case.

> The special duty exception requires a finding that (1) the municipality was uniquely aware of the particular danger or risk to which the plaintiff is exposed, (2) there are allegations of specific acts or omissions on the part of the municipality, (3) the specific acts or omission are either affirmative or willful in nature, and (4) the injury occurred while the plaintiff was under the direct and immediate control of the employees and agents of the municipality. (Citation omitted). *Id.* at 779.

In affirming the trial court's grant of summary judgment in favor of the Village, the appellate court found that the evidence did not show that the Village had developed any special relationship with the plaintiffs.

Pursuant to these standards, this Court finds that the law regarding the Public Duty Rule applies to movants' motions to dismiss the A5AC.

B.
Application of the Public Duty Rule

To apply the Public Duty Rule to the facts alleged in the A5AC, this Court must, first, determine whether the conduct of the movants alleged in the A5AC as to the PCSS was a "governmental service," subject to the Public Duty Rule. This Court finds that providing flood control management is a governmental service to benefit the public at large.[1]

[1] The First District Appellate Count also addressed the circumstances of governmental services regarding storm water and sewage in an unpublished decision, *River City Facilities Mgmt. Co., LLC v. Metro. Water Reclamation Dist.*, 2012 IL App (1st) 120464-U. In that case, the plaintiffs sued the District for flood damage that occurred after a heavy rainfall, alleging the District failed to utilize means to empty or drain storm water and sewage retention facilities prior to the storm, failed to monitor rising water levels, and failed to follow its own written guidelines. *Id.* at ¶ 4. The court first addressed the parties' arguments of whether the Public Duty Rule is still viable, which the court held it was. *Id.* at ¶ 25. The court, next, held that the Public Duty Rule applies to a governmental unit's provision of water management and collection. *Id.*

Plaintiffs argue that the A5AC alleges that the movants owned the infrastructure of the PCSS, which provides the flood control service, and that they failed to maintain and improve it, and, thus, the failure to maintain owned property caused the flooding of their properties. This Court finds that the allegations regarding the maintenance and improvement of the infrastructure of the PCSS are government services to the public at large. *See Donovan v. Village of Ohio,* 397 Ill. App. 3d 844, 850 (3d Dist. 2010) (holding that governmental service to the public at large, including maintenance, does not raise a duty). Accordingly, the Public Duty Rule applies to the allegations of failed maintenance of the owned infrastructure of the PCSS in the A5AC.

Since the Public Duty Rule applies to the allegations of the roles of the movants regarding the PCSS, for the A5AC to state a cause of action against movants, it must contain allegations of fact which, when viewed in the light most favorable to plaintiffs, support the application of the special duty exception as to each of the movants. Specifically, this Court must determine whether the A5AC contains allegations showing that plaintiffs were under the "direct and immediate control" of the movants at any point where it is alleged that movants committed any of acts or omissions of a willful nature.

Plaintiffs, generally, allege that their homes, located in the "Robin Court-Dee Road Community Area," are affected by stormwater and sewage overflows from the PCSS. The PCSS structures alleged in the A5AC span across the towns of Park Ridge and Maine Township. Movant Metropolitan Water Reclamation District of Greater Chicago ("District") is alleged to own and have control over the entire PCSS. Alternately, other defendants are variously alleged to own and control certain parts of the PCSS. (*See, e.g.*, A5AC ¶¶ 95, 354, 363, 388, 404, 504.) Plaintiffs allege that the PCSS has been developed over decades by those defendants who are public entities, and partly in coordination with the private defendants.

Around 1960, plaintiffs allege that movant Park Ridge and former defendant Cook County approved a "Robin Neighborhood Plat Plan" from the developer of the Robin Neighborhood. Plaintiffs allege that the Plat Plan granted "Drainage Easements" to movant District, movant Park Ridge, movant Maine Township, and former defendants Glenview, and/or the County. (¶ 66.3.) Plaintiffs allege that, pursuant to those easements, the following structures were approved that now exist within the PCSS: (1) the "undersized 60" Howard Court Culvert," (2) the 120" Robin Court Culvert, less than 100 yards upstream of the Howard Court Culvert, (3) the 60" Robin Alley Culverts, less than 200 yards upstream of the Howard Court Culvert, (4) the Robin Neighborhood Main Drain, which "flows through the Robin Court Culvert but bottlenecks at the Howard Court Culvert," (5) the 60" Robin Alley Stormwater Sewer, "now connected to the Dempster Basin, transporting stormwater from the Dempster Basin to the Robin Neighborhood Main Drain," and (6) other "stormwater sewers tributary to the Main Drain."

Plaintiffs further allege that, around 1961, movant Park Ridge and the County approved a similar Plat Plan for the Dee Neighborhood. Again, "Drainage Easements" were granted to the District, Park Ridge, Maine Township, Glenview, and/or the County. The Plan resulted in construction of what plaintiffs characterize as the "undersized 60" Dee Neighborhood Stormwater Pipe conveying the Dee Neighborhood Subsegment of the Robin-Dee Community Segment of the Main Drain . . . ." In addition, "tributary stormwater sewers" to the Main Drain were constructed.

At some time before 1987, movant Park Ridge constructed the "North Ballard Storm Sewers," which are north of Advocate's property. Those flowed to the Main Drain. Park Ridge also constructed the "North Ballard Storm Drain," which drains into the Main Drain.

Metropolitan Water Reclamation District

Plaintiffs' basic allegations against movant District are that it was vested with "sole power . . . to supervise and coordinate stormwater management across jurisdictions," and further that it "by either design control or operation control affects all upstream sanitary sewerage systems." Plaintiffs allege that the District, despite having knowledge of design and maintenance defects within the PCSS, failed to take "corrective measures to remedy and/or protect the Plaintiffs against the foreseeable dangerous conditions existing on its PCSS Properties posed by excess stormwater." Plaintiffs further allege that the District "negligently caused an accumulation of sanitary sewer water into citizens' homes from its sanitary sewage system." Finally, plaintiffs allege that the District approved "defective" plans from defendant Advocate relating to Advocate's design of PCSS components on its own property, which contributed to the 2008 flooding.

Plaintiffs nowhere allege, nor can it be inferred from their allegations, that any of them were at any time "under the direct and immediate control of the employees and agents" of the movant District. Thus, the A5AC contains nothing to support a cause of action based on application of the special duty exception to the District.

Maine Township

Plaintiffs generally allege that movant Maine Township had jurisdiction of the PCSS within Maine Township. Plaintiffs allege that Maine Township made no construction changes to the Howard Court and Dee Neighborhood Stormwater Pipe since the 1960s, despite knowledge of maintenance and design problems, and that its inaction failed to prevent known flooding risk to plaintiffs' property.

Plaintiffs further specifically allege that in the hours before the flooding on September 13, 2008, the Maine Township Highway Department had mobilized and/or readied trucks for sandbag delivery to the Robin-Dee Neighborhood, in anticipation of flooding from the predicted storm. However, plaintiffs allege the sandbags arrived too late, after the flooding had already occurred.

Plaintiffs' allegations do not support the special duty exception as to movant Maine Township. Plaintiffs allege that Maine Township undertook to obtain sand and sandbags, which they did not deliver to plaintiffs in time. However, the special duty exception only applies when the plaintiffs are under the "direct and immediate control" of the governmental employees or agents. Plaintiffs' allegations do not establish that any of the plaintiffs were under the "direct and immediate control" of Maine Township, such that a special duty was created. Furthermore, these allegations do not support a finding that Maine Township's conduct was for the particular plaintiffs, but was, rather, for the members of the communities at large.

Thus, the A5AC contains nothing to support a cause of action based on application of the special duty exception to movant Maine Township.

Park Ridge

Plaintiffs generally allege that movant Park Ridge owned, controlled, planned, and designed public improvements to the PCSS within its jurisdiction. Plaintiffs allege that Park Ridge knew of prior flooding of plaintiffs' property, and yet failed to take corrective measures to remedy or protect plaintiffs from the foreseeable dangerous condition posed by the PCSS. Plaintiffs further allege that Park Ridge was in the best position to make changes to plans submitted by defendant Advocate for work on the PCSS on Advocate's property. Particularly, plaintiffs allege that "Park Ridge did not compel Advocate [] to revise their North and South Development Plans to provide more stormwater storage . . . ."

Plaintiffs further specifically allege that on September 13, 2008, movant Park Ridge "deployed its police and/or Department of Public Safety to Dempster Road near the Plaintiffs' Robin-Neighborhood." The A5AC does not contain any further allegations about any actions those officers took, nor any allegations of how the officers' conduct contributed to the flooding of plaintiffs' homes, if at all, or involved any of them undertaking any task for any particular plaintiff.

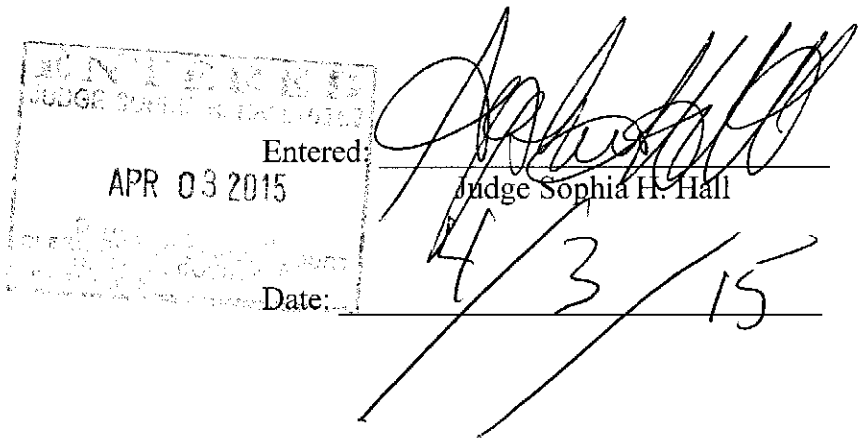
Plaintiffs' allegations do not establish that the special duty exception applies to movant Park Ridge. Plaintiffs allege that Park Ridge deployed police officers on September 13, 2008, the day of the flooding, but do not include allegations describing the conduct of the police

officers. Thus, it cannot be inferred that plaintiffs were under the "direct and immediate control" of any Park Ridge personnel at any time of an act or omission.

Thus, the A5AC contains nothing to support a cause of action based on application of the special duty exception to movant Park Ridge.

CONCLUSION

For the foregoing reasons, the Court finds that the Public Duty Rule applies to the allegations of the movants' conduct in the A5AC. Furthermore, the Court finds that the allegations therein do not support the application of the special duty exception to the Public Duty Rule. Accordingly, plaintiffs have not alleged sufficient facts to infer the existence of an actionable duty on the part of these three movants, and the Motions to Dismiss are granted under § 2-615.



APPENDIX

Document 4

Attorney No. 58090

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, CHANCERY DIVISION

DENNIS TZAKIS et al., Plaintiffs	)	**2009 CH 6159**
v.	)	
ADVOCATE HEALTH et al, Defendants	)	**HON. SOPHIA H. HALL**
	)	

AUGUST 18, 2016 ORDER RELATING TO PENDING MOTIONS & OTHER ISSUES

Upon the Court being duly informed of the premises for this Order;

IT IS HEREBY STATED:

1. **PLAINTIFFS' MOTION FOR RECONSIDERATION RE 4/3/2015 PUBLIC DUTY RULE DECISION: On February 8, 2016, the Plaintiffs moved per their "Motion based upon Coleman v. East Joliet Fire Protection District for Reconsideration of the April 3, 2015 Order relating to the Local Public Entities and the Public Duty Rule". After briefing and two oral arguments including on this date, this Court grants Plaintiffs' Motion to vacate the Court's dismissal of the LPE claims based upon the Public Duty Rule; specifically, this Court's vacates the Court's April 3, 2015 Decision/Order.**
2. **MAINE TOWNSHIP'S MOTION FOR LEAVE TO CITE ADDITIONAL AUTHORITY: Maine Township's "Motion for Leave to Cite Additional Authority in Support of its Motion for a 304(a) Finding and its Motion to Dismiss the Takings Claim (Count 76) SORELLS V. CITY OF MACOMB, IL App (3d) 140763(October 23, 2015)" is granted.**
3. **CASE MANAGEMENT CONFERENCE: All matters including Case Management issues are entered and continued to MONDAY, OCTOBER 3, 2016 AT 9:30 A.M.**

ENTERED:
Dated: 8/18/16

ENTERED
JUDGE SOPHIA H. HALL-0162
AUG 18 2016
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

HONORABLE SOPHIA H. HALL
JUDGE, COOK COUNTY CIRCUIT COURT

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APPENDIX

Document 5

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, CHANCERY DIVISION

DENNIS TZAKIS, ZENON GIL, CATHY PONCE, ZAIA GILIANA, JULIA CABRALES, and JUAN SOLIS, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, A Proposed Class Action,	)	**Case No. 09 CH 6159 (Consolidated with 10 CH 38809, 11 CH 29586, 13 CH 10423, 14 CH 6755)**
Plaintiffs,	)	**Hon. Sophia H. Hall**
v.	)	
BERGER EXCAVATING CONTRACTORS, INC., ADVOCATE HEALTH AND HOSPITALS CORPORATION D/B/A/ ADVOCATE LUTHERAN GENERAL HOSPITAL, COOK COUNTY, GEWALT HAMILTON ASSOCIATES, INC., VILLAGE OF GLENVIEW, MAINE TOWNSHIP, METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, and CITY OF PARK RIDGE,	)	
Defendants.	)	

DECISION

This matter comes on to be heard on Defendants City of Park Ridge, Metropolitan Water Reclamation District, Maine Township and Cook County's (hereinafter "Local Public Entities" or "LPEs") Joint Motion for Permissive Interlocutory Order Certifying Question for Appeal arising out of this Court's order of August 18, 2016.

In its August 18, 2016 Order, this Court granted plaintiffs' Motion to Reconsider its April 3, 2015 decision dismissing the LPEs. This Court found that the Illinois Supreme Court decision *Coleman v. East Joliet Fire Prot. Dist.*, 2016 IL 117952 (2016) issued on January 22, 2016 abolishing the Public Duty Rule, applied retroactively to the instant case.

This Court, now, on its own motion, reconsiders its order of August 18, 2016. This Court reviewed the parties' briefs on the LPEs' Motion to Certify. In their briefs, the LPEs included arguments which were not presented in the prior briefing on plaintiff's Motion to Reconsider this Court's April 3, 2015 decision. Those additional arguments have persuaded this Court to vacate

paragraph 1 of the August 18, 2016 order and reinstate its decision of April 3, 2015 dismissing the LPEs. For the following reasons, this Court finds that the *Coleman* decision should not be retroactively applied to the instant case.

I

Litigation Posture

The instant case has been in litigation for over seven years since its initial filing on February 11, 2009. Plaintiffs seek damages and a mandatory injunction against defendants arising out of the effects of the flooding of their properties after an intense rainstorm over the period of September 12-14, 2008. The complaint focused on the flood control system that was established to protect their properties from floods. In general, the storm water flowed to plaintiffs' properties from property owned by defendant Advocate Health and Hospitals Corporation. More details of the nature of plaintiffs' claims against all of the defendants are set forth in this Court's April 3, 2015 decision.

The clarity and sufficiency of the plaintiffs' complaint was addressed by defendants' motions. Between February 11, 2009 when the initial complaint was filed, and January 20, 2012, when the Amended Fifth Amended Complaint was filed, numerous motions to dismiss were filed and briefed. The Amended Fifth Amended Complaint is 299 pages long, containing 89 Counts, and 1514 allegations, some of which contain lettered subparts. Those totals are reduced by redactions appearing on the face of pages of the Amended Fifth Amended Complaint, a method utilized to finalize the remaining operative allegations of the complaint.

During the meantime, four cases have been filed alleging additional events of flooding. Those cases have been consolidated with the instant case and are as follows:

Cabrales et al. v. Advocate, 10CH38809: July 24, 2010 flooding event
Huyhn et al. v. Advocate, 11CH29586: July 23, 2011 flooding event
Giliana et al. v. Advocate, 13CH10423: April 18, 2013 flooding event
Solis et al. v. Advocate, 14CH6755: April 18, 2013, July 26, 2013 and May 12, 2014 flooding events

This Court has stayed those cases pending determination of the motions to dismiss filed in the instant case

Motion practice has continued over the years, such that at the present time, after two appeals, the case is still in the pleadings stage. At this time some of the original defendants are no longer parties. Defendant Berger Excavating Contactors, Inc., who was the contractor for the building of components of the system on Advocate's property, filed a Motion for Summary Judgment. This Court granted Berger's Motion and dismissed all claims against Berger with prejudice on September 5, 2014.

The litigation of Gewalt Hamilton, Inc.'s role as the architect who designed the components on Advocate's property was commenced with Gewalt's motion to dismiss filed June 16, 2011. On February 21, 2012, Gewalt filed a second motion to dismiss it from the Amended Fifth Amended Complaint. The motion raised the Statute of Repose and the failure of the Amended Fifth Amended Complaint to plead sufficient facts to support causation. On December 20, 2013, this Court granted Gewalt's motion on both grounds. On June 27, 2014, the parties agreed to a 304(a) finding as to this decision. Plaintiffs filed an appeal. While the case was on appeal, Gewalt settled with plaintiffs. The pending appeal was dismissed with prejudice and the December 20, 2013 order was the final order as to Gewalt.

Advocate, also, sought to have the Counts against it dismissed. On December 20, 2013, this Court granted Advocate's motion in part and denied it in part. A 304(a) finding was entered regarding the dismissed counts. Plaintiffs appealed. On December 18, 2015, the Appellate Court affirmed this Court's decision in part and reversed it in part in *Tzakis v. Advocate Health & Hosps. Corp.*, 2015 IL App (1st) 142285-U. The counts remaining against Advocate are Count 1 Negligence: Dominant Estate Overburdening, Count 7 Negligent Nuisance, Count 8 Negligent Trespass, and Count 11 Intentional Trespass.

Defendants Metropolitan Water Reclamation District of Greater Chicago, Maine Township, City of Glenview, City of Park Ridge, and Cook County, who are the movants herein, are the local public entities having a relationship to the flood control system. These entities, until January 22, 2016, were subject to the Public Duty Rule abolished by the Illinois Supreme Court.

The LPEs filed their first motions to dismiss on March 25, 2010, raising the application of the Public Duty Rule. They continued to include the issue of the application of the Rule in subsequent motions to dismiss. After plaintiffs filed the Amended Fifth Amended Complaint on January 12, 2012, the LPEs, on February 10, 2012, filed another motion to dismiss including the application of the Rule. Briefing ensued and this Court issued its decision applying the Public Duty Rule and dismissing the LPEs on April 3, 2015.

At that point, plaintiffs raised the issue of whether the Public Duty Rule decision applied to its claims for violation of the Takings Clause, Article I, Section 15, of the Illinois Constitution. All the LPEs filed briefs on this issue. At the time of the briefing the law regarding the application of the takings clause was in flux including before the United States Supreme Court. This Court's decision was under advisement when the Illinois Supreme Court issued *Coleman v. East Joliet Fire Prot. Dist.*, 2016 IL 117952 (2016) on January 22, 2016. Plaintiffs, then, on February 8, 2016 moved the Court to reconsider its April 3, 2015 decision based on the retroactive application of the abolishment of the Public Duty Rule. After the parties briefed the issue, on August 18, 2016 this Court vacated its April 3, 2015 decision.

II

This Court reconsiders its August 18, 2016 Order and finds that the *Coleman* decision abolishing the Public Duty Rule should not be applied retroactively to the instant case. Accordingly, this Court reinstates its April 3, 2015 decision dismissing the LPEs.

Standard for Retroactive Application

The standard for determining whether a decision is to be applied retroactively is addressed in *Aleckson v. Village of Round Lake Park*, 176 Ill. 2d 82, 87-88 (1997) and includes three factors. First, whether the decision establishes a new rule of law. Second, whether given the purpose and history of the new rule, its operation will be advanced or hampered by non-retroactive application. Third, whether after balancing the equities, injustice or hardship would result if the decision is applied retroactively.

First, this Court finds that the *Coleman* decision establishes a new rule of law. The law previously applicable to the instant LPE Motion to Dismiss, as set forth in this Court's April 3, 2015 decision, was that the Public Duty Rule applied to a public entity performing a government service to the general public. The Illinois Supreme Court in its *Coleman* decision overruled its decision in the *Zimmerman v. Village of Skokie,* 183 Ill. 2d 30 (1998), and established a new duty upon the LPEs that did not exist before. The court in *Zimmerman* had held that the Public Duty Rule survived the replacement of sovereign immunity with the Tort Immunity Act. The *Coleman* decision abolished the Public Duty Rule.

Second, no argument has been presented that the operation of the abolition of the Public Duty Rule would be advanced or hampered by non-retroactive application.

The LPEs argue that after balancing the equities, injustice and hardship would befall the taxpayers of these public entities, including the plaintiffs, if the abolition of the Public Duty Rule would be applied retroactively to the provision of flood control services at issue in the present seven year old case. It is evident that the litigation posture of the instant case will be dramatically changed now that the Supreme Court has abolished the Public Duty Rule.

Previously, with respect to any possible or pending litigation concerning the provision of governmental services, the LPEs would most likely include consideration of the effect of the Public Duty Rule when predicting the need for financial resources to defend any case against them. The effect of the Public Duty Rule would first require determining whether the services, which could be the subject of the complaint, constitute governmental services to the public. In the instant case, the LPEs took the position that flood control is a governmental service, subject to the Public Duty Rule. This position ultimately prevailed.

The retroactive application of the *Coleman* decision dramatically changes the considerations concerning the possible course of litigation of the instant case in the future. First,

the determination of whether a class action should be declared as an appropriate procedure for addressing the legal and factual issues must be determined, including the circumstances in the four additional cases consolidated with the instant case. Additionally, the LPEs must plead and undertake the burden of proving any affirmative defense available under the provisions of the Tort Immunity Act. If the LPEs raise section 2-201 of the Tort Immunity Act, the issue of whether the alleged conduct is discretionary or ministerial will require litigation because that issue is determined on a case by case basis. The Illinois Supreme Court so observed in the case *Van Meter v. Darien Park Dist.,* 207 Ill. 2d 359, 370-376 (2003). These steps require additional motion practice, investigation, and discovery through interrogatories and depositions of numerous defendants and plaintiffs.

The consequence to the LPEs of the abolition of the Public Duty Rule as a defense is financial. Every public entity has a responsibility to its taxpayers to estimate budgets and to tax its citizens reasonably. Predicting legal expenses is difficult because the entity does not know whether litigation will be filed. Once filed, the entity then must budget for the potential expenses of the litigation based on a prediction of the legal and factual issues which might be involved. Legal issues, to be determined based on facts alleged in pleadings taken as true, such as the application of the Public Duty Rule, involve different legal expenses than the expenses necessary to prepare for class certification, prove the availability of immunities under the Tort Immunity Act, and defend against assertions of wrongdoing.

The instant case, claiming that the LPEs are liable for flooding that occurred as claimed by plaintiffs in five class action lawsuits, illustrates the LPEs challenge in predicting the course of litigation and estimating the costs to its taxpayers. Here, since 2008, the LPEs relied on the application of the Public Duty Rule. Now, the new law, if applied retroactively, means that this 7 year old case will require substantially more litigation preparation than could have been predicted. This is a hardship on the LPEs and their taxpayers considering the unpredictable and unexpected reversal of longstanding law, the complexity of the case, and the passage of time.

For the foregoing reasons, this Court vacates paragraph 1 of the August 18, 2016 Order, reinstates its decision of April 3, 2015 and dismisses the LPEs.

ENTERED:
JUDGE SOPHIA H. HALL-0152

FEB 01 2017

DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge Sophia H. Hall

Date: 2/1/17

APPENDIX

Document 6

DMS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DENNIS TZAKIS, ZENON GIL, CATHY PONCE, ZAIA GILIANA, JULIA CABRALES, AND JUAN SOLIS ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, A Proposed Class Action, Plaintiffs	)	HON. SOPHIA H. HALL CASE NO. 09 CH 06159
v.	)	JURY DEMAND
BERGER EXCAVATING CONTRACTORS, INC., ADVOCATE HEALTH AND HOSPITALS CORPORATION D/B/A ADVOCATE LUTHERAN GENERAL HOSPITAL, COOK COUNTY, GEWALT HAMILTON ASSOCIATES, INC., VILLAGE OF GLENVIEW, MAINE TOWNSHIP, METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, and CITY OF PARK RIDGE, Defendants	)	

AMENDED FIFTH AMENDED CLASS ACTION COMPLAINT
AMENDING THE COMPLAINT ONLY ON ITS FACE

The Plaintiffs Dennis Tzakis, Zenon Gil, Cathy Ponce, Zaia Giliana, Julia Cabrales, and Juan Solis, on behalf of themselves and on behalf of all others similarly situated within the Robin-Dee Community Area Plaintiffs' Class, as proposed Plaintiff Class Representatives of the Robin-Dee Community Area Plaintiffs' Classs, by and through their attorneys, Phillip G. Bazzo, Macuga, Liddle, and Dubin, P.C., admitted Pro Hac Vice Counsel herein, Timothy H. Okal, Spina, McGuire and Okal, P.C., and William J. Sneckenberg, Sneckenberg, Thompson and Brody, P.C., state in support of their Fifth Amended Complaint against the Defendants Berger Excavating Contractors, Inc. ("Berger"), Advocate Health and Hospitals Corporation d/b/a Advocate Lutheran General Hospital ("Advocate"), Gewalt Hamilton Associates, Inc. ("Gewalt"), Metropolitan Water Reclamation District of Greater Chicago ("District"), City of Park Ridge ("Park Ridge"), Maine Township ("Township"), Village of Glenview ("Glenview"), and Cook County ("County"), the following averments.

EXHIBIT
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TABLE OF CONTENTS

PART I: JURISDICTION, VENUE AND CLASS ACTION AVERMENTS

1. The proposed Representative Plaintiffs Dennis Tzakis, Cathy Ponce, Zenon Gil, Zaia Giliana, Julia Cabrales, and Juan Solis resided in and continue to reside in the **Robin Court-Dee Road Community Area (herein "Robin-Dee Community Area")** ~~including the Park Ridge North Ballard Neighborhood~~ within the Township of Maine and the City of Park Ridge, Cook County, State of Illinois and were and are citizens of the State of Illinois. **See Complaint Exhibit 1.**
2. "Plaintiffs" are defined to mean and include: (i) all family members of all residents including all children, adults, elderly persons and/or home companions residing in the flood damaged residences at the time of the invasion, (ii) all persons who resided, occupied and/or owned property of any nature within these flood damaged residences at the time of the invasion; (iii) all persons who were and/or are owners of the flood damaged residences and other damaged real and/or personal property; (iv) all persons who were and/or are lessors of the properties who sustained water invasion damage, and (v) all insurers and/or subrogees of any of the persons who sustained water invasion damage.
3. **"Plaintiffs' property"** or **"property"** means and includes the Plaintiffs' residences, buildings, vehicles and/or any and all real property and/or personal property owned, rented, leased and/or otherwise controlled by a Plaintiff and any and all other property of any nature including legal estates of real property of a Plaintiff within Robin-Dee Community. "Plaintiffs' property" includes all servient estates of real property owned and/or controlled by a Plaintiff in relationship to a defendant's dominant estate(s) of real property.
4. The Defendant Berger Excavating Contractors, Inc. ("Berger") was and is an Illinois corporation doing business in Cook County, Illinois and is a citizen of Illinois.

5. The Defendant Advocate Health and Hospitals Corporation d/b/a Advocate Lutheran General Hospital ("Advocate") was and is an Illinois corporation doing business in Cook County, Illinois and is a citizen of Illinois. "Advocate" includes all predecessor corporations and all related corporations of Advocate.
6. The Defendant Gewalt Hamilton Associates, Inc. ("Gewalt") was and is an Illinois corporation doing business in Cook County, Illinois and is a citizen of the State of Illinois. "Gewalt" includes all predecessor corporations and associations and all related entities.
7. The Defendant Cook County ("County") was and is under the Tort Immunity Act ("TIA") a "local public entity", doing business in Cook County as a citizen of Illinois.
8. The Defendant Village of Glenview ("Glenview") was and is a "local public entity" under the TIA doing business in Cook County as a citizen of Illinois.
9. The Defendant Maine Township ("Township") was and is a "local public entity" under the TIA, doing business in Cook County as a citizen of Illinois.
10. The Defendant Metropolitan Water Reclamation District of Greater Chicago (the "District") was and is a TIA "local public entity", doing business in Cook County as a citizen of Illinois.
11. The Defendant City of Park Ridge ("Park Ridge") was and is a "local public entity" under the TIA, doing business in Cook County, as a citizen of Illinois.
12. "Defendant" includes any predecessor or successor in interest and/or title of a Defendant.
13. This case has an amount in controversy that exceeds $75,000 and satisfies the other minimum legal and equitable jurisdictional amounts and conditions of this Court.
14. Cook County is the proper venue as (a) these claims arise out of occurrences occurring in Cook County, (b) the Plaintiffs reside and/or own property in Cook County, (c) non-governmental Defendants do business in Cook County, and (d) local public entities operate in Cook County.

PART II: ROBIN-DEE COMMUNITY AREA PLAINTIFF CLASS

15. The proposed **Robin-Dee Community Area** Class Representatives Plaintiffs Dennis Tzakis, Cathy Ponce, Zenon Gil, Zaia Giliana, Julia Cabrales, and Juan Solis resided in, owned residences and owned other properties within the Robin-Dee Community Area and continue to reside in, continue to own residences and continue to own other properties in this Area.

16. Nothing here in this paragraph is intended in any way to prevent the certification of this action as a class action. The following listing of plaintiff class members is only for purpose of providing notice to the Defendants as to known claimants within the class and not limitation. The plaintiff members of the class include but are not limited to the following persons: Dennis Tzakis, Cathy Ponce, Zenon Gil, Edward Lee-Fatt, Zaia Giliana, Julia Cabrales, and Juan Solis, the proposed representative plaintiffs; Angela DeLeon, Fred Dinkha, Lisa Hegg, Carolyn Reed, , and Jerry Tzakis, Griselda Alarcon, Mohammed Anwer, Khalid Anwer and Rahila Afshan, Fidelmar Arriaga and Georgina Catalan, Cesar Arteaga and Edith Castaneda, Fazle Asgar and Farida Yasmee, Wanda Austin, Lubna Awwad and Eddie Michael, Noma and Subul Baig, Domingo and Daditha Barbin, Valerie Barton, Madline Baturin, Salvador Berrum, Briar Court Condominium Association, Roque Carbrales, James and Michelle Catane, Charles Cawelle and Ferron Forrester, Alejandro and Abehna Chavez, Pravin Chokshi and Dixit and Sancotta Chokshi, Felipe Contreras, Rodulfo Cuballes, Ricardo Cuevas, Thalia and Konstantinos Davos, Antonio DeLeon, Francisco Diego and Felicitas Paguia, Michelle Diego and Marlon Mansalapuz, Nawal Dinka, Ismael and Angela Dominguez, Nieves Escobar, Bernabe and Marcelina Escobedo, Smajl and Safete Feka, Richard Gabrel, Ananda Gil, Evon Giliana, Ioan and Analiana Gyulai, Chigozie and Flora Harry, Abu and Laila Hasan, Syed and Asmat Hasan, Carlos and Gina Herbias, Alejandro and Brenda Herrera, Agustin Herrera and Marina Enrriguez,

Daniela Hristova and Ilia Georgiev, Eloy and Martha Huicochea, Aaron Huynh and Beyinda Phan-Huynh, Amir and Shamoona Khan, Shashi and Sandeep Khurana, Charles and Aloha Koffler, Harshad and Bharti Kothari, Oliver and Marjorie Lawrence, Sr., Linnette Lee-Fatt, Alexander Leschinsky and Marina Aksman, Cipriano Librea and Margarita Tungcab, Jaime and Ana Macapugay, Nitin and Nidhi Malik, Nicanor and Lourdes Mandin, Javier and Maria Montes, Jose and Maria Nunez, c/o Janet Nunez, Oluwatoyin and Olajide Okedina, Rajendran and Lilitha Paramasivam, Rosalinda Paramo, Katuiscia Penette, Victor and Catalina Ponce, c/o Cathy Ponce, Sheel and Minu Prajapati, Christopher Reed and Amy Berenholz, Shabbis and Zeenat Samiwala, Anne Sloma, Jefferson and Shirley Ann Sotto, Deborah Tzakis, Christina Tzakis, Annalinda Villamor, Noel and Lucent Wilson, Joshua Winter and Beth Campbell, Robert Yalda, Robert and Helda Youkhana, Magdalena Zieba-Surowka and Bartosz Surowka and Vela Swain.

17. The proposed Representative Plaintiffs bring this proposed class action pursuant to 735 ILCS 5/2-801 on behalf of themselves and on behalf of all other persons, owners, residents and/or insurers within the **Robin-Dee Community Area Class** affected by the **Prairie Creek Stormwater System**'s stormwater surface overflows complained of herein.

17.1. Generally, the **Robin-Dee Community Area Class** includes the Robin-Dee Community, ~~but also includes other neighborhoods upstream of the Robin-Dee Community and includes neighborhoods in **Park Ridge** such as the **Park Ridge North Neighborhood**~~.

17.2. The Proposed Robin-Dee Community Area Class substantially exceeds 500 citizens.

17.3. The Robin-Dee Community Area Class Plaintiffs consist of all persons (including insurers) who sustained injury or damage arising from surface water and/or sanitary sewer

home-invasive flooding on **September 13, 2008** from the overflow of the Prairie Creek Stormwater System.

17.4. This class includes persons who sustained sewer water invasions through this area's sanitary sewers due to the overflow of the Prairie Creek Stormwater System including the Main Drain overflows and Ballard, Pavilion and Dempster Basins overflows ~~including in areas upstream of Potter Avenue in the Prairie Creek Watershed~~.

17.5. This class includes persons in the **Robin Neighborhood, Dee Neighborhood, Briar Neighborhood,** ~~and **Park Ridge North Neighborhood** besides other neighborhoods including other neighborhoods which may be uncovered during discovery upstream of Potter Avenue~~.

17.5.1. ~~The **Park Ridge North Ballard Neighborhood** includes water invasion citizen victims north of Ballard Road on Western, Parkside, Home and Woodview within Park Ridge~~.

17.6. ~~Other areas of the Prairie Creek Watershed upstream of the Robin-Dee Community may also be affected by the stormwater and sanitary water defects as discovery is ongoing *~~.

18. As detailed herein relating to the issues of fact and law, there are questions of fact and law common to the members of the Robin-Dee Community Area Plaintiff Class which predominate over questions affecting only individual members as required by 735 ILCS 5/2-801(2).

19. The Representative Plaintiffs and their attorneys will fairly and adequately represent and protect the interests of the proposed Robin-Dee Class as required by 735 ILCS 5/2-801(3).

20. This proposed Class Action is an appropriate method for the fair and efficient adjudication of this controversy as contemplated by 735 ILCS 5/2-801.

PART III. STATEMENT OF FACTS COMMON TO ALL COUNTS

21. "This Defendant" means each defendant. By this averment is meant that these averments are direct to each Defendant individually, requiring an individual answer. It is not the intent of this pleading to plead a "joint" averment, that is, an averment requiring this Defendant to answer as to another Defendant or the knowledge of another Defendant. Each Defendant is requested to answer these averments only as to its knowledge. "Joint allegations", "joint counts", "joint knowledge" or joinder of claims is not the intent of this Part of this Complaint. This statement applies to Subparts in Part III and is incorporated into all Subparts.

22. "Defendant" means this Defendant (through its attorney) who is answering this Part III. Each Defendant is request to respond to this Part III.

23. "**At all relevant times**" prefaces each averment paragraph.

24. "**Upon information and belief**" qualifies each averment sentence where an **asterisk** appears at the end of the averment sentence unless otherwise evident from the context.

III.A.OVERVIEW OF PRAIRIE CREEK STORM WATER SYSTEM MAP

25. Over the decades Park Ridge, the County, Maine Township, and the District among other local public entities in coordination with their private partners including Advocate and Gewalt developed a man-made public improvement hereinafter referred to as the Prairie Creek Stormwater System ("PCSS"). These local public agencies have controlled the process of the PCSS public improvement's development through their review, approval and construction oversight including original plat approvals dated in 1960 and 1961 for the Robin-Dee Community. Each of these local public entities receives tax monies and fees from Plaintiffs for the services it provides relating to planning, development, review and/or management of the

Prairie Creek Stormwater System public improvement. Attached hereto and incorporated herein as Exhibit A is a Google Earth Image of the most relevant area of the Prairie Creek Stormwater System to the most immediate causes and responsibilities for the September 13, 2008 man-made home-invasive flooding as alleged herein by the Plaintiffs.

26. The PCSS is a stormwater system of public improvements consisting of a (a) a central Main Drain ultimately receiving all Prairie Creek Watershed stormwater, said main drain consisting of open, channelized drains like the Robin Neighborhood Main Drain, and enclosed pipes like the Dee Neighborhood Stormwater Pipe, and other drains and culverts in various segments along the path of the Main Drain; (b) retention/detention basins for stormwater storage such as the Ballard Basin, Pavilion Basin and Dempster Basin and their tributary stormwater sewers which feed these basins; and (c) tributary stormwater sewers usually under the streets collection street stormwater runoff which then drain to the Main Drain or its storage components.

27. The PCSS receives generally receives most of the stormwater runoff within the Prairie Creek Watershed (PCW), a watershed which exceeds 1 square mile upstream of the 60" Howard Court Culvert at Point E yet is expected by its operator(s) to safely drain through this culvert without flooding the Robin-Dee Community. See Exhibit 1.

27.1. The North Drain Main Drain and Robin-Dee Main Drain of the Prairie Creek Main Drain drains stormwater essentially from Point A on the north, the east boundary of the North Development Main Drain and Point B on the south to Point J on the west.

27.2. The thick white arrows on Exhibit 1 show the general path of the Main Drain's stormwater as it proceeds through the Main Drain's North Development Main Drain Subsystem and the Main Drain's Robin-Dee Main Drain of the PCSS.

27.3. Exhibit 1 sets forth terms that are incorporated herein and will be used to describe the stormwater structures, flows and other facts relevant to this case.

28. Relating to Exhibit 1 and the North Development Main Drain Subsystem of the PCSS , the PCW's Upstream stormwater enters at Point A1, the Upstream Main Drain's discharge point.

29. The upstream stormwater from Point A1 flows either to the Ballard or Pavilion Basin, where the stormwater discharges to the 60" Ballard Basin Discharge Culvert at Point A3.

30. Stormwater also enters the Ballard Basin at Point A2, Point A2 stormwater being collected from the tributary storm sewers which are located in Park Ridge and/or Maine Township*.

31. During dry weather conditions, stormwater remains in the Ballard Basin; only when it rains does the Ballard Basin stormwater discharge through Point A3, the Ballard Basin Discharge Culvert into the MD Robin-Dee Community Segment.

32. The Ballard and Pavilion Basin's stormwater then flows to Point A3, which is the 60" Ballard Basin Discharge Culvert; over 1 square mile of Upstream Watershed stormwater is expected by its operator(s) to flow through this single 60" culvert.

33. The 60" Ballard Basin Discharge Culvert then discharges to Point C1, the north 60" Ballard Robin Alley Culvert.

34. The Robin Neighborhood Subsegment of the Prairie Creek Stormwater System includes besides the Robin Neighborhood Main Drain the Maine Township tributary stormwater sewers within to the Robin Neighborhood*.

35. The Robin Neighborhood Main Drain begins at Point C1 and Point C2, the identical 60" culverts. These Robin Alley Culverts are side-by-side under the Robin Alley bridge.

36. Point C2 , the south 60" Dempster Robin Alley Culvert, receives Dempster Basin stormwater.

37. The Dempster Basin contributes flow to the Robin Neighborhood Main Drain from the South Development drains through an 84" stormwater sewer turning at Point B1 to Point B2.

38. Point B3 is the 60" Dempster Basin Discharge Culvert which receives the Dempster Basin stormwater and conveys it through the 60" Robin Alley Stormwater Sewer to Point C2.

39. During land-invasive and home-invasive flooding, overflowing surface water invades the Robin Neighborhood from the Dempster Basin Parking Lot, between Points B3 and C2.

40. Point D is the 120" Robin Court Culvert receiving the Robin Neighborhood Main Drain's stormwater from the twin 60" Robin Alley Culverts.

41. Point E is the 60" Howard Court Culvert through which the owner(s), engineer(s) and/or operator(s) of the Robin Neighborhood Main Drain attempt to drain the 120" upstream flow from the 120" Robin Court Culvert and the twin 60" Robin Alley Culverts.

42. The Robin Neighborhood Main Drain begins at Points C1 and C2, the twin 60" Robin Alley Culverts and ends at Point E, the 60" Howard Court Culvert.

43. Point E, the Howard Court Culvert is the intake culvert for the 60" Dee Neighborhood Stormwater Pipe ("DNSP") which is also the Dee Neighborhood Main Drain.

44. Points F1, F2 and F3 are points of tributary stormwater flow into the DNSP.

45. Point G is the Dee Road Junction Manhole through which the Dee Neighborhood Main Drain flows in its DNSP and which receives stormwater from Points F1, F2 and F3.

46. Point H is the 60" discharge end pipe of the 60" Dee Neighborhood Stormwater Pipe which empties the Dee Neighborhood MD into an open channel, the Briar Neighborhood MD.

47. The Dee Neighborhood Main Drain is the Dee Neighborhood Stormwater Pipe extending from Point E, the Howard Court Culvert, to Point H.

48. The PCSS's Dee Neighborhood Subsegment includes both the Dee Neighborhood Main Drain and its tributary stormsewers beginning at Points F1 and F2.

49. Point I is a hard, right 90 degree turn of the Briar Neighborhood Main Drain, where the entire Prairie Creek Main Drain is expected to turn and proceed north to the Rancho Lane Neighborhood.

50. Point J is the approximate location of the Rancho Lane Culverts.

51. Point H through Point J is the Briar Court Main Drain.

52. The Robin-Dee Community Main Drain means the Main Drain from Points C1 and C2 through and past Point J west to Potter Road.

53. "Robin-Dee Community" refers to the Robin Neighborhood platted in or around 1960 and the Dee Neighborhood platted in or around 1061 and contiguous parcels such as the apartment parcel on the eastside of Dee Road and the Briar Court Condominium parcel.

54. "Robin Dee Community Area" means the Robin-Dee Community ~~and other nearby areas within the Prairie Creek Watershed~~ which sustained invasive flooding on September 13, 2008 because of the surface water overflow flooding described herein. ~~This term includes the Park Ridge North Ballard Neighborhood.~~

55. Point A3 is situated near the bank of the Ballard Basin; the Ballard Basin together with the Pavilion Basin which is to the east of Ballard Basin constitute the North Development Ballard Basin Complex which includes connected sewers and stormwater structures.

56. Point B2 is near the bank of the Dempster Basin. "Basin Structures" or "Primary Basin Structures" mean the Ballard, Pavilion and Dempster Basins and their and any connected stormwater subsystem including interconnected drains.

57. Points A1, A2 and A3 and B1, B2 and B3 on on Advocate's North Development which includes Advocate's property north of Dempster Road and includes (1) the Basin Structures (2) North Development Main Drain and (3) other lands, buildings and improvements including streets, parking lots and parking garage(s). See Exhibit 1.

58. Point B2 receives stormwater from Advocate's South Development which is Advocate's property south of Dempster Road, which includes land, building and other improvements.

III.B. PRE-1960 MAIN DRAIN NATURAL PATH MEANDERING NOT STRAIGHT

59. The **Prairie Creek Watershed** ("PCW") is a stormwater watershed generally having its boundaries as Golf Road on the north, Washington Ave. on the east, Dempster Road on the south and Potter Road on the west in Maine Township, Park Ridge, Glenview, Niles and Des Plaines. The PCW specific boundaries are delineated in the 2002-Initiated IDNR Farmers/Prairie Creek Strategic Planning Investigation (herein "**2002 IDNR Investigation**").

60. Through most of the first-half of the 20th century, and (a) before 1960, before the **Robin Neighborhood** was platted in 1960 and the **Dee Neighborhood** was platted in 1961, and (B) before the Robin-Dee Community Area Plaintiff Class' land and residences were built and developed in these two neighborhoods, the **Prairie Creek** naturally meandered through the **PCW** through the **Robin-Dee Community Area**.

60.1. The **Robin-Dee Community Area** and Robin-Dee Community Area Class is defined here by these three primary neighborhoods affected by the 2008 home-invasive flooding along other contiguous neighborhoods may have been affected as further discovery may reveal.

60.2. The **Robin Neighborhood** is bounded on the north by Ballard, on the east by Robin Alley, on the south by Dempster, and on the west by Howard Court and a line to Ballard.

60.3. The **Dee Neighborhood** is bounded on the north by the Dee Neighborhood Main Drain, on the east by Howard Court, on the south by Dempster and on west by Briar Court.

~~60.4. The **Park Ridge Ballard North Neighborhood** is bounded on the north by Church, on the east by Western, on the south by Ballard and on the east by Columbus/Federal.~~

60.5. The Robin Dee Community is the Robin Neighborhood and the Dee Neighborhood .

~~60.6. The **Robin Dee Community** and the **Park Ridge Ballard North Neighborhood** form the **Robin Dee Community Area**, the primary Plaintiff Class area pending further discovery.~~

61. A semi-circular line from Points C1-C2 to Point F3 to Point I depicts the Prairie Creek's natural path the Prairie Creek before its development as the Prairie Creek Stormwater System Public Improvement.

III.C. 1960-61 PARK RIDGE AND COUNTY APPROVED RN-DN PLAT PLAN-60" HOWARD COURT CULVERT AND DEE NEIGHBORHOOD STORMWATER PIPE

62. Before or around 1960. the public improvements of the PCSS's Robin Neighborhood Main Drain had been or were being constructed. The developer of the Robin Neighborhood prepared a plat plan depicting the existing straightened, man-made route **Main Drain** on which the **Robin Neighborhood** Main Drain was laid out. This plat plan was entitled "Dempster Garden Homes Subdivision" (herein "**RN Plat Plan**") and is geographically coextensive with the Robin Neighborhood, being Ballard to Robin Court Alley to Dempster to Howard Court back to Ballard.

62.1. The developer also prepared other stormwater and sanitary sewer water management documents to the **RN Plat Plan** which where necessary or required as preconditions to obtaining LPE approvals relating to stormwater and sanitary sewer water management.

62.2. The developer submitted these water management plans to **Park Ridge** and the **County** for their review and expected approval water management requirements set by them *.

62.3. These plans requested permission and authority for construction and improvements including public improvement construction from **Park Ridge** and the **County** to drain stormwater into the PCSS's Robin Neighborhood Main Drain *.

63. In or around 1960, **Park Ridge** & the County received the **RN Plat Plan** and the necessary and/or required sewer water management plan *. **Park Ridge** & the **County** reviewed the **RN Plat Plan** including sewer water management plans for compliance with **Park Ridge** & County stormwater drainage requirements *. **Park Ridge** & the County also reviewed the **RN Plat Plan** for compliance with their sanitary sewage collection requirements for plat plan approval *.

64. In or around 1960, **Park Ridge** and the County approved the **RN Plat Plan**. Concurrent with the **RN Plat Plan** approval, **Park Ridge** approved sewer construction plans including approving all storm and sanitary sewers to be installed as compliant with applicable laws *.

65. The **RN Plat Plan** set forth that **Park Ridge** and/or the **County** represented to the developer that the developer could hook up to a public sanitary sewer system or interceptor sewer to serve all of the residences in this subdivision in conformity with standards of design and safety adopted by the Cook County Department of Health governing sanitary sewers.

66. **RN PLAT MD DRAINAGE EASEMENT**: The **RN Plat** provided, conveyed, created, dedicated and/or acknowledged easements for ingress and egress to the public, governmentally-owned and/or governmentally-controlled **Robin Neighborhood Main Drain**.

66.1. The **RN Plat Plan** provided, conveyed, created, dedicated and/or acknowledged easements along the existing path of the **Robin Neighborhood Main Drain** within an "EASEMENT FOR DRAINAGE DITCH" (herein **"RN Plat's MD Drainage Easement"**).

66.2. The **RN Plat's MD Drainage Easement** consisted of **two areas** which are both 265' long, the distance between the Robin Alley, the Robin Court and Howard Court Culverts.

66.3. The District, Park Ridge, Maine Township, Glenview and/or the County were and/or are and/or continue to be the easement holders of this MD Drainage Easement *.

66.4. The District, Park Ridge, Maine Township, Glenview and/or the County were permitted and/or authorized by the MD Drainage Easement to construct, build, improve, maintain, clean and/or perform any other activity related to or arising out of the ownership and/or operation of the **Robin Neighborhood Main Drain** *.

67. **RN PLAT TRIBUTARY STORMWATER SEWER EASEMENT**: The **RN Plat Plan** also provided, conveyed, created, dedicated and/or acknowledged utility easements for the Robin Neighborhood's **Tributary Stormwater Sewer Service** tributary to the **Robin Neighborhood Main Drain** ("**RN Plat's Tributary Stormwater Sewers Easement**).

67.1. The **RN Plat Plan** provided, conveyed, created, dedicated and/or acknowledged easements along the route of the existing **RN Tributary Stormwater Sewers** which sewers drain into the Robin Neighborhood Main Drain.

67.2. The existing 60" **Robin Alley Sewer conveys stormwater from the Dempster Basin** under **Robin Alley** to the **Robin Alley Culverts** which discharge into the **M D Robin Neighborhood Subsegment** is within the **RN Tributary Stormwater Sewers Easement.**

67.3. The District, Park Ridge, Maine Township, Glenview and/or the County were and/or are the easement holders of the RN Plat's Tributary Stormwater Sewers Easement *.

67.4. The District, Park Ridge, Maine Township, Glenview and/or the County were permitted and/or authorized by the RN Plat's Tributary Stormwater Sewers Easement to construct,

build, improve, maintain, clean and/or perform any other activity related to or arising out of the ownership and/or operation of stormwater sewers tributary to the Main Drain * .

68. **RN PLAT'S SANITARY SEWER EASEMENT**: The **RN Plat Plan** also provided, conveyed, created, dedicated and/or acknowledged a **Sanitary Sewer Easement** ("**RN Plat's Sanitary Sewer Easement**") for municipal sanitary sewer service within the **Robin Neighborhood**.

68.1. The District, Park Ridge, Maine Township, Glenview and/or the County were and continue to be the easement holders of the RN Plat's Sanitary Sewers Easement *.

68.2. The District, Park Ridge, Maine Township, Glenview and/or the County were permitted and/or authorized by the RN Plat's Sanitary Sewers Easement to construct, build, improve, maintain, clean and/or perform any other activity related to or arising out of the ownership and/or operation of sanitary sewers within the Robin Neighborhood *.

69. RN PLAT PLAN A TIA PLAN: The **RN Plat Plan** is a plan within the meaning of "plan" as the term "plan" is used in Article III of the Tort Immunity Act.

70. STORMWATER STRUCTURES WITHIN APPROVED PLAN: The following existing stormwater structures are within the governmentally-approved **RN Plat Plan's Easements**: (a) the undersized 60" **Howard Court Culvert**; (b) the 100 yard upstream 120" **Robin Court Culvert**; (c) the 100 yards upstream twin **60" Robin Alley Culverts**; (d) **Robin Neighborhood Main Drain** which flows through the Robin Court Culvert but bottlenecks at the Howard Court Culvert; and (e) the **60" Robin Alley Stormwater Sewer** now connected to the Dempster Basin, transporting stormwater from the Dempster Basin to the **Robin Neighborhood Main Drain**.

71. In or around 1960, **Park Ridge** issued permits for the construction of the existing **RN Plat's Tributary Stormwater Sewers and Sanitary Sewers** as set forth in the tributary stormwater sewers easements identified in the RN Plat Plan *. Construction occurred per these Permits *.

72. In or around 1960, the **County** issued permits for the construction of the existing **RN Plat's Tributary Stormwater Sewers and Sanitary Sewers** as set forth in the tributary stormwater sewer easement in the RN Plat Plan *. Construction occurred per these Permits*.

73. The foregoing eleven paragraphs are incorporated by reference with the substitution of "DN Plat Plan" for "RN Plat Plan. " In or around 1961, the developer of the Dee Neighborhood prepared a similar plat plans as the RN Plat Plans depicting the straightened route of the **Dee Neighborhood Main Drain** channeled through the undersized 60" **Dee Neighborhood Stormwater Pipe.** This plat plan was entitled the "First Addition to the Dempster Garden Homes Subdivision" (herein "**DN Plat Plan**").

74. In or around 1961, Park Ridge & **County** approved the **DN Plat Plan**. Concurrently, **Park Ridge & the County** approved all sewer water management plans *.

75. As set forth in the **DN Plat Plan**, the County, Park Ridge, the District, Glenview and/or Maine Township represented to the developer that the developer could hook up sewers to a public sanitary sewer system or interceptor sewer to serve residences in this subdivision in conformity with standards of design and safety adopted by the Cook County Department of Health.

76. **DN PLAT MD DRAINAGE EASEMENT**: The **DN Plat** provided, conveyed, created, dedicated and/or acknowledged easements for ingress and egress to the public, governmentally-owned and/or governmentally-controlled **Dee Neighborhood Main Drain of the PCSS.**

76.1. Specifically, the **DN Plat Plan** provided, conveyed, dedicated and/or acknowledged easements along the existing path of the Dee Neighborhood **Main Drain** within the **Dee Neighborhood** within an easement for drainage ditch (herein "**DN Plat's MD Easement**").

76.2. The **DN Plat's MD Drainage Easement** consisted of the routing of the **Dee Neighborhood Stormwater Pipe** which channeled the **Main Drain**.

76.3. The District, Park Ridge, Maine Township, Glenview and/or the County were and continue to be the easement holders of the DN Plat's MD Drainage Easement *.

76.4. The District, Park Ridge, Maine Township, Glenview and/or the County were permitted and/or authorized by the DN Plat's MD Drainage Easement to construct, build, improve, maintain, clean and/or perform any other activity related to or arising out of the ownership and/or operation of the undersized 60" **Dee Neighborhood Stormwater Pipe** conveying the **Dee Neighborhood Subsegment** of the **Robin-Dee Community Segment** of the **Main Drain** within the **DN Plat's MD Drainage Easement** *.

77. **DN PLAT TRIBUTARY STORMWATER SEWER EASEMENT**: The **DN Plat Plan** also provided, conveyed, created, dedicated and/or acknowledged utility easements for the Dee Neighborhood's **Tributary Stormwater Sewer Service** referred to herein as the **DN Plat's Tributary Stormwater Sewers Easement**.

78. **DN PLAT'S SANITARY SEWER EASEMENT**: The **DN Plat Plan** also provided, conveyed, created, dedicated and/or acknowledged a **Sanitary Sewer Easement** ("**DN Plat's Sanitary Sewer Easement**") for municipal sanitary sewer service within the **Dee Neighborhood**.

79. RN PLAT PLAN and DN PLAT PLAN A TIA PLAN: The RN Plat Plan and the **DN Plat Plan** is a plan within the meaning of "plan" as used in Article III of the Tort Immunity Act.

80. In or around 1961, **Park Ridge** & the County issued permits for the construction of the existing **DN Plat's Tributary Stormwater Sewers** within the DN Plat Plan *.

81. In or around 1961, **Park Ridge** & the County issued permits for the construction of the existing **DN Plat's Sanitary Sewers** as set forth in the sanitary sewer easements in the DN Plat Plan *.

III.D. GOVERNMENTAL DEFENDANTS SUPERVISED SEWERS INFRASTRUCTURE

82. During the land development of the Robin-Dee Community Area, the County, the District, Park Ridge, Maine Township and/or Glenview authorized and permitted the construction of stormwater sewers developed stormwater sewers serving the Robin-Dee Community Area including the stormwater and sanitary sewer infrastructure in and around the Robin-Dee Community Area, these stormwater sewers being structures and elements of the PCSS.

83. In or about early 1960s, the following **Prairie Creek Stormwater System** structures had been built or were built and both **Park Ridge** and the **County** knew of their existence and their drainage and conveyance capacity

84. The Prairie Creek has been converted by urbanization including public improvements such as channelization in the Robin-Dee Community to a stormwater drain and will be referred to as the "Prairie Creek Main Drain", "Main Drain" or "MD".

85. The Prairie Creek Main Drain is now part of a complex, interrelated stormwater system which be referred to as the "Prairie Creek Stormwater System" ("PCSS"). The PCCC receives, conveys, stores and discharged stormwater collected within the now-urbanized, publicly improved Prairie Creek Watershed.

86. The now-straightened, channelized subsegment of the Prairie Creek Main Drain of the Prairie Creek Stormwater System proceeding through the Robin Neighborhood will be referred to as the "MD Robin Neighborhood Subsegment" of the Prairie Creek Stormwater System. The Robin Neighborhood Main Drain is a channelized 10' wide open stormwater drain beginning at the Robin Alley on the east and proceeding west to Howard Court.

87. The Main Drain flows from east to west within the Dee Neighborhood through a 60" enclosed stormwater pipe (the "MD Dee Neighborhood Stormwater Pipe"). The MD Dee Neighborhood Stormwater Pipe is a 60" enclosed stormwater pipe which begins at Howard Court and ends at the western boundary of the Dee Neighborhood. The MD Dee Neighborhood Pipe receives stormwater through the Howard Court Culvert from the Robin Neighborhood Main Drain.

88. The straightened segment of the Prairie Creek has become a stormwater drain integral to the operation of the entire Prairie Creek Stormwater System as the only exit for stormwater from the North Development Main Drain is the Robin-Dee Community Main Drain (from Points C1-C2 through Point J) which is the Robin-Dee Community Segment of the PCSS. A segment as used herein means, not only the Main Drain but the tributary sewers feeding the Main Drain and related and connected tributary structures. For example, F1 and F2 are tributary stormwater sewers conveying stormwater to the Main Drain.

88.1. The existing **Robin-Dee Main Drain**'s straightened path from Robin Alley to the Briar Court Elbow (**Points C1-C2 through Point I**) was not its original route, original path, original topography or original elevations of the Prairie Creek.

88.2. Through development and urbanization, the Prairie Creek has been transformed from a natural creek to the man-made PCSS conveying stormwater from areas upstream and tributary to the Prairie Creek Main Drain within the now-urban Prairie Creek Watershed.

88.3. One or more of the governmental defendants approved this straightening of the Main Drain Robin-Dee Community Segment of the PCSS.

89. Before 1987, the following Prairie Creek Stormwater Structures were constructed within the : (a) the Robin Neighborhood Main Drain; (b) the twin 60" Robin Alley Culverts; (c) The 60" Robin Alley Stormwater Sewer currently connected to the Dempster Basin and the Robin

Neighborhood Main Drain; (d) the 120" Robin Court Culvert; and (e) the 60" Howard Court Culvert.

90. Both **Park Ridge** and the **County** (a) approved the existence of these Prairie Creek Stormwater Structures, (b) approved their drainage and conveyance capacity, and (c) knew of the undersized 60" Howard Court Culvert in relationship to both the 120" Robin Court Culvert which was less than 100 yards upstream and the twin 60" Robin Alley Culverts which were less than 200 yards upstream of the Howard Court Culvert *.

III.D.1. PARK RIDGE OWNS AND OPERATES THE TRIBUTARY NORTH BALLARD STORM SEWERS WHICH FLOW TO THE MAIN DRAIN

91. During this infrastructure development before 1987, the City of Park Ridge constructed and/or caused to be constructed the **Park Ridge North Ballard Storm Sewers** which are storm sewers north of Ballard and the Advocate North Development on the streets of Parkside Dr. , Parkside Avenue and Knight Avenue and nearby and contiguous streets within Park Ridge's city limits..

92. Park Ridge drains the Park Ridge North Storm Sewers south to the Prairie Creek Main Drain.

93. Park Ridge approved the design, construction and operation of the Park Ridge North Storm Sewers to flow into the Prairie Creek Main Drain.

III.D.2. PARK RIDGE OPERATES THE BALLARD STORM DRAIN WHICH FLOWS TO THE DRAIN.

94. During this infrastructure development before 1987, Park Ridge constructed and/or caused to be constructed the **Park Ridge North Ballard Storm Drain** which is a storm drain on the south side of Ballard Road within Park Ridge's city limits which drains into the Main Drain *.

95. Park Ridge owns and/or operates the Park Ridge Ballard Storm Drain which parallels Ballard Road and drains into the Prairie Creek Main Drain *.

96. The County, District and/or another governmental body in addition to Park Ridge also approved the drainage of the Park Ridge Ballard Strom Drain to collect, receive, transport and convey stormwater runoff flows during rainfalls into the Prairie Creek Main Drain *.

97. The Park Ridge Ballard Storm Drain contributed to and/or caused the man-made home-invasive flooding suffered by the Plaintiff Class herein.

III.D.3. COOK COUNTY, DISTRICT AND/OR MAINE TOWNSHIP OWN AND OPERATE THE ROBIN-DEE COMMUNITY STREET STORM SEWERS WHICH FLOW TO THE DRAIN.

98. Cook County, the District and/or Maine Township own and operate the Robin-Dee Community Street Storm Sewers under Robin Alley, Robin Court, Howard Court, Dee Road, Briar Court and Bobbi Lane within Maine Township.

99. Cook County, the District and/or and/or Maine Township own and operate the upstream and tributary municipal street Stormwater Sewers upstream of the Main Drain within Maine Township (".Upstream Stormwater Sewers")

III.D.4. COOK COUNTY, DISTRICT, PARK RIDGE AND/OR MAINE TOWNSHIP OWN AND/OR OPERATE THE TRIBUTARY UPSTREAM STREET STORM SEWERS WHICH FLOW TO THE DRAIN.

100. Cook County, the District, Park Ridge and/or Maine Township own and operate the Street Storm Sewers under Robin Alley, Robin Court, Howard Court, Dee Road, Briar Court and Bobbi Lane and upstream of these street sewers in Maine Township and/or Park Ridge *.

III.E. 1975: THE NORTH DEVELOPMENT IS PART OF THE INTEGRATED MUNICIPAL PRAIRIE CREEK MAIN DRAIN PUBLIC IMPROVEMENT.

101. Before the North Development's land, building, parking lots and other improvements were developed, the Prairie Creek naturally meandered through the North Development in a semi-circular path, different from the unnatural, man-made September 13, 2008 path.

III.E.1. IN 1975, ADVOCATE RESERVED THE DEMPSTER BASIN SITE FOR PARK RIDGE.

102. Before 1976, Advocate acquired the **North Development** and, between the date of acquisition in or around 1976 and September 13, 2008, **Advocate** altered, modified and/or changed with the approval of **Park Ridge, the County** and, later, the **District,** the natural drainage patterns of the **Prairie Creek Main Drain.**

103. Specifically, or or about 1976, the natural topography, the natural swales and/or other natural conditions of the pre-existing, undeveloped land condition of **Advocate's North Development** and the natural path of the **North Development Main Drain** were altered by **Advocate** with **Park Ridge** approval including but not limited to the **1976 Advocate North Development Plat Plan** and all subsequent plans relating to **North Development drainage.**.

104. In 1976, **Advocate** submitted to **Park Ridge** the "Lutheran General Hospital North Campus Development" Plat Plan (herein "**North Development Plat Plan**").

104.1. The North Development Plat Plan depicted the edge or outside boundary topography of the existing flood plain intruding upon Robin Alley .

104.2. The Main Drain as its routing path existed on September 13, 2008 was substantially and significantly altered by Advocate .

104.2.1. Advocate's alterations from the 1976 routing of the Main Drain resulted in increased flows into the servient lands within the Robin-Dee Community *.

104.2.2. Subsequently plans by Advocate approved by **Park Ridge** altered and increased the flows westward towards the Robin-Dee Community *.

104.3. The North Development Plat Plan specified a Drainage Ditch, at the site of the existing Dempster Basin, proceeding to the Robin Alley.

104.4. Advocate dedicated a drain easement to Park Ridge for the Dempster Drainage Ditch *.

105. In 1976, in the North Development Plat Plan, Advocate explicitly reserved for Park Ridge the site of the existing Dempster Basin specifying that said southwest corner of the North Development as reserved for a future City of Park Ridge water reservoir.

105.1. The existing Dempster Basin site is situated on this reserved water reservoir site.

105.2. This Dempster Basin site was reserved in 1976 by Advocate for Park Ridge's benefit*.

106. In 1976, Park Ridge approved the **North Development Plat Plan** including all drainage alterations including changes to the topography of the North Development.

106.1. Concurrently, **Park Ridge** approved all sewer water management documents including approving all stormwater and sanitary water management provisions of these documents relating to all applicable drainage laws, statutes, ordinances and other sources of law *.

107. In 1976, after these approvals from **Park Ridge**, the **North Development Plat Plan** was recorded with the Cook County Recorder of Deeds.

108. Since 1976, this Defendant was on constructive notice that both the North Development Segment and the Robin-Dee Community Segment of the Prairie Creek Main Drain posed substantial flood risks to the Robin-Dee Community Area Plaintiffs' Class *.

III.E.2. IN 1976, IDOT PUBLICLY DECLARED THE ROBIN-DEE COMMUNITY AREA SUBJECT TO FLOOD RISKS.

109. In October 1976, the Illinois Department of Transportation issue a Flood Risk Report ("**1976 IDOT Flood Risk Report**") relating to the **North Development Plat Plan**.

110. IDOT reported that a large portion of the subdivision set out in the the North Development Plat Plan was and is subject to flood risks.

110.1. This IDOT Flood Risk Report was partially based upon the "1st Addition to Lutheran General Hospital Subdivision" Plat approved by Park Ridge and the County in 1976.

111. This IDOT Flood Risk Report was recorded by the Cook County Recorder of Deeds.

111.1. Since 1976, this Defendant was on constructive notice that both the North Development Segment and the Robin-Dee Community Segment of the Prairie Creek Main Drain posed substantial flood risks to the Robin-Dee Community Area Plaintiffs' Class *.

III.E.3. POST-1976 ALTERATIONS TO THE TOPOGRAPHY OF THE NORTH DEVELOPMENT.

112. Advocate's modifications to the natural patterns of drainage include but are not limited to (a) constructing and/or enlarging the Ballard Basin, (b) constructing and/or enlarging the Pavilion Basin, (c) constructing the Dempster Basin and (d) altering the pre-existing path of the **North Development Segment** of the Main Drain.

113. For purposes of example but not limitation, on or about August 13/14, 1987, invasive flooding catastrophically invaded the Robin-Dee Community from **Advocate's North Development** and from the **PCSS** when stormwater invaded and flooded homes and properties within the Robin-Dee Community Area.

III.F. 1987 CATASTROPHIC INVASIVE FLOODING

114. After the 1987 Catastrophic Invasive Flooding of the Robin-Dee Community Area from Advocate's North Development and the PCSS, **Park Ridge**, **Maine Township**, and **Glenview** along with other entities commissioned an investigation into the 1987 Flooding by hiring Harza Engineering Services to investigate the 1987 Flooding.

III.G. 1990-1991 HARZA REPORT REPORTING UNDERSIZED CULVERTS AND OTHER DEFECTS

115. In 1990, Harza notified and put the Stormwater Defendants on notice of both **maintenance defects** and **design defects** in the PCSS including defects in both the MD

North Development Segment and Robin-Dee Community Segment including but not limited to the undersized 60" **Howard Court Culvert Bottleneck.**

116. The **1990 Harza Study** actually informed and notified **Park Ridge, Maine Township** and **Glenview** and possibly other **Stormwater Defendants** that the stormwater flow capacity of the **PCSS** including the **MD North Development Segment** and the **MD Robin-Dee Community Segment** had been seriously eroded through **design defects** and **maintenance defects.** Specifically, the Harza Studies put these Stormwater Defendants on notice that:

116.1. The stormwater flow capacity of the PCSS's Robin-Dee Community Main Drain and North Development Main Drain was reduced by **design defects** including the effects of inadequately designed modifications and including undersized culverts, tortuous channel realignments, and other stormwater component or structure design defects; and

116.2. Stormwater flow capacity was reduced by **maintenance defects** relating to maintenance within the Prairie Creek Main Drain of the PCSS including within the MD Robin-Dee Community Segment including by not limited to brush, debris, trees, and other obstructions to flow within the Prairie Creek Main Drain itself.

117. In 1990, Harza specifically imparted actual and/or constructive knowledge to the Park Ridge, Maine Township and Glenview and possibly other Stormwater Defendant that the **MD Robin-Dee Community Segment** of the PCSS had several serious maintenance and design obstructions which limited the capacity of these segments of the Prairie Main Drain to less than a pre-climate-change 5 year rainfall-runoff event, substantially below any reasonably safe standard for the safe collection, storage, transportation, conveyance and discharge of stormwater within the PCSS.

118. The 1990 Harza Study reported design defects (including but not limited to undersized culverts and tortuous channel realignments) and reported maintenance defects (including but not limited to bushes, concrete and other obstructions caused by debris) existed within the Robin-Dee Community Main Drain of the PCSS. These design and maintenance defects posed an imminent, foreseeable risk of invasive flooding into the Robin-Dee Community Area during significant but reasonably manageable rainfalls.

III.H. POST 1987 AND/OR PLANS BETWEEN 1987 AND 2002 FAILED TO CORRECT THE KNOWN DANGEROUS DEFECTS

119. After the 1987 Invasive Flood and before the 2002 Invasive Flood, numerous Post-1987 and Post-1990 Plans including multiple plans relating to **North Development's** stormwater drainage and **South Development's** stormwater drainage were prepared and submitted by **Advocate** and its engineer **Gewalt** to the **District** and **Park Ridge** as Advocate continued the development of its North Development and South Development.

120. Specifically, Advocate initiated development plans relating to its North Development and alteration of its Ballard Basin on its North Development as part of the Drainage Plans.

120.1. Advocated initiated the development process for areas of the North Development including the development of the Ballard Basin by retaining Gewalt to draft Plans including but not limited to drainage engineering plans and topography altering plans altering the topography and natural drainage of areas of Advocate's North Development.

121. After the 1987 Flood, Gewalt engineered the North Development Drainage Plans including Plans relating to alterations to the Ballard Basin and connected structures.

122. Advocate and Gewalt submitted these Plans and related stormwater permit applications relating to the North Development Drainage Plans to Park Ridge and the District.

123. After initial submission of these Drainage Plan, Advocate and Gewalt discussed, consulted and/or revised some of its drainage plans based upon discussions or reviews performed by Park Ridge and the District *.

124. Park Ridge reviewed the North Development Drainage Plans including the Advocate Ballard Basin Plans and approved Advocate's North Development Drainage Plans including those plans relating to the alteration of Advocate's North Development Drainage.

125. The District reviewed the North Development Drainage Plans including the Advocate Ballard Basin Plans and approved these Advocate's North Development Drainage Plans.

126. Based upon these Drainage Plans from Advocate and Gewalt and the approvals and permits issued by the District and Park Ridge, Advocate constructed the existing North Development Stormwater Subsystem including but not limited to the public improvements and/or quasi-public improvements of the existing Ballard Basin and the Pavilion Basin.

III.I. AUGUST 2002 CATASTROPHIC FLOODING

127. On or about August 22/23, 2002, as rain fell upon the Prairie Creek Watershed and stormwater accumulated within the Prairie Creek Main Drain including but not limited to Advocate's **North Development**, accumulating stormwater flood waves from the then existing **Advocate's Ballard Basin** surcharged the undersized 60 " Advocate **Ballard Basin Discharge Culvert** and catastrophically overflowed the Ballard Basin and the Robin Neighborhood Main Drain of the Prairie Creek Stormwater System ("PCSS") onto the properties of and into the residences of the Robin-Dee Community Area Plaintiff Class.

128. On or about August 22/23, 2002, as rain fell on the Advocate **South Development**, the then-existing undersized 60 " **Dempster Basin Discharge Culvert** was surcharged by flows from the 84 " **Advocate Dempster Stormwater Sewer** which overflowed the undersized 60

" Dempster Basin Discharge Culvert, catastrophically invading the residences of members of the Robin-Dee Community Area Plaintiff Class who sustained invasive flooding.

129. On or about August 22/23, 2002, as accumulated stormwater from Advocate's **North Development and South Development** discharged into the Robin-Dee Community Segment of the Prairie Creek Main Drain, these discharging accumulated stormwaters surcharged the undersized 60 " **Howard Court Culvert,** resulting in the MD Robin-Dee Community Segment of the PCSS being surcharged, catastrophically invading the residences of members of the Robin-Dee Community Area Class who sustained invasive flooding.

III.J. 2002 IDNR COMMENCED INVESTIGATION OF THE 2002 FLOOD.

130. Later in 2002 or in 2003, based upon this 2002 Invasive Flooding from the Prairie Creek Main Drain into the Robin-Dee Community Area, the Illinois Department of Natural Resources commenced a study of the Prairie Creek Drainage Watershed (herein "2002 IDNR Study") in conjunction with the Local Public Entities including Park Ridge, Maine Township, Glenview and the District.

131. The IDNR Study found numerous bottlenecks and obstructions to flow as the causes of the invasive flooding into the Robin-Dee Community and developed possible remedies including remedies which could be implemented by this Defendant to prevent invasive flooding into the Robin-Dee Community. These remedies included but were not limited to:

131.1. increasing the storage capacity of Advocate's Basin Structures by pumping stormwater out of the Basin(s) before and/or during anticipated rain storms;

131.2. increasing storage capacity for upstream stormwater by the construction of a dual purpose soccer-field/retention basin contiguous to Advocate's South Development on East Maine High School property south of Dempster; and

131.3. constructing a main drain stormwater pipe which would supplement the Dee Neighborhood Stormwater Pipe to transport more stormwater west towards the Potter Street

131.4. As used here, these alternatives shall be referred to as the "**Equitable Remedies**".

III.K. PLANS BETWEEN 2002 AND SEPTEMBER 2008 FAILED TO CORRECT KNOWN DANGEROUS BOTTLENECKS

132. After the 2002 Invasive Flooding but before the September 13, 2008 Invasive Flooding, numerous Plans including multiple plans relating to Advocate North Development's stormwater drainage and Advocate South Development's stormwater drainage including relating to the Dempster Basin, the Dempster Basin Stormwater Sewer and other North Development and South Development drainage plans (herein "these Post-2002 Plans" in the following paragraphs) were submitted by Advocate and its engineer Gewalt to the District and Park Ridge as Advocate continued its development of its North Development and its South Development.

133. Gewalt engineered these North Development and South Development Drainage Plans including the Advocate's Plans relating to the Dempster Basin and the Dempster Basin Stormwater Sewer and connected land and drainage structures.

134. Advocate and Gewalt submitted their applications relating to these Plans for the North Development Drainage Plans and South Development Drainage Plans including the Advocate's Plans relating to the Dempster Basin and Dempster Stormwater Sewer and connected structures to Park Ridge and the District.

135. After initial submission of these Plans relating to Advocate's North Development and South Development, Advocate and Gewalt discussed, consulted and/or revised these Drainage Plans based upon discussions or reviews performed by Park Ridge and/or the District *.

136. Park Ridge reviewed these North and South Development Properties Drainage Plans including the Advocate Dempster Basin Plans and any Plan modifications and approved these

Plans including those plans relating to the alteration of Advocate's North Development Drainage and South Development Drainage.

137. The District reviewed these North Development Drainage Property and South Development Property Drainage Plans including the Advocate Dempster Plan and any Plan modifications and approved these Advocate's North and South Development Properties Drainage Plans including those plans relating to the Dempster Basin.

138. Based upon information and belief, Advocate, Gewalt, the District and/or Park Ridge did not perform and did not contract for the performance of the use or operation of a watershed stormwater computer model simulating the designs of the **Primary Basin Structures** and/or other drainage plans and these Plans' affects on stormwater flows in the PCW.

139. Advocate, Gewalt, Park Ridge and/or the District did not modify, change and/or alter any of these Plans to remedy the persistent, known, foreseeable, imminent risk of invasive stormwater flooding from Advocate North Development into the Robin-Dee Community Area including:

139.1. These Defendants did not correct or remedy in these or other Plans the undersized 60" Howard Court Culvert Bottleneck despite knowledge of the flooding risk;

139.2. These Defendants did not correct or remedy in these or other Plans the undersized 60" Ballard Basin Discharge Culvert Bottleneck despite knowledge of the flooding risk; and

139.3. . These Defendants did not correct or remedy in these or other Plans the undersized 60" Ballard Basin Discharge Culvert Bottleneck despite knowledge of the flooding risk.

III.L. CONTRACTUAL OBLIGATIONS OWING THE PUBLIC UNDER DISTRICT PERMITS

140. The standard District "Sewerage System Permit" in its "General Conditions of the Permit" relating to said Plans and Permits discussed above and herein contained the following relevant paragraphs or similar relevant paragraphs.

140.1. These terms and conditions are set forth in District Permit No. 06-032 and are an example of identical and/or substantially identical Permit Terms and Conditions agreed to by Advocate and Gewalt relating to the issuance of the District's Permits relating to Plans referred to herein.

140.2. These Permit Duties were owed to the Plaintiffs' Class as foreseeable plaintiffs who would be foreseeably injured by breach of these duties.

141. Permit Paragraph 1 of each of permits contained an **Adequacy of Design** provision:

> 1. **Adequacy of Design:** The schedules, plans, specifications and all other data and documents submitted for this permit are made a part hereof. The responsibility for the adequacy of the design shall rest solely with the Design Engineer and the issuing of this permit shall not relieve him of that responsibility. The issuance of this permit shall not be construed as approval of the concept or construction details of the proposed facilities and shall not absolve the Permittee, Co-permittee or Design Engineer of their respective responsibilities.

141.1. Gewalt was the "Design Engineer" as that term is used within the District's Permit.

142. Permit Paragraph 3 of each of said Permits relates to **Allowable Discharges**:

> **3. Allowable Discharges:** Discharges into the sanitary sewer system constructed under this permit shall consist of sanitary sewage only. Unless otherwise stated by the Special Conditions, there shall be no discharge of industrial wastes under this permit. **Storm waters shall not be permitted to enter the sanitary sewer system.** Without limiting the general prohibition of the previous sentence, roof and footing drains shall not be connected to the sanitary sewer system.

143. Permit Paragraph 5 of each of these Permits relates to **Maintenance** and provides:

> **5. Maintenance:** The sewer connections, lines, systems or facilities constructed hereunder or serving the facilities constructed hereunder shall be properly maintained and operated at all times in accordance with all applicable requirements. It is understood that the responsibility for maintenance shall run as a joint and several obligation against the property served, the owner

and/or the operator of the facilities, and said responsibility shall not be discharged nor in any way affected by change of ownership of said property.

144. **Permit Conditions Apply to Detention Basins**: By way of example and illustration, but not limited to MWRD Permit No. 06-032, said permit conditions apply to Detention Basins such as Advocate's Basin Structures.

III.M. KNOWLEDGE OF LACK OF MAINTENANCE PROGRAM.

145. **Knowledge of Lack of Maintenance Program**: Based upon the 1990 Harza Studies, the 2002 invasive flooding, other **Earlier Flooding Studies** and other facts set forth herein, before September 13, 2008, this Defendant knew or should have known that the responsible parties were not undertaking the extensive cleaning program called for in the Harza Study and/or performing other required maintenance of the MD Robin-Dee Segment and/or MD North Development Segment of the PCSS, thereby reducing if not further eroding the flow capacity of the MD Robin-Dee Community Subsegment to receive flows from Advocate North Development Property and significantly increasing the foreseeable risk of catastrophic surcharging and surcharging invasive flooding into the Robin-Dee Community.

146. This Defendant knew or should have known that all areas within the Robin-Dee Community south of the Prairie Creek Main Drain were in either an alleged Special Flood Hazard Area or a Floodway as reported by the 1990 Harza Study and IDNR Study, as evidenced by the 1987 and 2002 invasive flooding into the Robin-Dee Community and as defined by the 2000 FEMA FIRM and the 2008 FEMA FIRM.

147. This Defendant should have known that the Robin-Dee Community Area Class was at a significant, highly foreseeable, highly probable substantial risk of invasive flooding damage and injury from the North Development's accumulated stormwater.

III.N. ROBIN-DEE COMMUNITY PLAINTIFFS' DOWNSTREAM AND SERVIENT TO NORTH DEVELOPMENT PROPERTY

148. The Robin-Dee Community Area Plaintiffs' Class Members resided in, owned real property and/or owned personal property within the Robin-Dee Community Area which properties are downstream, generally at lower elevations and servient to the North Development Property, the South Development Property and the Main Drain.

III.O. THE DISTRICT PROVIDES STORMWATER MANAGEMENT SERVICES

149. The District provided Stormwater Management Services to the Plaintiffs.

149.1. Plaintiffs paid taxes to the District for the District's stormwater management services.

149.2. The District collected taxes and fees from the Plaintiffs for providing these services.

III.P. GLENVIEW PROVIDES SANITARY SEWERAGE DISPOSAL SERVICES

150. Glenview owns and controls the street sanitary sewers to which the Maine Township Plaintiffs' house sanitary leads are connect and provides sanitary sewerage disposal services to these Plaintiffs who reside in the Maine Township subarea of the Robin-Dee Community Area.

151. The Maine Township Plaintiffs paid taxes and fees to Glenview to provide these services.

152. Glenview collected taxes and fees for providing its sewerage services to these Plaintiffs.

III.Q. PARK RIDGE PROVIDES SANITARY SEWERAGE DISPOSAL SERVICES

153. Park Ridge owns and operates the street sanitary sewers to which the Park Ridge Plaintiffs' house sanitary leads are connected and provides sanitary sewerage disposal services to these Plaintiffs who reside in the Park Ridge subarea of the Robin-Dee Community Area.

154. These Park Ridge Plaintiffs paid taxes and fees Park Ridge to provide these services.

155. Glenview collected taxes and fees for providing its sewerage services to these Plaintiffs.

III.R. DISTRICT PROVIDES SANITARY SEWERAGE DISPOSAL SERVICES

156. The District owns and operates the regional sanitary sewer interceptors to which the Maine Township and Park Ridge street sanitary sewers connect and provide sanitary sewerage disposal services to all Plaintiffs in the Robin-Dee Community Area.

157. Plaintiffs paid taxes and fees to the District to provide sanitary sewerage services.

158. The District collected taxes and fees for providing its sewerage services to Plaintiffs.

III.S. KNOWLEDGE OF HOWARD COURT CULVERT BOTTLENECK AND OTHER BOTTLENECKS

159. This Defendant knew of the persistent, repetitive, frequent flooding of the Plaintiffs' land and homes over the course of decades.

160. Prior to September 13, 2008, based on facts existing from 2002 through September 2008 being documented by, reported by or available from the Illinois Department of Natural Resources (the "2002 IDNR Study"), this Defendant knew or should have known of substantial and serious design and maintenance defects within the PCSS which defects posed imminent and serious foreseeable unreasonable risks of invasive flooding damage to the Plaintiffs including but not limited to the following defects: (a) the Ballard Basin Discharge Culvert Bottleneck; (b) the Dempster Basin Discharge Culvert Bottleneck; and (c) the Howard Court Culvert Bottleneck; (d) defects in the maintenance of the **MD Robin-Dee Community Segment** including bushes, brush, concrete, rocks and other debris affected flow; (e) defects in the maintenance of the **MD North Development Segment** and Basin Structures including failures to desilt detention basins; and (f) other defects relating to the drainage design(s) and/or plan(s) of Advocate's North Development Property and/or the Prairie Creek Main Drain including but not limited to the design and/or plans for or relating to the **Advocate Basin Structures** including the **Dempster Basin Stormwater Subsystem** which received flows from the **South Development.**

161. **Small Rainfalls an Imminent Threat**: This Defendant knew or should have known that, because of the foregoing design, planning, maintenance, operational, storage, conveyance and other defects within the PCSS, Advocate's North Development Property and the MD Robin-Dee Community Segment of the PCSS posed a dangerous, highly-unreasonable, high-foreseeable risk of invasive flooding damage to the Plaintiffs even during a small rain in the pre-climate change 2 year rainfall event let alone a significant rainfall.

161.1. This Defendant knew or should have known that storage defects, conveyance and transportation defects, maintenance defects and other defects on or within Advocate's North Development Property and the MD Robin-Dee Community Segment of the PCSS would cause invasive flooding with a reasonable degree and/or high degree of certainty into the Robin-Dee Community from Advocate's North Development Property and the Robin Neighborhood Main Drain, for any significant rainfall exceeding a pre-climate change 2-year return frequency, resulting in serious and substantial invasive flooding damage to Plaintiffs:

161.2. this Defendant knew or should have known that such defects resulted in dangerously substandard stormwater management performance of Advocate North Development Property's drainage system and subsystems and the MD Robin-Dee Community Segment of the PCSS below any reasonable standard including but not limited to a pre-global warming sub-five year event let alone a high return-frequency stormwater management standard such as the post-climate change 100 year event return frequency standard; and

161.3. this Defendant knew or should have known that the older return frequency standards were substandard based upon the effect of global warming and climate change within the Chicago Region on rainfall intensity and duration and that larger rainfalls were more frequent

during the existing period of global warming, resulting in corrections, modification and changes to all existing Plans to address the increase necessary drainage storage capacities.

162. Knew Need to Plan for Defects in Main Drain: Based upon the Earlier Flood Investigations and any reasonable inspection of the Robin-Drive Segment, this Defendant knew or should have known that any Plan or design relating to Development upstream of the Robin-Dee Community Area should take into consideration the serious reduced ability or actual inability (if any ability exists to receive upstream flows) of the MD Robin-Dee Community Segment to receive upstream stormwater flows including upstream stormwater flows from the Advocate's North Development and areas upstream.

163. R-D Segment Without Flow or Volume Capacity: Based upon the Earlier Flood Investigations and any reasonable inspection of the Robin-Drive Segment, if the Defendant had conducted a reasonable investigation of the Robin-Dee Community, then the Defendant would have discovered that the MD Robin-Dee Segment of the PCSS could not receive the stormwater which it discharged from Advocate Development Properties.

164. R-D Segment Not Improved: Based upon the Earlier Flood Investigations and any reasonable inspection of the Robin-Drive Segment, this Defendant knew or should have known that the MD Robin-Dee Community Segment had not been improved or reconstructed to maintain or increase since its original construction capacity and, consequently the Robin-Dee Community Segment was unable to safely receive and transport stormwater accumulating on and from Advocate's North Development.

165. R-D Segment Not Cleaned: This Defendant knew or should have known that the MD Robin-Dee Community Segment of the PCSS had not been adequately and regularly cleaned or maintained, resulting in restrictions to flow within the MD Robin-Dee Community Segment.

166. **Reasonable Inspection Disclose this Knowledge**: This Defendant knew or should have known of the foregoing publicly known unsafe drainage conditions and their character by the use of a reasonable adequate inspection system or program and/or other reasonably adequate investigations relating to the Advocate North Development and the MD Robin-Dee Segment of the PCSS.

167. On September 11, 2008, the following conditions existed within the Main Drain:

167.1. Relating to the North Development Main Drain and its Segment Subsystem, surcharge and overflow surcharge flooding from Advocate's North Development was more likely than not to occur during a significant rain caused by the following actions or failures to act:

167.1.1. Since the 2002 Invasive Flooding, responsible parties failed to increase temporarily storage on Advocate's North Development Properties such as by using sandbags and other water storage systems to increase the storage capacity of the **Basins**;

167.1.2. Since the 2002 Invasive Flooding, responsible parties failed to increase permanent storage on Advocate's North Development Properties such as by increasing the ability of Advocate's **Basin Structures** to store more stormwater such as by raising the Discharge Culvert's Discharge level, desilting these three Basins, and taking other steps to increase storage capacity relating to Advocate's **Basin Structures** including pre-storm pumping;

167.1.3. Since the 2002 Invasive Flooding, responsible parties failed to deploy substantial temporary stormwater pumps to pump out as much stormwater as is feasible before and during the early stages of a rain storm from North Development **Basin Structures**;

167.1.4. Since the 2002 Invasive Flooding, responsible parties failed to construct and permanently deploy stormwater pumps to pump out as much stormwater as is feasible before and during the early stages of a rain storm from North Development's Basins;

167.2. Since the 2002 Invasive Flooding, responsible parties failed to increase storage upstream of the Robin-Dee Community including upstream of the MD Robin-Dee Segment such as on other areas of the Advocate's North Development, Maine Township's Hall property off Ballard Road and/or the Maine Township High School Property south of Dempster Road.

167.3. Relating to the PCSS's Robin-Dee Main Drain and its Segment Subsystems:

167.3.1. This Defendant knew or upon reasonable inspection would have known that the Howard Court Culvert was an undersigned culvert and would cause bottleneck surcharge invasive flooding from the stormwater discharging and overflowing from the Robin Neighborhood Subsegment of the Main Drain;

167.3.2. This Defendant knew or should have known that surcharge invasive flooding from the Dee Neighborhood Subsegment of the Prairie Creek Main Drain would result in reverse, stormwater sewer surcharging and invasive flooding from the Dee Road Stormwater Subsystem and the Howard Court Stormwater Subsystem;

167.3.3. This Defendant knew or should have known that surcharge invasive flooding caused by the Briar Neighborhood Elbow would occur during significant rains; and

167.3.4. This Defendant knew or should have known that the Rancho Neighborhood Bottlenecks would cause invasive flooding during significant rains.

168. Given the repeated invasive floodings into homes and properties of the Robin-Dee Community in 1987 and 2002 and on other dates before September 13, 2008 and the repeated governmental studies including the 1990 Harza Study in 1990, the 2000 FEMA FIRM, the 2008 FEMA FIRM and the IDNR stating the flood risks threatening the Plaintiffs, this Defendant knew or, with reasonable, due diligence, should have known before September 13, 2008 that:

168.1. this Defendant knew or should have known that the Prairie Creek Drain, tributary

storm sewers and/or other structures of the PCSS were not being inspected and/or adequately inspected to determine the existence of debris, the necessity for removing debris and/or the existence of other maintenance defects which defects would obstruct or reduce the flow of stormwater during a rainfall;

168.2. this Defendant knew or should have known of the accumulations of debris in the Prairie Creek Main Drain, tributary storm sewers and/or other structures of the Prairie Creek Main Drain which blocked, obstructed and/or restricted stormwater flows within the sewers and other structures of the PCSS;

168.3. this Defendants knew or should have known that the storm sewers and/or other structures of the PCSS were not being adequately cleaned or maintained including not being cleaned or maintained free of obstructive or restrictive debris such as trees, bushes, brush, rocks, and other debris which would obstruct flow and/or reduce flow of stormwater during a rainfall;

168.4. this Defendant knew or should have known that Advocate's North Development Property and the PCSS were not being adequately operated immediately or shortly before a rainfall including:

168.4.1. this Defendant knew that the **Primary Basin Structures** on Advocate's North Development Property were not being properly operated because the responsible parties were not pumping out and emptying the **Primary Basin Structures** within the PCSS so as to optimize storage of likely or expected stormwater runoff; and

168.5. this Defendant knew or should have known that the defective maintenance, the undersized culverts, the bottlenecks, the tortuous channel misalignments and other defects within Prairie Creek Main Drain including but not limited to Advocate's North Development Segment and the Robin-Dee Community Segment of the Prairie Creek

Main Drain were catastrophically reducing the ability or capacity of the PCSS to adequately operate during any foreseeable significant but reasonably manageable rainfall.

169. Prior to Friday, September 12, 2008, Berger placed, caused to be placed, knew and/or should have known of flow-restricting materials over the Dee Road Neighborhood street stormwater catchbasin inlets immediately adjacent and contiguous to Dee Neighborhood Plaintiffs' residences and properties.

170. During the days and hours before accumulated stormwater from Advocate's North Development invaded the Robin-Dee Community on Saturday, September 13, 2008, this Defendant knew or should have known by the exercise of due diligence of the following facts:

170.1. This Defendant knew or should have known of the impending rain approaching the PWC;

170.2. This Defendant knew or should have known of the dangerous stormwater runoff to be generated by this rainfall threatening an already vulnerable-to-flooding Plaintiffs' Area;

170.3. This Defendant knew or should have known of the unreasonable, dangerous accumulations of stormwater on Advocate's North Development **Primary Basin Structures** and within other segments of the PCSS relating to this rainfall; and

170.4. This Defendant knew or should have known of the unreasonable and foreseeable imminent threat of catastrophic invasive flooding into the Robin-Dee Community Area Plaintiff Class' homes and properties posed by the accumulated stormwater from Advocate's North Development.

171. The activities of stormwater management within the unique Prairie Creek watershed are inherently dangerous in the urbanized watershed as has been demonstrated by the most non-river repetitive flooding in Cook County and the repetitive inability to control stormwater and manage

this stormwater as demonstrated by four major catastrophic floods since 1987 and many less class-wide invasive flooding during this period.

III.T. THE PUBLIC IMPROVEMENTS IN PLACE AT THE TIME OF THE SEPTEMBER 13, 2008 MAN-MADE CATASTROPHIC WATER INVASIONS.

172. Public Improvement: The Ballard Basin and the Pavilion Basin are public improvements to the Prairie Creek Stormwater System as these Basins receive upstream stormwater from upstream areas of Prairie Creek Watershed.

172.1. Upstream stormwaters drain to the Upstream Main Drain from PCSS's Upstream Segment tributary sewers and the retention/detention basin(s);

172.2. Upstream stormwater enters the Upstream Main Drain upstream of the North Development, emptying all of its collected and conveyed stormwater at **Point A1**;

172.3. Tributary stormwater from the Park Ridge North Ballard Neighborhood drains into the North Development Main Drain at or between **Point A1 and Point A2**;

172.4. Tributary stormwater from the Maine Township North Ballard Neighborhood drains into the North Development Main Drain at or between **Point A1 and Point A2** and/or at other locations south of Ballard (drainage culverts/pipes near or between **Points A1 and A2**); and

172.5. possible Upstream Stormwater tributary to the Pavilion Basin entering the Pavilion Basin from the east of the Advocate North Development*.

173. As September 2008, Exhibit 1 shows the routing of the Prairie Creek Stormwater Flow from the east boundary at Point A1 of the Main Drain's North Development Segment to the approximate western boundary of the Main Drain Robin-Dee Segment of the Main Drain of the PCSS (Point J) although the Segment extends to Potter Road. Exhibit 1 designates the stormwater structures relevant to understanding the flow of stormwater on September 13, 2008

through the North Development Segment and Robin-Dee Segment of the Prairie Creek Main Drain. The directional arrows in thick white depict the design direction of flow.

174. **The PCSS as a Public Improvement**: The County approved and oversaw the development of the Prairie Creek Main Drain's Robin-Dee Community Segment (Points E through J) through its pre-1960s and 1960s development when the undersized 60" Howard Court Culvert was constructed as was its 60" Dee Neighborhood Stormwater Pipe (Points E-H).

175. The PCSS stormwater improvements constitute "property" or "properties" under the Tort Immunity Act ("TIA").

176. These PCSS Stormwater Improvements include:

176.1. The PCSS North Development Segment consisting of (a) the North Development Main Drain (being at Point A1 and traversing to Point A3), (b) the Ballard Basin which essentially serves as the North Development Main Drain traversing Advocate North Development property, (c) the Pavilion Basin on the Advocate North Development property, (d) all Park Ridge and/or Maine Township tributary stormwater sewers discharging into the North Development Main Drain, and (e) all other stormwater structures and related components on the North Development Property; and

176.2. The PCSS Robin-Dee Community Segment and its Subsystem consisting of (a) the Robin-Dee Main Drain between Points C1-C2 (the twin Robin Alley Culverts) and continuing past Point J (the Rancho Lane Culverts) to Potter Road.

177. Stormwater is also "property" or "personal property" within TIA Article III, § 10/3-101.

III.U. SEPTEMBER 13, 2008 SEQUENCE OF THE FLOODING STAGES

178. On Thursday, September 11, Friday, September 12, 2008 and Saturday, September 13, 2008 before the invasive flooding on the morning of Saturday, September 13, 2008, this

Defendant knew or should have known based upon weather forecasts and readily available actual rainfall data to areas west of Cook County, that the September 12-13, 2008 rain event was certain to exceed a two year return frequency and, with legal certainty, would generate rainfall runoff and stormwater which this Defendant knew or should have known could not properly be collected, stored, transported and/or discharged by the PCSS given this rainfall and given the maintenance and design defects within the PCSS including within the Prairie Creek Main Drain.

179. On Friday, September 12 and Saturday morning, September 13, 2008, rain fell over the PCW, including upstream of the Robin-Dee Community Plaintiffs' Class homes and properties.

180. Because of these known maintenance and design defects in the collection, storage, conveyance, transportation, and discharge structures and components of the PCSS, dangerous accumulations of stormwater developed on Advocate's North Development.

181. On September 13, 2008, these dangerous accumulations of stormwater catastrophically invaded the Robin-Dee Community Area Plaintiff Class' persons, residences, vehicles and other real and personal properties from Advocate's North Development and the Robin-Dee Community Segment of the Prairie Creek Main Drain.

182. On September 13, 2008, neither Advocate's North Development Pavilion Building nor North Development Parking Structure suffered any invasive flooding in any interior space.

183. But for the known maintenance and design defects relating to the collection, storage, transportation, conveyance, and operation of the PCSS, the Robin-Dee Community Area Plaintiff Class would not have sustained catastrophic invasive flooding to their persons and property on Saturday, September 13, 2008.

184. In combination with the rainfall weather conditions, but for the foregoing known and/or discoverable defects in the design, planning, maintenance, collection, storage, transportation,

conveyance, and operation of the PCSS including defects in Advocate's North Development stormwater structures, the Robin-Dee Segment of the Prairie Creek Main Drain, and the Robin-Dee Sanitary Sewerage System, the Robin-Dee Community Area Plaintiff Class would not have sustained catastrophic invasive flooding into their persons and property on September 13, 2008.

185. At no relevant time was the rainfall weather conditions the sole proximate cause of the Robin-Dee Community Area Plaintiff Class' injuries and damages.

186. The rainfall and its associated stormwater which occurred on September 12, 2008 and September 13, 2008 over the Prairie Creek Drainage Area/Watershed and the resulting runoff was a stormwater runoff which could have been properly managed by this Defendant by safe planning, safe engineering, safe collection, safe storage, safe transportation, safe conveyance and/or safe discharge relating to these accumulated stormwaters.

187. This rainfall and its associated stormwater which occurred on September 12, 2008 and September 13, 2008, were not an "Act of God" rainfall or stormwater runoff as defined by Illinois statutory and/or common law.

188. Because of these ongoing maintenance and design defects including but not limited to cleaning the Robin-Dee Segment and to redesigning the known bottlenecks including but not limited to the Ballard Basin Discharge Culvert Bottleneck, Dempster Basin Discharge Culvert Bottleneck and Howard Court Culvert Bottleneck, in both the Advocate North Development and the Robin-Dee Segment of the Prairie Creek Main Drain as set forth in this Complaint, the Robin-Dee Community continues to suffer irreparable harm and shall continue to suffer irreparable harm as evidenced by the September 13, 2008 Invasive Flooding into the Robin-Dee Community.

III.V. GENERAL SUMMARY OF CLAIM

189. On September 13, 2008, during the rainfall, rainfall runoff began collecting in storm sewers upstream of the Robin-Dee Community Area. These storms sewers which are tributary to the Prairie Creek Main Drain began to empty into the PCSS' Upstream Main Drain.

190. Beginning at Points A1 and A3, the Upstream Main Drain began to fill the Ballard and Pavilion Basins until these Basins' stormwater levels rose and discharge into Robin Neighborhood Main Drain at Point C1.

191. Point C2 was receiving stormwater from Points B1, B2 and B3, the Dempster Basin.

192. After the Ballard, Pavilion and Dempster Basins began emptying into the Robin Neighborhood Main Drain at Points C1 and C2, because the Robin Court Culvert is 120", the full flowing 60" Robin Alley Culverts (Points C1 and C2) could safely discharge their dual 60" full flows through the larger 120" Robin Court Culvert at Point D.

193. However, the 60" Howard Court Culvert Bottleneck occurred at Point E because the 120" design full flow of the 120" Robin Court Culvert (Point D) cannot possibly be received by the undersized 60" Howard Court Culvert at Point E. The 120" full flow from Point D is under gravity (rather than pump or other pressure) so that it is physically impossible for the 60" Howard Court Culvert to receive 120" of flow from the Robin Neighborhood Main Drain. Because of this open, obvious, catastrophic undersizing of the Howard Court Culvert, most of the 120" flow floods over the 60" Howard Court Culvert into the lower elevation and lower topography homes (mostly to the south of the Robin Neighborhood Main Drain and Dee Neighborhood Drains. Under no natural circumstance do the laws of physics allow the 120" diameter circular Robin Court Culvert flow to safely bottleneck into the substantially smaller 60" diameter circular Howard Court Culvert.

194. As a direct result of the Howard Court Bottleneck, stormwater invasively flooded the lands and the homes of the Robin-Dee Community Area.

195. Similar bottlenecks exist at both the Ballard and Dempster Basins.

196. The 60" inch Ballard Basin Discharge Culvert at Point A3 is surcharged by a mini-tsunami-like flood wave action from the Ballard Basin which engulfs the culvert, exceeding the banks of the Ballard Basin and invading the Robin-Dee Community (the "Ballard Basin Discharge Culvert Bottleneck").

197. The 60" inch Dempster Basin Discharge Culvert at Point B3 is surcharged by the 84" Dempster Basin Stormwater Sewer Subsystem from Point B2 in a min-tsunami-like flood wave action engulfing this Culvert ("Dempster Basin Discharge Culvert Bottleneck").

198. Further, downstream waters could not be safely conveyed because of other downstream bottlenecks such the Briar Court Elbow where the Main Drain makes a sharp right-turn at Point I and the undersized Rancho Lane Culverts at Point 2, undersized to receive 120" flow.

199. As a result of the bottleneck inability of the Howard Court Culvert and its connected 60" Dee Neighborhood Stormwater Pipe to receive any additional stormwater and other downstream bottlenecks due to defective maintenance and/or design North Development Main Drain Stormwater Complex including the Ballard and Pavilion Basins, the Robin Neighborhood MD and the Dee Neighborhood Main Drain, and the bottlenecks set forth here for description not limitation, stormwater overflows the Robin Neighborhood Main Drain and the Dee Neighborhood Stormwater Pipe and prevents flows from the 60" Ballard Basin Discharge Culvert and the 60" Dempster Basin Discharge Culvert from being conveyed by the Robin Neighborhood Main Drain and the Dee Neighborhood Main Drain.

200. In turn, the Ballard Basin overflows its banks into the Robin Neighborhood. Similarly, the Dempster Basin overflows its banks into the Robin Neighborhood. Further, sheet surface stormwater flow from the Dempster Parking Lot which is at a higher elevation and contiguous to the Robin Neighborhood discharges into the Robin Neighborhood.

201. Because minimal or no stormwater can flow through the Main Drain's Robin-Dee Segment of the PCSS, as the rainfall runoff stormwater continues to reach the Robin-Dee Community, more and more excess accumulated stormwater overflows from the North Development into the Robin-Dee Community until the entire lower-elevation surface areas of the Robin-Dee Community invasive flooded.

202. Sanitary sewers are becoming full because the stormwater is infiltrating sanitary sewers not designed to receive flows of stormwater let alone dozens of 4" or 6" flows from basements filled with water. The stormwater enters the Robin-Dee Community Sanitary Sewer systems through (a) basements through breaking basement windows, doors and other areas of the residences which are not water-tight and (b) manholes, loose sanitary sewer joints and other sources of inflow and infiltration (such as holes in the manholes or such as significant gaps between the manhole lids and manhole chimneys).

203. The Robin-Dee Community Area Plaintiffs reside in areas where the sanitary sewers are separated from the stormwater sewers. Under applicable design standards, a sanitary sewage system is a "closed" sewage system which means that stormwater is not introduced into the sanitary sewer system as a matter of design. The Robin-Dee Community Area Plaintiffs were not served by a "combined" system of stormwater-sanitary common sewers.

204. As the Robin Neighborhood's basements fill with stormwater, and as stormwater invades the sanitary sewer system through manholes and broken pipe joints, this stormwater then

surcharges the Sanitary Sewerage System resulting in sewage backups into homes which are at higher surface elevations and not receive direct stormwater intrusion*. These sewage backups continue in areas which did not experience surface flooding so long as their basement are below the highest elevations of stormwater in the Robin-Dee Community's basements and first floors. such at higher elevations than the surface flooded areas.

205. This surface water flooding continues until reduced flows gradually drain the Main Drain's Robin-Dee Segment.

206. The sewage backups in the Robin-Dee Community Area continue until the downstream local sanitary sewers and regional interceptors were able to receive the flows from the Robin-Dee Community Area Sanitary Sewers.

207. Around or by September 14, 2008, the residual flow capacity of the Main Drain's Robin-Dee Community Segment was able to safely receive and transport residual accumulated stormwater stormwater form the Robin-Dee Community Area, thereby draining the surface ponding within the Robin-Dee Community Area.

III.W. CAUSATION: FLOODING STAGES SEQUENCE

208. "This Defendant" means Advocate, Berger, the District, Park Ridge, Maine Township and the County in this Subpart.

209. The approximate order of the surface-water invasive and sewer-water invasive floodings occurred generally along the following stages on September 13, 2008. Depending upon a resident's proximity to Dee Road, the Berger obstructions of the stormwater culvert inlets played a role in the inability to drain stormwater from those areas.

209.1. **STAGE 1: Basins begin to fill to their discharge elevations**: The Ballard, Pavilion, and Dempster Basins fill to the discharge elevations of their respective discharge culverts: the

Ballard Basin Discharge Culvert (**Point A3**) and the Dempster Discharge Culvert (**Point B3**). No surcharging of the Robin Neighborhood Main Drain or Dee Neighborhood Stormwater Pipe/Main Drain has occurred.

209.1.1. **Filling of Ballard-Pavilions Basins**: Upstream Prairie Creek Watershed stormwater ("Upstream PCW stormwater") begins discharge into the Ballard Basin Stormwater System through **Points A1 and A2.** Local Advocate North Development stormwater ("**Advocate North stormwater**") from its streets, parking lots, buildings and other impervious areas and its saturated pervious grounds drain into the Ballard Basin Stormwater Subsystem which includes the interconnected **Pavilion Basin**. Besides **PWC upstream stormwater** under **District** and/or **County** control, and **Advocate** North Development stormwater under **Advocate** control, **Park Ridge** stormwater from the **Park Ridge North Ballard Neighborhood** flows into the **Ballard Basin***. Similarly. **Maine Township** stormwater from Maine Township north of the **Ballard Basin** flows into the **Ballard Basin***.

209.1.2. **Filling of Dempster Basin: Advocate South Development** stormwater discharges through **Point B2** into the Dempster Basin. Possibly Park Ridge stormwater from its municipal sewers around the Advocate South Development also discharge to the Dempster Basin *.

209.2. **STAGE 2: Basins begin to discharge through basin culverts to the PCSS Robin Neighborhood Main Drain**: Upon the water elevation within a basin rising to the invert/bottom elevation of its discharge culvert, this stormwater flows into the the basins reach their discharge elevation, they discharge stormwater from the the Ballard Basin at Point C3 and Dempster Basins. The second stage before the invasive flooding is that the Ballard and Dempster Basins then begin discharging water to **Points C1-C2**. No surcharge of the Robin-

Dee Community Main Drain occurs until the combined flows at Points **C1-C2** (the two 60" culverts) are bottleneck and surcharge the single 60" Howard Court Culvert at **Point E**.

209.3. **Stage 3: Basin's surcharge PCSS's Howard Court Culvert, Dee Neighborhood Pipe and Robin Neighborhood Main Drain and Overflow**: As the rate and volume of stormwater increase in the north 60" Ballard Basin Robin Alley Culvert and the south 60" Dempster Basin Robin Alley Culvert, these two culverts' combined flows exceed the capacity of the single 60" downstream Howard Court Culvert. Consequently, bottleneck surcharging occurs at the Howard Court Culvert resulting in a backing-up of the stormwater and overflow of the Robin Neighborhood and Dee Neighborhood Main Drains.

209.4. **Stage 4: Ballard and Dempster Basins Overflow**: Because the discharge culverts are blocked from discharging by backwater and other fluid dynamics involving the Howard Court Culvert bottleneck and Robin Alley Culverts backwater obstruction. there is no method of discharging water by design from these Basins. The Basins rise and overtop the basin banks/berms. Because there is no barrier such as sandbags, the Basin Overflow overtops Advocate's North Development and sheet flows along the surface, invading the Robin-Dee Community with all excess upstream stormwaters.

209.5. **Stage 5: Surface-Water Home Invasions:** Surface-water home invasions occur when the invading stormwaters, sometimes at mini-tsunami wave action rates, inundates the Robin-Dee Community. Stormwater invades through basement windows and first floor doors and other penetrable openings to a home's envelop.

209.6. **Stage 6: Sanitary Sewer Subsystems Surcharge and Sewage Backups**: Stormwater is traveling over manholes besides into basements' sanitary drains. Because sanitary sewers are smaller in diameter than stormsewers, the sanitary sewer subsystems surcharge and sanitary

sewer backups occur. This phenomenon occurs even in homes with no surface water invasions because water seeks its own equilibrium level within a closed system such as the sanitary sewer systems. These invasions affect the performance of the District's sanitary sewer interceptors besides the performance of the Glenview and Park Ridge local municipal sanitary sewer systems: these systems including the interceptors (depending upon flow permissions) surcharge and backup the entire Regional Sewage System operated by the District. The District causes upstream backups by failing to deploy temporary pumpage systems to remove sanitary sewage such as into unsurcharged stormwater drains or tanker trucks.

210. This Defendant failed to exercise ordinary care to increase either temporarily or permanently the storage capacity of the North Development by the following actions:

210.1. This Defendant failed to make any effort at calculating the amount of stormwater from the September 13, 2008 storm although this storm was predicated and known days in advance of its arrival to affect the Chicago Region: if the Defendant had attempt to know how much stormwater could be generated, then the Defendant would know how many flood protection actions were necessary.

210.2. This Defendant failed to deploy temporary pumps to pump down and empty the Ballard Basin, Pavilion Basin and Dempster Basin before the September 13, 2008 storm. This Defendant could have began pumping on Thursday, September 11 and Friday, September 12 and completely emptied these Basins so that these Basins could be used for their maximum stormwater storage.

210.3. This Defendant failed to either temporarily or permanently increase the storage capacity so that these Basins had adequate storage capacity to receive the excess stormwater from

Advocate Properties and the Upstream Prairie Creek Watershed; this Defendant could have increased storage in at least the following two methods:

210.3.1. This Defendant failed to use standard temporary flood prevention barriers such as sand bags or inflatable water systems with or without machines with capacities of 5,000 sand bags/hor to create a water-impervious barrier between the Robin-Dee Community including but not limited to the Robin Alley and the North Development and/or storing all of the excess stormwater on the North Development. These stormwater barriers would serve two purposes: (a) prevent North Development excess stormwater from invading the Robin-Dee Community and (b) increase temporary storage capacity when used in conjunction with plugging or raising the elevations of the Ballard Basin and Dempster Basin discharge culverts; or

210.3.2. This Defendant failed to raise the banks of the Ballard, Pavilion and Dempster Basin with additional dirt berms in conjunction with raising the elevations of the Ballard and Dempster Basin discharge culverts.

211. The above staging sequence was affected by Berger's obstruction of the Dee Road stormwater inlets with fabric.

212. If the Defendant would have completely pumped down the Basins or either temporarily or permanently raised the Basins' bank elevations in conjunction with raising their discharge culverts, all stormwater from the September 13, 2008 storm would have been stored on North Development Property and the Plaintiffs would not have sustained their invasive flooding.

213. Comingling of Stormwater: Because the invading stormwater comingled and mixed together regardless of ownership and/or control, and cannot be readily apportioned, this Defendant is liable for all injury and damage caused by the invading stormwater to the Robin-Dee Community Plaintiff Class.

214. Combined Causation-Indivisible Injury: The tortious conduct of this Defendant combined with the tortious conduct of other Defendants to proximately cause an indivisible injury to the Robin-Dee Community Plaintiff Class for this invading stormwater.

215. Proximate Cause: As a proximate cause of these breaches of duties by this Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part.

PART IV: COMMON LEGAL AVERMENTS

216. "This Defendant" means each defendant individually. By this averment is meant that these averments are direct to each Defendant individually, requiring an individual answer. It is not the intent of this pleading to pled a "joint" averment, that is, an averment requiring this Defendant to answer as to another Defendant or the knowledge of another Defendant.. Each Defendant is requested to answer these averments only as to its knowledge. "Joint allegations", "joint counts", "joint knowledge" or joinder of claims is not the intent of this pleading. This statement applies to Subparts in Part III and is incorporated into all Subparts

217. Generally, unless otherwise indicated, as used in this Part entitled "Statement of Common Count Averments", "this Defendant" or "Defendant" means each of the following defendants individually: Advocate, Gewalt, the District, Park Ridge, Maine Township and the County (also known as the "Stormwater Defendants").

217.1. "Defendant" means this Defendant (through its attorney) who is answering this Part IV.

217.2. Generally, unless otherwise indicated, "this Defendant" does not include Berger.

217.3. Generally, unless otherwise indicated, these averments pertain to the District only in its capacity as a "Stormwater Defendant"; these averments, unless otherwise indicated, do not

pertain to the District in its separate capacity as a "Sanitary Sewer Water Defendant" relating to the interceptors into which both Glenview and Park Ridge discharge sanitary sewer water.

217.4. Generally, unless otherwise indicated, these averments pertain to Park Ridge only in its capacity as a "Stormwater Defendant"~~; unless otherwise indicated, these averments do not apply to Park Ridge in its separate capacity as a "Sanitary Sewer Water Defendant" for the Park Ridge Ballard North Neighborhood or other Park Ridge neighborhoods affected by these stormwater invasions into the Robin Dee Community~~.

218. **Factual Basis for Legal Duties of Due Care:** Before September 13, 2008, this Defendant knew or should have known of the highly-likely and highly-probable floodings risks posing serious injury and damage to Plaintiffs based upon **Earlier Floodings** and **Studies.**

218.1. Since 1976, this Defendant knew or should have known of the defects in the Prairie Creek Stormwater System (PCSS) detailed in the 1975-1976 IDOT Flood Report including that the MD North Development Segment and the MD Robin-Dee Segment posed a substantial flood risk to Plaintiffs;

218.2. Since 1987, this Defendant knew or should have known of the invasive floodings into the Robin-Dee Community Area based upon the 1987 Catastrophic Man-Made Flood;

218.3. Since 1990-1991, this Defendant knew or should have known of the undersized culverts including the 60" undersized Howard Court Culvert based upon the 1990-1991 Harza Engineering Studies and Reports;

218.4. Since 2002, this Defendant knew or should have known of the of the invasive floodings into the Robin-Dee Community Area based upon the 1987 Catastrophic Man-Made Flood;

218.5. Since 2002, this Defendant knew or should have known of the 2002 IDNR investigation,

218.6. Since the 1960s, this Defendant knew or should have known based upon an inspection of the 60" Howard Court Culvert and its 100 yard upstream 120" Robin Court Culvert that this was an open and obvious bottlenecks and catastrophic restriction to flow which a reasonable inspection of the MD Robin-Dee Community Segment of the PCSS would have revealed,.

219. Based upon the **Earlier Floods** and **Earlier Flooding Investigations**, and these known or reasonably knowable facts posing an imminent risk of harm to the Plaintiff, this Defendant owed a general non-delegable legal duty to Plaintiffs to properly manage stormwater under this Defendant's control, supervision, management and/or jurisdiction so as to prevent foreseeable harm to foreseeable plaintiffs.

220. ~~As a controller, supervisor, manager, operator, party in control and/or jurisdiction in control, of the accumulated stormwater on Advocate's North Development Property, this Defendant was under a general non-delegable duty to operationally control the stormwater accumulating upstream of the Robin-Dee Community Area, including on Advocate's North and South Developments Properties, so as not invasively flood plaintiffs' lands and catastrophically flood with invasive stormwater plaintiffs' persons and properties~~.

IV.A. COMMON CONSTITUTION ARTICLE XI. SECS. 1 AND 2 LEGAL AVERMENTS

221. For this subpart: (a) this or the "Stormwater Manager Defendant" means Advocate, Gewalt, the District, Park Ridge, Maine Township, and the County; (b) this or the "Sanitary Sewage Manager Defendant" means Glenview, ~~Park Ridge~~ and the District; and (c) this or the "Defendant" means each Defendant except Berger.

222. Illinois Constitution of 1970, Article XI, §§1 and 2 provides that it is the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations, a right of each person to a healthful environment and a right to

this right against any party, government or private.

223. This Defendant owed a duty to the Plaintiffs to provide and to maintain a healthful environment.

224. The stormwater within the Ballard, Pavilion and Dempster Basin Structures and surrounding lands contained (a) duck, geese and other water fowl feces, urine and wastes, (b) other types of animal feces, urine and waste, (c) other pollutants associated with surface water runoff including heavy metals and deleterious dissolved dusts and (d) other bacteria, viruses, drugs and/or wastes, harmful to human health, safety and welfare.

225. The sanitary sewer water in the sanitary sewer systems operated by Glenview~~, Park Ridge~~ and/or the District contained (a) feces and urine, (b) e-coli, (c) other bacteria and virus, including bacteria and viruses which cause hepatitis and gastric disorders and (d) other unhealthy, injurious bodily wastes, bodily fluids, bacteria, viruses, drugs, chemicals and other form of unhealthy, injurious pollutants, wastes and liquids.

226. This Defendant knew or should have known of the unhealthy environment posed by the pollutants contained in the stormwater water and the sanitary sewage.

227. This Stormwater Manager Defendant breached these duties as stormwater manager by tortiously causing the release and escape of accumulated stormwater from the Advocate North Development to invade the Robin-Dee Community Area in breach of its duty to provide a healthful environment.

228. This Sanitary Sewage Manager Defendant breached these duties as sanitary sewer system manager by tortiously causing the release and escape of accumulated stormwater from the Advocate North Development to invade the Robin-Dee Community Area in breach of its duty to provide a healthful environment.

IV.B. COMMON NEGLIGENT STORMWATER SYSTEM MAINTENANCE BREACHES BASED UPON UNDERTAKING/ASSUMED CONTRACTUAL DUTIES LEGAL AVERMENTS.

229. For this subpart, this "Defendant" means Advocate ~~and Gewalt~~.

230. The standard District "Sewerage System Permit" in its "General Conditions of the Permit" relating to said Plans and Permits discussed above and herein contained the following relevant paragraph or similar relevant paragraph applying to Permittees such as Advocate and agents or representatives of Permittees ~~such as Gewalt~~.

231. The following term and condition is set forth in District Permit No. 06-032 and is an example of an identical and/or a substantially identical Permit Term and Condition agreed to by Advocate ~~and Gewalt~~ relating to the issuance of the District's Permits based upon the Plans submitted for approval as listed herein.

232. Paragraph 5 of each of these Plans and Permits relates to **Maintenance** and identically or substantially identically provides as follows:

> **5. Maintenance:** The sewer connections, lines, systems or facilities constructed hereunder or serving the facilities constructed hereunder shall be properly maintained and operated at all times in accordance with all applicable requirements....

233. This Permit Duty was owed to the Plaintiffs' Class as foreseeable plaintiffs who would be foreseeably injured by breach of this Permit duty.

234. This Permit Condition applies to the Detention Basin designed by Advocate ~~and Gewalt~~ and constructed by Advocate ~~and Gewalt~~. By way of example and illustration, but not limited to

MWRD Permit No. 06-032, said permit conditions apply to Detention Basins such as Advocate's Basin Structures.

235. Breach of Maintenance: This Defendant breached this duty to property maintain the stormwater systems and stormwater facilities by the following conduct *:

236. This Defendant failed to maintain the plan depth of its retention basins by failing to desilt *; and

237. This Defendant failed to maintain the stormwater systems and facilities in compliance with reasonable standards*.

IV.C. COMMON NEGLIGENT STORMWATER SYSTEM MAINTENANCE BREACHES BASED UPON FORESEEABLE HARM LEGAL AVERMENTS

238. For this subpart, "this Defendant" means: the District, in its capacity as stormwater manager of the Prairie Creek Stormwater System (PCSS), and Maine Township in its capacity as stormwater manager of the PCSS within its jurisdiction.

239. This Defendant owed the following maintenance duties relating to Stormwater Structures within the Prairie Creek Stormwater System.

240. **Cleaning**: This Defendant owed a non-delegable duty to clean, maintain, and/or repair drainage structures within the Prairie Creek Stormwater System under its ownership, possession, control, management, supervision and/or jurisdiction. This duty to clean included:

240.1. Removing of natural obstructions such as trees, tree trunks, tree limbs and other natural developing or growing obstructions to flow;

240.2. Removing man-made obstructions to flow such as collapsed banks, collapsed walls which previously provided lateral support, debris discharged into drains and sewers and similar man-made obstructions to flow; and/or

240.3. Repairing and/or restoring banks and bankwalls to design standards.

241. This Defendant breached these duties by the following acts and conduct:

242. This Defendant failed to remove natural obstructions such as trees, tree trunks, tree limbs, and other natural developing or growing obstructions to including within the Main Drain Robin-Dee Community Segment of the Prairie Creek Stormwater System (PCSS);

243. This Defendant failed to remove man-made obstructions to flow including the areas of the Robin-Dee Segment where the brick bank walls collapsed into the Main Drain Robin Neighborhood Subsegment and where other man-made debris collects within the Main Drain Robin Neighborhood Subsegment; and

244. This Defendant failed to reconstruct the bank walls so as to prevent earth and other debris such as the bank brick walls themselves from obstructing flows through the Main Drain Robin-Dee Community Segment.

IV.D. COMMON NEGLIGENT SANITARY SYSTEM MAINTENANCE BREACHES OF DUTY BASED UPON 35 ILL. ADM. CD. SEC. 306.303 LEGAL AVERMENTS

245. For this subpart, "this Defendant" means: the Glenview, ~~Park Ridge in its capacity as local sanitary sewage owner and manager,~~ and the District, in its capacity as regional sanitary sewage owner and manager.

246. 35 Ill.Adm.Cd. Sec. 306.303 imposes duties upon this Defendant for the benefit of the Plaintiffs to properly operate and manage sanitary sewage under its control and/or ownership.

247. **Breaches:** This Defendant breached these duties include but not limited to the following:

247.1. This Defendant knew in the past stormwater invasive flooding of the Robin-Dee Community area by surface stormwater that stormwater invades the entire area sanitary sewers through floor drains in individual units yet this Defendant failed to temporarily bulkhead branches of its sanitary sewer system with sandbags or other systems to prevent sanitary sewerage home invasions upstream of the immediately-affected Robin-Dee Community and use pump(s) upstream of the bulkhead to discharge any sanitary sewage collecting during the storm in breach of its duty to do so.

247.2. This Defendant knew of the existence of holes in the manhole lids in the Robin-Dee Community Area and that these holes in the manhole covers impermissibly permits stormwater to enter the Sanitary Sewerage System during flooding yet failed to seal these holes its manholes in breach of its duty to do so;

247.3. This Defendant knew of the absence of water-tight seals between the manhole lid and its seating ring in the manholes and that this lack of a water-tight seal impermissibly permitted stormwater to enter the Sanitary Sewerage System yet this Defendant failed to seal these lids in breach of its duty to do so;

247.4. Defendant knew that its manholes are not properly maintained including properly sealed and properly rendered water-tight from stormwater, yet this Defendant failed to render water-tight its manholes in breach of these duties impermissibly permitting stormwater inflows into the Sanitary Sewerage System*; and

247.5. This Defendant knew or should have known of impermissible levels of inflow and infiltration in violation of application state, regional, county and local standards, yet this Defendant failed to correct these inflow/infiltration defects, thereby impermissibly allowing stormwater to invade the sanitary sewage system in violation of its duty*.

IV.E. COMMON NEGLIGENT SANITARY SYSTEM MAINTENANCE BREACHES OF DUTY BASED UPON FORESEEABLE HARM LEGAL AVERMENTS

248. For this subpart, "this Defendant" means: the Glenview, ~~Park Ridge in its capacity as local sanitary sewage system owner and manager,~~ and the District, in its capacity as regional sanitary sewage system owner and manager.

249. **Duty to Properly Manage Sanitary Sewage:** Based upon the Earlier Floodings and the Earlier Flooding Studies, this Defendant owed duties to the Plaintiffs to properly operate and manage sanitary sewage under its control and/or ownership so as to prevent foreseeable harm to Plaintiffs.

250. **Breaches:** This Defendant breached these duties include but not limited to the following:

250.1. This Defendant knew in the past stormwater invasive flooding of the Robin-Dee Community area by surface stormwater that stormwater invades the entire area sanitary sewers through floor drains in individual units yet this Defendant failed to temporarily bulkhead branches of its sanitary sewer system with sandbags or other systems to prevent sanitary sewerage home invasions upstream of the immediately-affected Robin-Dee Community and use pump(s) upstream of the bulkhead to discharge any sanitary sewage collecting during the storm in breach of its duty to do so.

250.2. This Defendant knew of the existence of holes in the manhole lids in the Robin-Dee Community Area and that these holes in the manhole covers impermissibly permits stormwater to enter the Sanitary Sewerage System during flooding yet failed to seal these holes its manholes in breach of its duty to do so;

250.3. This Defendant knew of the absence of water-tight seals between the manhole lid and its seating ring in the manholes and that this lack of a water-tight seal impermissibly

permitted stormwater to enter the Sanitary Sewerage System yet this Defendant failed to seal these lids in breach of its duty to do so;

250.4. Defendant knew that its manholes are not properly maintained including properly sealed and properly rendered water-tight from stormwater, yet this Defendant failed to render water-tight its manholes in breach of these duties impermissibly permitting stormwater inflows into the Sanitary Sewerage System*; and

250.5. This Defendant knew or should have known of impermissible levels of inflow and infiltration in violation of application state, regional, county and local standards, yet this Defendant failed to correct these inflow/infiltration defects, thereby impermissibly allowing stormwater to invade the sanitary sewage system in violation of its duty*.

IV.F. COMMON NEGLIGENT STORMWATER OPERATIONAL CONTROL BREACHES BASED UPON CONTRACTUAL/ASSUMED DUTIES LEGAL AVERMENTS

251. For this subpart, this "Defendant" means Advocate ~~and Gewalt~~.

252. The standard District "Sewerage System Permit" in its "General Conditions of the Permit" relating to said Plans and Permits discussed above and herein contained the following relevant paragraph or similar relevant paragraph applying to Permittees such as Advocate and agents or representatives of Permittees ~~such as Gewalt~~.

253. The following term and condition is set forth in District Permit No. 06-032 and is an example of an identical and/or a substantially identical Permit Term and Condition agreed to by Advocate ~~and Gewalt~~ relating to the issuance of the District's Permits based upon the Plans submitted for approval as listed herein.

254. Paragraph 5 of each of these Plans and Permits relates to operation besides maintenance and identically or substantially identically provides as follows:

5. Maintenance: The sewer connections, lines, systems or facilities constructed hereunder or serving the facilities constructed hereunder shall be properly maintained and operated at all times in accordance with all applicable requirements....

255. This Permit Duty was owed to the Plaintiffs' Class as foreseeable plaintiffs who would be foreseeably injured by breach of this Permit duty.

256. This Permit Condition applies to the Detention Basin designed by Advocate and Gewalt and constructed by Advocate ~~and Gewalt~~. By way of example and illustration, but not limited to MWRD Permit No. 06-032, said permit conditions apply to Detention Basins such as Advocate's Basin Structures.

257. Breach of Duty of Proper Operation: This Defendant breached this duty to properly maintain the stormwater systems and stormwater facilities by the following conduct:

258. This Defendant failed to pump down the Ballard, Pavilion and Dempster Detention Basins before the September 13, 2008 storm so as to maximize the capacity of these detention basins to detain and storage stormwater;

259. This Defendant failed to pump accumulated stormwater into other areas on the North and South Development which could temporarily store stormwater such as the Advocate parking garage on the North Development, other parking garages and/or parking lots;

260. This Defendant failed to install a flood prevention barrier system between the Robin-Dee Community the North Development including but not limited to:

261. emergency plugging of the Ballard Basin Discharge Culvert with sandbags or another system either before the storm or upon discovering that the Main Drain Robin-Dee Community Segment was nearly running full and about to overtop its banks and bottleneck at the Howard Court Culvert;

262. emergency plugging of the Dempster Basin Discharge Culvert Culvert with sandbags or another system upon discovering that the Main Drain Robin-Dee Community Segment was nearly running full and about to overtop its banks and bottleneck at the Howard Court Culvert;

263. temporarily erecting before the storm and/or during the earlier stages of the storm an impervious stormwater barrier such as sandbags, sand barrels, and/or the Aqua Barrier Inflatable Dam system or similar systems to act a barrier between the Robin-Dee Community and the North Development to prevent the release and escape of excess accumulated stormwater from the North Development and retain stormwater on the North Development.

IV.G. COMMON NEGLIGENT STORMWATER OPERATIONAL CONTROL BREACHES OF DUTY BASED UPON FORESEEABLE HARM LEGAL AVERMENTS

264. For this subpart, this "Defendant" means Advocate, ~~Gewalt~~, Berger, the District, Park Ridge, Maine Township and the County.

265. IV.G.1. OPERATIONAL CONTROL BREACHES BEFORE THE 2008 STORM

266. Planning Duty to Know Effects of Stormwater Release on Lower Elevation Homes: When planning operational practices for managing stormwater, this Defendant owed a duty to know the reasonably foreseeable harmful consequences and/or effects which stormwater that accumulates on and then discharges and/or releases from the North Development and/or South Development Properties would have on downstream, contiguous and/or lower elevation property owners and/or occupants including the risks of surface flooding to downstream, contiguous property owners such as the Plaintiffs.

267. Breach: This Defendant breached this duty by failing to investigate or properly investigate downstream flooding of the Plaintiffs' Robin-Dee Community Area.

268. Planning Duty to Properly Determine Approaching Rainfall Flood Risks: When planning operational practices for managing stormwater, this Defendant owed a duty to properly determine the characteristics of stormwater runoff to be generated by rainfall events approaching the Prairie Creek Watershed including stormwater quantities, intensities, peaks, times of concentration and other parameters.

269. Breach: This Defendant beached this duty by failing to calculate and/or properly calculate rainfall runoff stormwater risks relating to stormwater quantities, intensities, peaks, times of duration and other parameters as they would affect Plaintiffs.

270. Use of State-of-the-Art Computer Model: Given the foreseeable harm to Plaintiffs from Earlier Floods detailed in Earlier Flood Investigation, this Defendant owed a duty to use state-of-the-art computer modeling of the PCW and the PCSS to determine the effects of the developments of Advocate Developments Properties on the Prairie Creek Main Drain and the Prairie Creek Stormwater System on the stormwater volumes, intensities, peaks, times of concentration and other parameters of stormwater.

271. Breach: This Defendant breached this duty by failing to use state-of-the-art computer modeling of the PCW and the PCSS to determine or properly determine stormwater discharges onto Plaintiffs' lands and properties.

272. Using State of the Art Science for Calculating Stormwater Characteristics Affecting Flow Downstream: When planning operational management practices for managing stormwater, this Defendant owed a duty to use state-of-the-art science for determining stormwater volumes, intensities, peaks, times of concentration and other stormwater parameters so as to prevent invasive flooding from stormwater accumulating on North Development Property as to Plaintiffs.

273. Breach: This Defendant breached these duties relating to operational panning before the storm as follows:

274. this Defendant failed to maintain a rain gauge(s) on Advocate's Property and/or in the Upper Prairie Creek Watershed to gauge the rainfall, thereby not being able to accurately estimate rainfall;

275. this Defendant failed to use Doppler or Nextrad Radar, especially from nearby O'Hare to measure rainfall; and

276. this Defendant failed to install a stormwater runoff logger and/or combination stormwater/rainfall logger in its Stormwater Structures under its control so as to determine the rainfall runoff being generated by the rainfall, thereby not knowing how much storage would be needed for a storm.

277. Proper Determination of Needed Storage Capacity for Forecasted Rainfall Runoff Stormwater: When planning operational practices for managing stormwater including storage capacity for anticipated rainfall runoff stormwater, this Defendant owed a duty to know of all relevant characteristics relating to the capacity and/or lack of capacity of Advocate's Developments Properties, the Prairie Creek Stormwater System upstream of the Plaintiffs, and/or other contiguous properties under its control, supervision, jurisdiction and/or management to store stormwater so as to predict the timing of pumping practices and/or implementation of emergency flood protection systems including flood prevention barrier system. These duties include but are not limited to duties to properly monitor, inspect, study and know the imperviousness, the slope and all other factors which affect the intensity, flow, quantity, timing and other characteristics of the generation of stormwater runoff before and during a rainfall

from Advocate's Development Properties and/or other properties under its operation, control, jurisdiction and/or management.

277.1. **Breach:** This Defendant breached these duties by failing to know the proper storage capacities necessary for a storm of the strength of the September 13, 2008 storm.

278. **Knowledge of Downstream Conveyance Structure Restrictions**: This Defendant owed a duty to know of the capacity or lack of capacity including any PCSS Stormwater Structures downstream including any bottlenecks or other obstructions to stormwater conveyance and flow from Advocate's North Development Properties, other upstream properties under its ownership, operation, control, management or jurisdiction and/or Upstream Properties which would affect this Defendant's ability to discharge stormwater from the Advocate's North Property. This duty includes a duty to know the existence of downstream bottlenecks, downstream obstructions, downstream blockages and/or downstream restrictions of the PCSS including the undersized 60" Howard Court Culvert, the undersized Dee Neighborhood Main Drain and other MD Robin-Dee Segment and North Development Discharge Culverts which would affect this Defendant's ability to safely discharge stormwater from Advocate Development Properties or property under its ownership, operation, control, management or jurisdiction.

279. Breach: Substantially before September 13, 2008 besides on September 13, 2008, this Defendant breached these duties by failing to know whether downstream segments of the PCSS including the Robin-Dee Segment of the Prairie Creek Main Drain could safely receive excess stormwater without invasive flooding into the Robin-Dee Community from property or property under its ownership, operation, control, management or jurisdiction.

280. **Flood Prevention Plan**: Relating to planning operational practices to manage stormwater, this Defendant owed a duty owed a non-delegable duty to have an emergency action

plan to prevent invasive flooding from Advocate Development Properties or property under its ownership, operation, control, management or jurisdiction.

280.1. **Breach**: This Defendant failed to develop an emergency plan of action to prevent invasive flooding into the Robin-Dee Community Area.

281. **Notify and Complain to Responsible Officials to Remedy Downstream Defects:** This Defendant owed a non-delegable duty to notify and/or complain to responsible persons about the lack of cleaning, lack of maintenance, and/or lack of repair and/or disrepair of drainage structures not on property under its ownership, operation, control, management or jurisdiction which unmaintained drainage structure(s) affects the ability to discharge and/or drain and/or optimally drain drainage structure(s) on Advocate Development Properties or property under this Defendant's ownership, operation, control, management or jurisdiction.

282. Breach: This Defendant breached this duty by failing to contact the responsible party(ies) for the proper cleaning, maintenance and/or repair of Stormwater Structures including the Robin Neighborhood Main Drain and the MD Dee Neighborhood Stormwater Pipe Subsegment within the Prairie Creek Stormwater System.

IV.G.2. OPERATION CONTROL BREACHES AS THE 2008 STORM APPROACHES AND DURING THE 2008 STORM

283. **Pre-Storm Preparation Duties**: Based upon the Earlier Floodings and Earlier Flooding Studies, this Defendant owed the following specific duties of due care to the Plaintiffs relating to Pre-Storm Preparation Duties so as to prevent invasive flooding from excess accumulated stormwater discharging into the Robin-Dee Community Area from Advocate Development Properties.

284. Estimating Likely Rainfall Runoff: Relating to likely, approaching rainfall in the PCW, this Defendant owed a non-delegable duty to know or reasonably estimate or predict the amount or volume of an impending, estimated rainfall in the vicinity of or approaching the PCW, including the North Development Property, the South Development Property, the Upper Prairie Creek Watershed, and the Lower Prairie Creek Watershed, or other property under this Defendant's ownership, operation, control, management or jurisdiction and Upstream Property so as to predict the likelihood of invasive flooding and to initiate emergency action to prevent invasive flooding;

285. Breach: This Defendant breached the above duty by failing to estimate the rainfall to occur within the Prairie Creek Watershed including the areas of the Prairie Creek Watershed upstream from the Plaintiffs' Robin Dee Community Area.

286. Estimate Stormwater: Relating to stormwater generated by an approaching rainfall, a non-delegable duty to know or reasonably estimate the stormwater from an impending, approaching rainfall including knowing all relevant characteristics to calculate stormwater on This Defendant's property, property under its ownership, operation, control, management or jurisdiction or Upstream Property so as to predict the likelihood of invasive flooding and to initiate emergency action to prevent invasive flooding.

286.1. **Breaches**: This Defendant breached these above duties by failing to learn of and/or to know of the reasonable estimates of stormwater including critical stormwater characteristics such as volume, intensity and times of concentration to be generated by the September 13, 2008 and to take actions appropriate to a proper calculation of anticipated stormwater and the timing of its collection and transportation.

287. **Pre-Storm Planning Duty to Mobile Temporary Pump Stations:** This Defendant owed a non-delegable duty to plan substantially before a storm to have stormwater pump stations with adequate stormwater pumps available to, first, pump down the Basin Structures to maximize stormwater storage of these Basins and, second, to pump away from the Robin-Dee Community including onto the North Development and South Development parking lots and parking structure(s) and to the High School Recreational Areas south of Dempster so as to maximize surface storage.

288. Breaches: On or shortly before September 13, 2008, this Defendant breached the above duty because the Defendant failed to set up pumps stations to (a) pump down the existing Basin Structures and /or (b) pump stormwater into other areas such as North and/or South Development parking lots and/or parking garages and/or the Recreational Areas of the East Maine High School south of Dempster Road.

289. Duty to divert Ballard and Dempster Basin Stormwater water flows to other areas of Advocate Property: This Defendant was under a duty to deploy stormwater pumps to pump away from the Robin-Dee Community and the Prairie Creek Main Drain into other areas of the North Development Property and/or the South Development Property including but not limited to the Advocate's North Development Parking Structure Basement and/or other below grade parking structures.

290. Breaches: This Defendant failed to divert stormwater away from the Robin-Dee Community Area including failing to divert stormwater from the Ballard Basin to other areas of the North Development and South Development through pumping from the Ballard Basin into those areas including parking lot areas and parking structures.

291. Mobilize Tanker Trucks to Receive Excess Flow: This Defendant owed a duty to rent and/or deploy tanker trucks to receive the overflow or excessive flow from the Ballard, Pavilion and Dempster Basins so as to avoid invasive flooding into the Robin-Dee Neighborhood.

292. Breach: This Defendant failed to rent and/or deploy tanker trucks to receive the excess stormwater accumulating in the Ballard, Pavilion and Dempster Basins.

293. **Pre-Storm Pumping Down of Basin**: This Defendant owed a duty to pump down the Basin Structures before the storm arrives or in the very early stages of the storm.

294. Breach: This Defendant breached the above duty by failing to pump down the Ballard Basin, Pavilion Basin and Dempster Basin so as to increase these Basins storage capacities to equal the anticipated storage volume necessary for the September 13, 2008 rainfall.

295. **Stormwater Temporary Storage Systems:** This Defendant owed a non-delegable duty to have temporary stormwater storage systems available to store stormwater on the North Development including but not limited to:

295.1. Using Sandbagging Trucks with a capacity of 10,000 sandbags per hour or similar capacity to create a sandbag barrier between the Robin Neighborhood and the North Development;

295.2. Using temporary, rapid-erection stormwater barrier systems such as the inflatable dams used in the Aqua Barrier System or similar systems to temporarily and timely increase storage capacity on the North Development and South Development;

295.3. Using below-Robin-Neighborhood-flooding-hydraulic-grade-line parking structures and other non-habitable spaces for pump storage;

295.4. Using tank trucks to store pumped stormwater;

295.5. Using other pre-storm or earlier storm methods such as barriers and pumps to prevent invasive flooding.

296. Breaches: This Defendant breached these above duties including but not limited to the following conduct:

296.1. This Defendant failed to deploy a work force to create a sandbag barrier using a Sandbagging Truck with a capacity of 10,000 sandbags per hour or similar capacity trucks or machines to create a sandbag/sand barrel barrier between the Robin Neighborhood and the North Development;

296.2. This Defendant failed to deploy a temporary, rapid-erection stormwater barrier systems between the North Development and the Dee Neighborhood;

296.3. This Defendant failed to block or restrict flows with sandbags or other systems at the Ballard Basin Discharge Culvert;

296.4. This Defendant failed to block or restrict flows with sandbags or other systems at the Dempster Basin Discharge Culvert;

296.5. This Defendant failed to use inflatable dams used in the Aqua Barrier System or similar systems including sandbags and sand barrels to temporarily and (a) increase storage capacity on the North Development and South Development and (b) erect a stormwater barrier between the Robin Neighborhood and North Development at the east Robin Alley street line so as to store stormwater upstream;

296.6. This Defendant failed to use below-Robin-Neighborhood-flooding-hydraulic-grade-line parking structures and other lower non-habitable spaces for pumping stormwater for storage; and

296.7. This Defendant failed to use tank trucks to store excess stormwater.

296.8. This Defendant failed to use other pre-storm or earlier storm methods such as barriers and pumps to prevent invasive flooding.

297. **Pumping Down Before Storm**: This Defendant owed a non-delegable duty to provide proper and adequate pumping capacity to increase stormwater storage capacity on this Defendant's property or property under its ownership, operation, control, management or jurisdiction including but not limited to pumping down the Ballard, Pavilion and Dempster Basin into the Robin-Dee Segment of the Prairie Creek Main Drain before or in the early stages of a rainfall accumulated and/or accumulating stormwater in the Advocate Primary Basin Structures and/or other watershed storm sewers and/or storm sewer systems so that all pre-existing, then-accumulated, pre-rainfall stormwater in retention basins, sewers and other stormwater structures on this Defendant's property or property under its ownership, operation, control or jurisdiction before this rain event would be drained so as to maximize the storage capacity and storage ability of all retention and/or detention basins, sewers and/or other stormwater structures and systems to receive and store stormwater from the imminent, impending significant rainfall and all implicit duties including but not limited to seeking and obtaining any necessary permissions and/or permits to permit such pumping.

297.1. **Breaches**: This Defendant breached these duties by failing to pump down the Ballard, Pavilion and Dempster Basins before the storm so as to maximize stormwater capacity of these retention/detention basins.

298. Pumping during the storm away from Robin-Dee Community: This Defendant owed a duty to pump into below-flood-hydraulic-grade-line depressions on Advocate Development Properties such as below-flood-hydraulic-grade-line parking structures and other similar temporary storage.

299. Breaches: This Defendant breached the above duties by failing to pump stormwater away from the Robin-Dee Community to other areas of the North and South Development including into parking garage(s) and other lower elevation areas than the Robin-Dee Community and into temporary storage areas created by rapid-erection stormwater containment systems such as the inflatable Aqua Barrier Dam.

300. Temporary Storage: This Defendant owed a non-delegable duty to temporarily increase stormwater storage capacity on Advocate North Development Properties or property under its ownership, operation, control and/or jurisdiction. This duty included but was not limited to:

301. A duty to employ temporary stormwater management and flood prevention systems such as sandbagging and/or temporary sand or water barrels, bins and/or similar sand or water stormwater container systems positioned at the perimeters of the Advocate Primary Basin Structures, and the Advocate Southwest Parking Lot north of the Dempster Basin; and

302. A duty to temporarily store excess accumulated water on Advocate North Development Property or Advocate South Development Property so as to temporarily increase the stormwater storage capacity of the Prairie Creek Stormwater System on the North and South Development.

303. Breaches: This Defendant breached these duties by failing (a) to create temporary storage capacity for excess stormwater on this Defendant's property or property under its control, supervision, management or jurisdiction and (b) to pump excess stormwater into this temporary storage system.

304. Duty to Prepare Emergency Flood Plan: This Defendant was under a non-delegable duty to prepare an Emergency Flood Plan to implement before and/or during a storm in the Prairie Creek Watershed in order to prevent invasive flooding into the Robin-Dee Community.

305. Breaches: This Defendant breached this above duties when it failed to prepare an emergency flood prevention action plan including by the failing to set or define a triggering rainfall event such as the likely or estimated rainfall amounts that mandate the activation of the emergency flood prevent action plan to prevent foreseeable invasive flooding into the Robin-Dee Community.

IV.H. COMMON NEGLIGENT SANITARY SYSTEM OPERATIONAL CONTROL BREACHES OF DUTY LEGAL AVERMENTS

IV.H.1. OPERATIONAL CONTROL BREACHES BEFORE THE 2008 STORM

306. As used in this Subpart, "this Defendant" means Glenview, ~~Park Ridge~~ and the District.

307. As a service provider receiving fees from the Plaintiffs, and as operator of its sanitary sewage disposal system, or that subsystem of the larger District System within its jurisdiction, this Defendant owed a duty to prevent foreseeable harm to its Plaintiff customers from sewage backups invading customers' homes from this Defendant's sanitary sewage disposal system.

308. Breaches: This Defendant breached these duties by failing to prepare a sewage flood prevention plan for the highly-foreseeable flooding of its sanitary sewers from invading stormwater from the Prairie Creek Stormwater System including invading water from the Robin Neighborhood Main Drain and the MD North Development Subsegment.

IV.H.2. OPERATIONAL CONTROL BREACHES AS THE 2008 STORM APPROACHES AND DURING THE 2008 STORM

309. Duty: As the September 13, 2008 storm approached and during the early stages of the storm, this Defendant had a duty to mobilize its equipment and forces to prevent sanitary sewage backup flooding through the basement floor drains of the Robin-Dee Community Area.

310. Breaches: On September 12 and 13, 2008, this Defendant breach this duty (a) by failing to temporarily bulkhead and separate from the remainder of its system those municipal lateral sanitary sewage sewers which become surcharged with stormwater during these stormwater invasive floodings; and (b) by failing to mobilize sewage pumps to pump out excess stormwater invading its sanitary sewage system, either pumping this sewer water into tanker trucks or another source for receiving this sanitary sewer water.

IV.I. COMMON NEGLIGENT STORMWATER SYSTEM DESIGN BREACHES OF DUTY LEGAL AVERMENTS

IV.I.1. NEGLIGENT STORMWATER SYSTEM DESIGN BREACHES BASED UPON CONTRACT

311. As used in this Subpart, "this Defendant" means Advocate and Gewalt, the District, and Park Ridge.

312. Advocate was the Permittee and Gewalt was the Permittee's representative and/or agent relating to District Stormwater Permit Applications and Permits issued relating to stormwater management on the North and South Developments including but not limited to District Permit Nos. 06-032, 05-438, 04-557, 04-040, 00-643, 94-530, 94-243, and 94-084.

313. This Defendant undertook and agreed to a general non-delegable duty of due care towards the plaintiffs as the foreseeable persons to be injured by unreasonably dangerous designs relating to Advocate's Ballard, Pavilion and Dempster Basins and related Stormwater Structures, Systems and Subsystems.

314. ~~This Defendant owed a specific non-delegable duty to Plaintiffs to adequately design the Ballard Basin, the Pavilion Basin and the Dempster Basin and to adequately design other land on the North Development and the South Development as mandated in Paragraph I of the General~~

~~Conditions of Permit, which is identical or substantially identical in all of the above numbered permits:~~

> ~~1. Adequacy of Design. The schedules, plans, specification and all other data and documents submitted for this permit are made a part hereof. The responsibility for the adequacy of the design shall rest solely with the Design Engineer and the issuing of this permit shall not relieve him of that responsibility. The issuance of this permit shall not be construed as approval of the concept or construction details of the proposed facilities and shall not absolve the Permittee, Co-permittee or Design Engineer of their respective responsibilities.~~

315. Breaches of Duty: This Defendant breached these design duties in multiple ways including but not limited to providing adequate storage capacity to receive the stormwater runoff generated by the September 13, 2008 rainfall occurrence.

316. The Plaintiffs incorporate the following averments in the next Subsubpart entitled "Common Negligent Stormwater System Design Breaches Based upon Foreseeable Harms."

IV.I.2. COMMON NEGLIGENT STORMWATER SYSTEM DESIGN BREACHES

317. As used in this Subpart, "this Defendant" means Advocate and Gewalt, the District, Park Ridge and Maine Township.

318. This Defendant owed a duty to design the Stormwater Structures of the Prairie Creek Stormwater System to prevent foreseeable invasive flooding harm to the downstream persons, homes and properties of home owners and residents serviced by this Defendant's Segments of the Prairie Creek Stormwater System based upon the Earlier Flooding and the Earlier Flooding Studies.

319. Duty to Investigate the Storage Needs to Serve Residents of the Prairie Creek Stormwater System: Before designing the Basin Structures and other stormwater subsystems which would connect to the Prairie Creek Stormwater System, this Defendant owed a duty to investigate, research, and study the storage needs to serve Plaintiff residents including to investigate the

Storage Requirements of the Prairie Creek Stormwater System which would be necessary to prevent invasive flooding into the Plaintiffs' Robin-Dee Community Area.

320. These duties including knowing the flow behavior of the Prairie Creek Stormwater System including a duties to properly monitor, inspect, study and know the imperviousness, the slope and all other factors which affect the intensity, flow, quantity and other characteristics of the generation of stormwater runoff within the Prairie Creek Watershed which runoff flows to the Prairie Creek Stormwater System.

321. Breaches: This Defendant breached these duties by failing to properly calculate stormwater flows through the Prairie Creek Stormwater System before designing the Ballard Basin, Pavilion Basin and Dempster Basin and other stormwater systems on the North Development and the South Development.

322. Planning Duty to Know Effects of Stormwater Release on Downstream Estates: When planning and designing any drainage or stormwater management on its Developments Properties, including relating to the Primary Basin Structures, this Defendant owed a non-delegable duty to know the harmful consequences and/or effects which stormwater that accumulates on and then discharges and/or releases from Advocate's North Development and/or South Development Properties would have on downstream and/or contiguous property owners and/or occupants including the risks of flooding downstream, contiguous property owners such as the Plaintiffs.

323. Breach: This Defendant did not calculate or properly calculate flooding elevations with the Prairie Creek Stormwater System in light of reasonable estimates of stormwater to be accumulated on the North Development Property from the North Development, South Development and other areas upstream of the North Development.

324. Duty to Investigate the Capacity of Downstream Main Drain: This Defendant owed a duty to investigate or properly investigate the flow capacity of the Main Drain Robin-Dee Community Segment to determine its ability or capacity, if any, to receive flows from the MD North Development Segment and other Upstream Segments and areas with the Upper Prairie Creek Watershed.

325. Breach: This Defendant breached this duty by failing to inspect the Main Drain Robin-Dee Community Segment and/or study the ability or capacity, if any, to receive flows from the Main Drain North Development Segment, including but not limited to (a) failing to read the 1990-1991 Harza Study and failing to obtain public records from the 2002 IDNR Investigation.

326. Employ State-of-the-Art Computer Modeling: More specifically, with full knowledge of the existence of computer modeling to model the performance of a stormwater management system such as the Prairie Creek Stormwater System, this Defendant was under a duty to employ a state-of-the-art reasonable computer model to simulate and predict the effects of its developments or developments on properties within its jurisdiction on stormwater runoff, stormwater flows through the Prairie Creek Stormwater System and any resulting flooding from stormwater.

327. Breaches: This Defendant failed to use or cause to be used a reasonable computer model to model the consequences of its changes to the drainage of Advocate Development Properties including the probable flooding consequences of its design and/or construction of improvements on its Advocate Development Properties.

328. This Defendant also failed to model other developments and/or the overall performance of the Prairie Creek Stormwater System to determine whether additional stormwater storage was

required within the overall Prairie Creek Watershed upstream of the Plaintiffs' Robin-Dee Community Area.

329. Use of Higher, Climate Change Standards to Prevent Invasive Flooding: Given the open and obvious foreseeable harm to Plaintiffs based upon Earlier Flooding and Earlier Food Studies, this Defendant owed higher, more protective stormwater management standards than standards promulgated by the District, Park Ridge, Maine Township and/or the County . These higher standards included (a) standards which were more restrictive of stormwater emissions and discharges and more protective of downstream foreseeable victims as lower elevations such as the Plaintiffs and (b) standards which considered climate change and global warming in the Chicago Region including increases in storm severity or intensity during the preceding 20-40 years. These standards included higher, more protective standards relating to stormwater storage quantities, stormwater detention durations, stormwater release rates and other stormwater detention/retention characteristics relating to storage, detention, retention and/or release;

330. Breaches: This Defendant breached these duties by failing to use zero-tolerance flood standards and by failing to consider the effects of climate change and global warming in the Chicago Region.

331. Duty to Use Proper State-of-the-Art Stormwater Standards and Calculation Methods Despite IDOT Model: Based upon the Earlier Floodings and the Earlier Flood Investigation, this Defendant knew that the stormwater calculation methodologies employed by the District, Park Ridge and other Local Public Entities was unreasonable. Because of this knowledge, this Defendant owed a duty to obtain and/or use then existing state-of-the –art methodology including reasonable computer stormwater management modes. These duties included a duty to

investigate both upstream and downstream stormwater capacities within the Prairie Creek Stormwater System using the model developed in 2002-2003-2004 by the IDNR.

332. Breaches: In breach of this duty, this Defendant negligently failed to employ any reasonable computer model, including the computer model used by the IDNR or available from the IDNR, to model any of its Plans submitted to the District, Park Ridge, Maine Township or any other Local Public Entity. These breaches include:

333. Although this Defendant knew or should have known that the Illinois Department of Natural Resources was investigating the 2002 Catastrophic Flooding, this Defendant either (a) failed to inquire whether the IDNR was using a stormwater management model for determining the causes of the 2002 Flooding or (b) if it did inquire, this Defendant failed to obtain the IDOT Stormwater Management Computer Model and use this model to determine what storage upstream of the Robin-Dee Community Area was necessary to prevent invasive flooding assuming a 100 year-global warming-climate change standard based upon the effects of global warming and climate change in the Chicago region.

334. This Defendant failed to construct its own stormwater computer management model independent of IDOT or other defendants to determine the effect of its proposed developments on the stormwater generated by its developments and/or upstream of its developments but which would collect on land such as the Basins which was owned, possessed, operated, supervised, controlled by or under the jurisdiction of this Defendant.

335. Duty to Correct Known Defect Designs: Based upon the Earlier Floodings and the Earlier Flooding Investigation, this Defendant was under a duty to correct known defects in its design of the Ballard Basin, Pavilion Basin, and Dempster Basin so as to prevent reasonably foreseeable high-probability invasive flooding into Plaintiffs' Robin-Dee Neighborhood Area. This

Defendant owed a specific non-delegable duty to Plaintiffs to adequately design its PCSS Stormwater Public Improvements including the Ballard and Pavilion Basins and other private improvements such as the Dempster Basin **affecting the performance of the PCSS** and to adequately design other stormwater structues and/or to properly review, reject with necessary revisions, compel modification, and take other action to prevent the design flooding occurring on the North Development into the Robin-Dee Community Plaintiff Class.

336. Breach: Despite the foregoing knowledge of defects throughout the Prairie Creek Stormwater System (PCSS), this Defendant failed to correct defective designs and reconstruct the public improvements on Advocate's North Development including (a) failing to enlarge all these Basins to increase storage capacity and (b) failing to use all parking lots and the parking garage near the Dempster Basin as additional, emergency storage areas.

337. Duty to Plan and Design Multi-use Areas and Structures for Temporary Stormwater Usage: Given the known flooding, the known stormwater transportation and conveyance downstream defects especially in the Main Drain's Robin-Dee Community Segment and the lack of adequate stormwater storage capacity based upon Earlier Floodings, Earlier Flood Studies and inspections and study of the then-existing Prairie Creek Stormwater System, this Defendant was under a duty to increase the storage capacity on available land including Advocate North Development and the Advocate South Development by converting all open areas and parking lots into temporary emergency stormwater detention basins for receive excess accumulated stormwater.

338. Breaches: This Defendant breached this duty by failing to design all available open areas and parking lots as temporary emergency stormwater detention basins for receiving excess

accumulated stormwater from both Advocate's properties and areas of the Prairie Creek Watershed upstream of the Robin-Dee Community.

339. This Defendant failed to design and plan its parking lots for multi-use strategies (such as both a parking lot during dry weather conditions and retention basin during wet weather conditions) of Advocate North Development and South Development such as to design, excavate and/or creation depression areas within parking lots for retaining excess stormwater; and

339.1.1. This Defendant failed to design and plan its parking structures for multi-use strategies (such as both a parking structure during dry weather conditions and retention basin during wet weather conditions) for parking structures of Advocate North Development and South Development such as to design, excavate and/or create depression areas within parking structures for retaining excess stormwater.

340. Negligently Failure to Remedy Imminent, Foreseeable Invasive Flooding Risk: Despite the foregoing knowledge of defects throughout the PCSS, before September 13, 2008, this Defendant owed a duty to improve the Advocate's North Development, its drainage structures, and/or other drainage structures of the PCSS on the Advocate's North Development and South Development so as to prevent reasonably foreseeable damage to the Plaintiffs.

341. Breach: This Defendant breached this duty: (a) failed to redesign the Ballard, Pavilion, and Dempster Basins including but not limited to (i) failing to increase the invert elevations (that is, the elevation at which basin stormwater begins drain through the Ballard Discharge Culvert and the Dempster Discharge Culvert into the Robin Neighborhood Main Drain, (ii) failing to elevate the culvert inflow elevation such as by a horizontal surface culvert design rather than a vertical surface culvert design at higher elevations commensurate with increases in Basins' bank elevations, (iii) increasing the bank elevations of the Basins together with corresponding culvert

discharge elevations, (iv) failing to create a permanent barrier berm between the Robin-Dee Community and the North Development Property perimeter so that all excess stormwater is stored on the North Development rather than discharging westward from the North Development either at the Robin Alley border or from Dempster Avenue or other areas; and (v) in general, failing to increase detention basin storage on the North Development and/or the South Development to receive and store stormwater from storms such as the September 13, 2008 storm.

IV.J. COMMON NEGLIGENCE-RES IPSA LOQUITUR-STORMWATER SYSTEM-BREACHES OF DUTY LEGAL AVERMENTS

342. As used in this Subpart, "this Defendant" means Advocate, the District, Park Ridge and Main Township.

343. **Exclusive Ownership/Control**: This Defendant exclusively controlled and/or operated the following properties and the stormwater on these properties: (i) the Advocate Main Drain North Development Segment of the PCSS: (ii) the Advocate North Development Property including but not limited to the Ballard, Pavilion and Dempster Basins and related Stormwater Subsystem and Structures and all other drainage components and structures on said Property; (iv) the North Development parking lots and parking structures; (v) Advocate South Development Property including all Stormwater Subsystems and Structures and all other drainage components and structures on said Property; (vi) all other stormwater drainage components and/or stormwater drainage structures on said North and South Development Properties; and (vii) all parking lots and parking structures on the South Development.

344. **Knowledge of Plaintiffs' Downstream**: This Defendant knew that, in relationship to the properties described in the previous paragraph, the Robin-Dee Community Area Class Plaintiffs' homes and properties were downstream and/or tributary, many at lower elevations and many at lower topographies than the above properties.

345. This Defendant knew that the Plaintiffs' used the PCSS and/or Robin-Dee Community Sanitary Sewerage System for these systems' intended purposes of disposing of sanitary stormwater from Plaintiffs' homes and properties into these stormwater sewers tributary to the Main Drain's Robin-Dee Community Segment.

346. The Plaintiffs' use of the Prairie Creek Stormwater System and/or the Robin-Dee Community Sanitary Sewerage System was/were reasonable and as intended and foreseen by Advocate.

347. The invasive flooding suffered by the Plaintiffs would not have ordinarily occurred but for the negligence of this Defendant relating to Advocate's improper and negligent inspection, study, maintenance, repair, design, engineering, and/or operation of its properties and the stormwater emanating from its properties including those properties described in this Count.

348. Advocate's operation of Advocate' exclusively controlled North and South Development Properties proximately caused the invasive flooding sustained by the Robin-Dee Community Area Plaintiff Class on September 13, 2008.

349. The Plaintiffs did not contribute to the invasive flooding which resulted from the operation of Advocate's Advocate North Development Property and Advocate South Development Property and component(s) and/or structure(s) under Advocate's exclusive control.

350. On September 13, 2008, this Defendant breached these duties owed to Plaintiffs proximately causing damages to the Plaintiffs' persons, homes and properties, said acts and/or omissions constituting Res Ipsa Loquitur Negligence.

351. As a proximate cause of these breaches of duties by Advocate, the Plaintiffs suffered and sustained the injuries and damages set forth under the "Damage" Part of this Complaint.

IV.K. COMMON NEGLIGENCE-RES IPSA LOQUITUR-STORMWATER SYSTEM-WITHIN PARK RIDGE JURISDICTION-BREACHES OF DUTY LEGAL AVERMENTS

352. As used in this Subpart, "this Defendant" means Advocate, the District, and Park Ridge.

353. The Plaintiffs paid fees and taxes for the stormwater management services based upon the stormwater management services provided by this Defendant and this Defendant collected these fees and taxes from the Plaintiffs for the stormwater management services.

354. **Exclusive Control**: This Defendant exclusively controlled and/or operated the following properties and the stormwater on these properties within the jurisdiction of Park Ridge: (i) the Advocate Main Drain North Development Segment of the Prairie Creek Stormwater System (PCSS); (ii) the Advocate North Development Property including but not limited to the Ballard, Pavilion and Dempster Basins and related Stormwater Subsystem and Structures and all other drainage components and structures on said North Development Property; (iv) the North Development open spaces, parking lots and parking structures; (v) Advocate South Development Property including all Stormwater Subsystems and Structures and all other drainage components and structures on said Property; (vi) all open spaces, parking lots and parking structures on the South Development; and (vii) all other stormwater drainage components and/or stormwater drainage structures on said North and South Development Properties.

355. **Knowledge of Plaintiffs' Downstream**: This Defendant knew that, in relationship to the Advocate North and South Development Properties and their elements set out in the prior paragraph, the Robin-Dee Community Area Class Plaintiffs' homes and properties were downstream and/or tributary, many at lower elevations and many at lower topographies than the above properties.

356. This Defendant knew that the Plaintiffs' used the Main Drain Robin-Dee Community Segment of the PCSS for the intended purposes of disposing of stormwater from Plaintiffs' homes and properties into these stormwater sewers tributary to the MD Robin-Dee Community Segment.

357. The Plaintiffs' use of the MD Robin-Dee Community Segment of the PCSS and the tributary sewers to the MD Robin-Dee Community Segment was reasonable and as intended and foreseen by this Defendant.

358. The invasive flooding suffered by the Plaintiffs would not have ordinarily occurred but for the negligence of this Defendant relating to this Defendant's negligent inspection, study, maintenance, repair, design, engineering, and/or operation of these above described properties under its control and/or jurisdiction as detailed in the Common Negligence Subparts herein relating to its stormwater management negligence.

359. This Defendant's operation of its exclusively controlled North and South Development Properties proximately caused the invasive flooding sustained by the Robin-Dee Community Area Plaintiff Class on September 13, 2008.

360. The Plaintiffs did not contribute to the invasive flooding which resulted from the operation of the Advocate North Development Property and Advocate South Development Property and component(s) and/or structure(s) described herein under this Defendant's exclusive control.

IV.L. COMMON NEGLIGENCE-RES IPSA LOQUITUR-STORMWATER SYSTEM-WITHIN MAINE TOWNSHIP JURISDICTION-BREACHES OF DUTY LEGAL AVERMENTS

361. As used in this Subpart, "this Defendant" means the District, Maine Township and the County.

362. The Plaintiffs paid fees and taxes for the stormwater management services based upon the stormwater management services provided by this Defendant and this Defendant collected these fees and taxes from the Plaintiffs for the stormwater managements services provided.

363. **Exclusive Control**: This Defendant exclusively controlled and/or operated the following properties and the stormwater on these properties within the jurisdiction of Maine Township (i) the Main Drain Robin-Dee Community Segment of the Prairie Creek Stormwater System (PCSS) including but not limited to the (a) the Robin Neighborhood Main Drain between Robin Alley and Howard Court, (b) the Dee Neighborhood Main Drain between Howard Count and Briar Court; (c) the single 60" Howard Court Culvert; (d) the single upstream 120" Robin Court Culvert; (e) the twin 60" Robin Alley Culverts; (f) the Briar Court Elbow the MC Robin-Dee Community Segment; and (g) the Rancho Lane Culverts.

364. **Knowledge of Plaintiffs' Downstream**: This Defendant knew that, in relationship to the Advocate North and South Development Properties and their elements set out in the prior paragraph, the Robin-Dee Community Area Class Plaintiffs' homes and properties were downstream and/or tributary, many at lower elevations and many at lower topographies than these properties described in the prior paragraph.

365. This Defendant knew that the Plaintiffs' used the Main Drain Robin-Dee Community Segment of the PCSS for the intended purposes of disposing of stormwater from Plaintiffs' homes and properties into these stormwater sewers tributary to the MD Robin-Dee Community Segment of the PCSS.

366. The Plaintiffs' use of the MD Robin-Dee Community Segment of the PCSS and the tributary sewers to the MD Robin-Dee Community Segment was reasonable and as intended and foreseen by this Defendant.

367. The invasive flooding suffered by the Plaintiffs would not have ordinarily occurred but for the negligence of this Defendant relating to this Defendant's negligent inspection, study, maintenance, repair, design, engineering, and/or operation of these above described properties under its control and/or jurisdiction as detailed in the Common Negligence Subparts herein relating to its stormwater management negligence.

368. This Defendant's operation of its exclusively controlled MD Robin-Dee Segment and Tributary Stormwater Sewers proximately caused the invasive flooding sustained by the Robin-Dee Community Area Plaintiff Class on September 13, 2008.

369. The Plaintiffs did not contribute to the invasive flooding which resulted from the operation of this Defendant's MD Robin-Dee Community Segment of the PCSS and Tributary Sewers and component(s) and/or structure(s) under this Defendant's exclusive control.

IV.M. COMMON NEGLIGENCE-RES IPSA LOQUITUR-SANITARY SEWER SYSTEM-BREACHES OF DUTY LEGAL AVERMENTS

370. As used in this Subpart, "this Defendant" means the Glenview, ~~Park Ridge~~ and the District.

371. The Plaintiffs paid fees and taxes for the sanitary waste disposal services based upon the services provided by this Defendant and this Defendant collected these fees and taxes from the Plaintiffs for the sanitary sewage services provided.

372. **Exclusive Control**: This Defendant exclusively controlled and/or operated the sanitary sewage system within its jurisdiction including but not limited to: (a) controlling all municipal street lateral sewers which it owns, operates and/or controls and/or (b) controlling all sanitary sewer interceptors which it owns, operates and/or controls.

373. **Knowledge of Plaintiffs' Downstream**: This Defendant knew that the some or all of the Robin-Dee Community Area Class Plaintiffs' homes and properties were connected to this Defendant's sanitary sewage system.

374. This Defendant knew that the Plaintiffs' used the municipal, government sanitary sewers connected to their homes was for the intended purposes of disposing of sanitary sewage and sewer water from Plaintiffs' homes and properties into these sanitary sewers under this Defendant's control.

375. The Plaintiffs' use of the municipal, government sanitary sewers was reasonable and as intended and foreseen by this Defendant.

376. The sewer-water invasive flooding suffered by the Plaintiffs would not have ordinarily occurred but for the negligence of this Defendant relating to this Defendant's negligent inspection, study, maintenance, repair, design, engineering, and/or operation of its sanitary sewage system under its control as detailed in the Common Negligence Subparts herein relating to sanitary sewage disposal services negligence.

377. This Defendant's operation of its exclusively controlled sanitary sewage disposal system proximately caused the sanitary sewer invasive flooding sustained by some members of the Robin-Dee Community Area Plaintiff Class on September 13, 2008.

378. The Plaintiffs did not contribute to the sanitary sewage invasive flooding which resulted from this Defendant's operation of this Defendant's sanitary sewage disposal system under this Defendant's exclusive control.

IV.N. COMMON NEGLIGENT STORMWATER NUISANCE VIOLATIONS-FROM PROPERTIES UNDER PARK RIDGE'S JURISDICTION LEGAL AVERMENTS

379. In this Subpart, "this Defendant" means Advocate, ~~Gewalt,~~ the District, Park Ridge, and the County and excludes Berger, Glenview and Maine Township.

380. Although not owning the North Development Property, Gewalt in its capacity as both design engineer and agent of Advocate caused and/or created the ~~nuisance of~~ stormwater invasions from North Development Property by its acts of negligent design detailed earlier herein in the Subparts entitled "Common Negligent Stormwater System Design". ~~Gewalt may also have been responsible for writing Operational Handbook relating to these stormwater system *.~~

381. This Defendant owned, operated, managed, maintained, designed, planned, constructed and/or controlled drainage components and/or drainage structures from which the excess accumulated stormwater (the nuisance) invaded the Plaintiffs' persons, homes and properties, including owing, operating, managing, maintaining and/or controlling the following properties and their drainage structures and/or creating and/or causing the creation of the nuisance of excess accumulated stormwater from these properties: (a) the Advocate North Development Property, including but the Basins and (b) the Advocate South Development Property including the Dempster Basin Stormwater Subsystem including its 84 " Dempster Basin Stormwater Subsystem Main Sewer discharging into the Dempster Basin.

382. This Defendant failed to reasonably design, engineer, maintain, repair and/or operate Advocate North Development Property and Advocate South Development Property including the Ballard Basin, Pavilion Basin, Dempster Basin and Dempster Basin Stormwater Subsystem as detailed in the Subparts relating to Common Negligent Stormwater Maintenance, Operation and Design.

383. This Defendant negligently caused an excess accumulation of stormwater from Advocate North Development Property and Advocate South Development Property including the Ballard Basin, Pavilion Basin, Dempster Basin and Dempster Basin Stormwater Subsystem to invade

and interfere with Robin-Dee Community Area Class Plaintiffs' persons, homes and properties on September 13, 2008.

384. As a direct and proximate result of the foregoing conduct of this Defendant relating to Advocate North Development Property and Advocate South Development Property including the Ballard Basin, Pavilion Basin, Dempster Basin and Dempster Basin Stormwater Subsystem, the Robin-Dee Community Area Class Plaintiffs suffered damage to their persons, homes, properties and other legally-protected economic and non-economic interests as alleged herein.

385. The Robin-Dee Community Area Class Plaintiffs did not consent for the stormwater which had accumulated on this defendant's properties or properties under its control to enter and settle in Plaintiffs' homes and properties.

386. By causing stormwater accumulated and controlled by this Defendant to physically invade the Robin-Dee Community Area Plaintiff Class' persons, homes, and properties from Advocate's Advocate North Development Property and Advocate South Development Property including the Ballard Basin, Pavilion Basin, Dempster Basin and Dempster Basin Stormwater Subsystem properties, this Defendant negligently created a dangerous nuisance of excess accumulated stormwater which excess accumulated stormwater invaded and flooded the Robin-Dee Community Area Class and substantially and unreasonably interfered with Plaintiffs' exclusive private use and enjoyment of their homes and properties.

IV.O. COMMON NEGLIGENT NUISANCE VIOLATIONS FROM PROPERTIES UNDER THE JURISDICTION OF MAINE TOWNSHIP LEGAL AVERMENTS

387. In this Subpart, "this Defendant" means the District, Maine Township, and the County.

388. This Defendant owned, operated, managed, maintained, designed, planned, constructed and/or controlled drainage components and/or drainage structures from which the excess

accumulated stormwater (the nuisance) invaded the Plaintiffs' persons, homes and properties, including owing, operating, managing, maintaining and/or controlling the following properties and their drainage structures and/or creating and/or causing the creation of the nuisance of excess accumulated stormwater from these properties: (a) the Main Drain's Robin Neighborhood Subsegment including the Howard Court Culvert; (b) the Main Drain's Dee Neighborhood Subsegment including the undersized 60" Dee Neighborhood Stormwater Pipe; and (c) the other components of the Main Drain's Robin-Dee Community Segment besides these two subsegments including (i) the flow-restricting right-angle Briar County Elbow within the Briar Neighborhood Subsegment and (ii) the Rancho Lane Subsegment with its undersized Rancho Lane Culverts (herein "the MD Robin-Dee Community Segment and its Stormwater Structures".)

389. This Defendant failed to reasonably design, engineer, maintain, repair and/or operate the MD Robin-Dee Community Segment and its Stormwater Structures. as detailed in the Subparts relating to Common Negligent Stormwater Maintenance, Operation and Design relating to properties within the jurisdiction of Maine Township.

390. This Defendant negligently caused an excess accumulation of stormwater from the MD Robin-Dee Community Segment and its Stormwater Structures including tributary stormwater sewers to invade and interfere with Robin-Dee Community Area Class Plaintiffs' persons, homes and properties on September 13, 2008.

391. As a direct and proximate result of the foregoing conduct of this Defendant relating to the MD Robin-Dee Community Segment and its Stormwater Structures including its tributary stormwater sewers, the Robin-Dee Community Area Class Plaintiffs suffered damage to their

persons, homes, properties and other legally-protected economic and non-economic interests as alleged herein.

392. The Robin-Dee Community Area Class Plaintiffs did not consent for the stormwater which had accumulated on this Defendant's properties or properties under its control to enter and settle in Plaintiffs' homes and properties.

393. By causing stormwater accumulated and controlled by this Defendant to physically invade the Robin-Dee Community Area Plaintiff Class' persons, homes, and properties from the MD Robin-Dee Community Segment and its Stormwater Structures including tributary storm sewers, this Defendant negligently created a dangerous nuisance of excess accumulated stormwater which excess accumulated stormwater invaded and flooded the Robin-Dee Community Area Class and substantially and unreasonably interfered with Plaintiffs' exclusive private use and enjoyment of their homes and properties.

IV.P. COMMON NEGLIGENT SANITARY STORMWATER NUISANCE VIOLATIONS LEGAL AVERMENTS

394. In this Subpart, "this Defendant" means Glenview, ~~Park Ridge~~ and the District.

395. This Defendant owned, operated, managed, maintained, designed, planned, constructed and/or controlled sanitary sewage disposal systems from which sanitary sewer water and sanitary sewage escaped and invaded the Plaintiffs' persons, homes and properties.

396. This Defendant failed to reasonably design, engineer, maintain, repair and/or operate its sewers under its control and/or jurisdiction as detailed in the Subparts relating to Common Negligent Sanitary Sewer Maintenance and Operation.

397. This Defendant negligently caused sanitary sewer water from its sanitary sewers or sanitary sewers under its control to invade and to interfere with some or all of the Robin-Dee Community Area Class Plaintiffs' persons, homes and properties on September 13, 2008.

398. As a direct and proximate result of the foregoing conduct of this Defendant relating to ownership, control, maintenance and/or operation of its sanitary sewers within the Robin-Dee Community Area Class, Plaintiffs suffered damage to their persons, homes, properties and other legally-protected economic and non-economic interests as alleged herein from sanitary sewage.

399. The Plaintiffs did not consent for the sanitary sewage to invade Plaintiffs' homes from this Defendant's sewage system and/or sewage system under its control.

400. By causing sanitary sewer water to physically invade the Robin-Dee Community Area Plaintiff Class' persons, homes, and properties from sanitary sewers under this Defendant's ownership, possession, control and/or management, this Defendant negligently created a dangerous nuisance of sanitary sewage water which sanitary sewage invaded and flooded some members of the Robin-Dee Community Area Class and substantially and unreasonably interfered with Plaintiffs' exclusive private use and enjoyment of their homes and properties.

IV.Q. COMMON NEGLIGENT TRESPASS VIOLATIONS FROM ADVOCATE STORMWATER LEGAL AVERMENTS

401. In this Subpart, "this Defendant" means Advocate, ~~Gewalt,~~ the District, Park Ridge and the County.

402. But for this Defendant's failures to act set forth in the Subparts relating to Common Negligent Stormwater System Maintenance, Operation and Design including (a) the failure to discharge by pumping existing, accumulated stormwater before surcharging of the Ballard, Pavilion and Dempster Basins and the surcharging of the Howard Court Culvert and (b) failure to capture excess stormwater from the Advocate's North and Advocate's South Development Properties onto Advocate's Properties, this Defendant failed to reasonably manage stormwater on September 13, 2008, proximately causing the Plaintiffs' invasive flooding.

403. As a direct, immediate and foreseeable result of the foregoing acts and/or omissions of this Defendant, this Defendant caused stormwater to invade the Plaintiffs' persons, homes and properties.

404. This Defendant had exclusive possession and control over the trespassing instrumentality of the excess accumulated stormwater from Advocate's North Development Property and Advocate's South Development Property, including the Ballard, Pavilion and Dempster Basins, on said North and South Development Properties.

405. The Plaintiffs were entitled to the exclusive enjoyment of their properties, including enjoyment exclusive of any invasive flooding caused by this Defendant's stormwater or stormwater under this Defendant's control from (a) Advocate's North Development Property and (b) Advocate's South Development Property.

406. This Defendant knew or should have known that its actions and/or inactions in failing to control stormwater from the North Development would result in invasive flooding into the Plaintiffs' homes during a significant rainfall such as the September 13, 2008 rainfall based upon Earlier Flooding and Earlier Flooding Studies.

407. This Defendant negligently failed to monitor, investigate, study, inspect, clean, maintain, repair, improve, design, redesign, plan and/or operate (a) Advocate's North Development Property, specifically the Ballard, Pavilion and the Dempster Basin, and (b) Main Drain Advocate North Development Segment of the PCSS, which failures proximately caused the invasive floodings into the Plaintiffs' persons, homes and properties.

408. As a direct and proximate result of the foregoing conduct by this Defendant, this Defendant's instrumentality of excess accumulated stormwater physically invaded the Plaintiffs' persons, homes and properties including (a) from excess stormwater from Advocate's North

Development Property, specifically the Ballard and the Dempster Basin, and (b) from excess stormwater from the Main Drain Advocate North Development Segment of the PCSS, and (c) from excess stormwater from the Main Drain Robin-Dee Community Segment of the PCSS.

409. As a direct and proximate result of the foregoing conduct of this Defendant, on September 13, 2008, the Plaintiffs suffered injuries and damages to their persons, homes and properties from invasive flooding from these above Properties.

410. The Plaintiffs did not consent for this Defendant's excess stormwater to physically invade and interfere with the exclusive use and occupancy of the Plaintiffs' persons, homes and property.

411. The Plaintiffs' injuries and damages were caused by the dangerous and calamitous occurrence of these Saturday, September 13, 2008 invasive stormwater floodings from (a) Advocate's North Development Property, specifically the Ballard and the Dempster Basin, (b) the Main Drain Advocate North Development Segment of the PCSS, and (c) the Main Drain Robin-Dee Community Segment of the PCSS surcharged by the North Development's accumulated stormwater.

412. The excess accumulated stormwater which entered, settled and physically invaded Plaintiffs' homes and properties interfered with the Plaintiffs' interests in the exclusive possession of their homes.

413. The excess accumulated stormwater which entered, settled and physically invaded Plaintiffs' homes and property constituted a negligent trespass upon and into the Plaintiffs' persons and homes.

414. This Defendant is liable to the Plaintiffs for negligent trespass because this Defendant caused harm to the legally protected interests of the Plaintiffs including harm to the exclusive,

quiet enjoyment of their land, homes and properties by causing an instrumentality, namely "Stormwater", to enter upon the property of the Plainitffs without their consent.

415.

IV.R. COMMON NEGLIGENT TRESPASS VIOLATIONS FROM MAINE TOWNSHIP STORMWATER LEGAL AVERMENTS

416. In this Subpart, "this Defendant" means the District, Maine Township and the County.

417. But for this Defendant's failures to act set forth in the Subparts relating to Common Negligent Stormwater System Maintenance, Operation and Design including (a) the failure to remove both natural and man-made obstructions from the Main Drain's Robin Neighborhood Subsegment, Dee Neighborhood Main Drain, MD Briar Neighborhood Subsegment and MD Rancho Lane Subsegment and (b) the failure to redesign and reconstruct the Main Drain's Robin Neighborhood Subsegment, Dee Neighborhood Main Drain, MD Briar Neighborhood Subsegment and MD Rancho Lane Subsegment, this Defendant failed to reasonably control and manage stormwater on September 13, 2008, proximately causing the Plaintiffs' invasive flooding.

418. As a direct, immediate and foreseeable result of the foregoing acts and/or omissions of this Defendant, this Defendant caused stormwater to invade the Plaintiffs' persons, homes and properties.

419. This Defendant had exclusive possession and control over the trespassing instrumentality of the excess accumulated stormwater from the Robin-Dee Community Segment of the Main Drain and its tributary stormwater sewers.

420. The Plaintiffs were entitled to the exclusive enjoyment of their properties, including enjoyment exclusive of any invasive flooding caused by this Defendant's stormwater or

stormwater under this Defendant's control from the Robin-Dee Community Segment of the Main Drain and its tributary stormwater sewers.

421. This Defendant knew or should have known that its actions and/or inactions would result in invasive flooding into the Plaintiffs' homes during a significant rainfall such as the September 13, 2008 rainfall based upon Earlier Flooding and Earlier Flooding Studies.

422. This Defendant negligently failed to monitor, investigate, study, inspect, clean, maintain, repair, improve, design, redesign, plan and/or operate the Main Drain's Robin-Dee Community Segment between Robin Alley on the east and Rancho Lane to the west and possibly to Potter Road on the east including failing to replace and/or supplement the 60" Dee Neighborhood Stormwater Piper with a pipe of additional size and/or larger to convey additional flows, which failures proximately caused the invasive floodings into the Plaintiffs' persons, homes and properties.

423. As a direct and proximate result of the foregoing conduct by this Defendant, this Defendant's instrumentality of excess accumulated stormwater physically invaded the Plaintiffs' persons, homes and properties including from the Main Drain's Robin-Dee Community Segment from Robin Alley on the east to the Briar Court Elbow on the west.

424. As a direct and proximate result of the foregoing conduct of this Defendant, on September 13, 2008, the Plaintiffs suffered injuries and damages to their persons, homes and properties from invasive flooding from these above Properties.

425. The Plaintiffs did not consent for this Defendant's excess stormwater to physically invade and interfere with the exclusive use and occupancy of the Plaintiffs' persons, homes and property.

426. The Plaintiffs' injuries and damages were caused by the dangerous and calamitous occurrence of these Saturday, September 13, 2008 invasive stormwater floodings from the Main Drain of the Robin-Dee Community Segment and its tributary stormwater sewers.

427. The excess accumulated stormwater which entered, settled and physically invaded Plaintiffs' homes and properties interfered with the Plaintiffs' interests in the exclusive possession of their homes.

428. The excess accumulated stormwater which entered, settled and physically invaded Plaintiffs' homes and property constituted a negligent trespass upon and into the Plaintiffs' persons and homes.

429. This Defendant is liable to the Plaintiffs for negligent trespass because this Defendant caused harm to the legally protected interests of the Plaintiffs including harm to the exclusive, quiet enjoyment of their land. homes and properties by causing an instrumentality. namely "Stormwater", to enter upon the property of the Plainitffs without their consent.

430.

IV.S. COMMON NEGLIGENT TRESPASS VIOLATION-SANITARY SEWER BACKUPS LEGAL AVERMENTS

431. In this Subpart, "this Defendant" means the Glenview, ~~Park Ridge~~ and the District.

432. But for this Defendant's failures to act set forth in the Subparts relating to Common Negligent Sanitary Sewer System Maintenance and Operation including (a) the failure to bulkhead upstream municipal sanitary sewers to prevent downstream sanitary sewers from surcharging and (b) the failure to pump out excess sanitary sewer water including pumping out into tanker trucks, this Defendant failed to reasonably control and manage sanitary sewer water

from this Defendant's sanitary sewer system on September 13, 2008, proximately causing the invasive floodings with sewer water and sewage of some Plaintiffs' homes.

433. As a direct, immediate and foreseeable result of the foregoing acts and/or omissions of this Defendant, this Defendant caused sanitary sewer water to invade some of the Plaintiffs' persons, homes and properties.

434. This Defendant had exclusive possession and control over the trespassing instrumentality of the sanitary sewer water and sewage form this Defendant's sanitary sewers.

435. These Plaintiffs who suffered sanitary sewer water invasions were entitled to the exclusive enjoyment of their properties, including enjoyment exclusive of any invasive sewer water flooding caused by this Defendant's sanitary sewer water and sewage or sanitary sewer water and sewage under this Defendant's control from this Defendant's sanitary sewers.

436. This Defendant knew or should have known that its actions and/or inactions would result in sanitary sewer water invasive flooding into some Plaintiffs' homes during a significant rainfall such as the September 13, 2008 rainfall based upon Earlier Flooding and Earlier Flooding Studies.

437. This Defendant negligently failed to monitor, investigate, study, inspect, clean, maintain, repair, improve, design, redesign, plan and/or operate this Defendant's sanitary sewers or sanitary sewers under its control such as by (a) bulkheading with sandbags certain surcharged sanitary sewers so further sanitary sewage invasions would not occur and (b) pumping out excess sanitary sewage into tanker trucks, which failures proximately caused the invasive sewer water floodings into some of the Plaintiffs' persons, homes and properties.

438. As a direct and proximate result of the foregoing conduct by this Defendant, this Defendant's instrumentality of excess accumulated stormwater physically invaded some of the

Plaintiffs' persons, homes and properties from this Defendant's sanitary sewers or sanitary sewers under its control.

439. As a direct and proximate result of the foregoing conduct of this Defendant, on September 13, 2008, some of the Plaintiffs suffered injuries and damages to their persons, homes and properties from invasive sewer water flooding from this Defendant's sanitary sewers or sanitary sewers under its control.

440. The Plaintiffs did not consent for this Defendant's excess sanitary sewer water to physically invade and interfere with the exclusive use and occupancy of the Plaintiffs' persons, homes and property.

441. Some of the Plaintiffs' injuries and damages were caused by the dangerous and calamitous occurrence of these Saturday, September 13, 2008 invasive sewer water floodings this Defendant's sewers or sewers under its control.

442. The excess accumulated sanitary sewer water which entered, settled and physically invaded some of the Plaintiffs' homes and properties interfered with some of the Plaintiffs' interests in the exclusive possession of their homes.

443. The excess accumulated stormwater which entered, settled and physically invaded some of the Plaintiffs' homes and property constituted a negligent trespass upon and into the Plaintiffs' persons and homes.

444. This Defendant is liable to the Plaintiffs for negligent trespass because this Defendant caused harm to the legally protected interests of the Plaintiffs including harm to the exclusive, quiet enjoyment of their land, homes and properties by causing an instrumentality, namely "Stormwater", to enter upon the property of the Plainitffs without their consent.

445.

IV.T. COMMON GROSS NEGLIGENCE VIOLATIONS LEGAL AVERMENTS

446. As used here, "Defendant" means each Defendant except Berger.

447. RECKLESS OMISSION TO ACT: This Defendant's acts and omissions where committed under circumstances exhibiting a reckless disregard for the Plaintiffs' safety. These reckless omissions include but are not limited to this Defendant 's failures to act when, after acquiring knowledge of the actual danger of invasive flooding onto Plaintiffs' persons and into Plaintiffs' homes and properties from the 1987 and 2002 catastrophic floods and **Earlier Flooding Studies**, this Defendant failed to exercise even ordinary care to prevent these floodings into Plaintiffs' homes including but not limited to this Defendant's failure to maintain and make the public and private improvements necessary to increase the storage capacity and conveyance capacity of the Main Drain of the Prairie Creek Stormwater System.

448. RECKLESS FAILURE TO DISCOVERY: This Defendant 's multiple, repetitive failures to discover the dangers to Plaintiffs resulted from this Defendant 's recklessness and or carelessness to inspect and investigate the causes of Plaintiffs' flooding. This Defendant could have discovered the legally certain flooding risks to Plaintiffs by the exercise of ordinary care including simply reading the 1990-1991 Harza Study and the 2002 IDNR preliminary analysis, reports and investigation notes and documents. This Defendant 's multiple, repetitive failures to investigate the causes of the 1987 and 2002 catastrophic invasive floodings constitute reckless failures to discovery highly foreseeable catastrophic dangers to the Plaintiffs.

449. DELIBERATE INDIFFERENCE: As specifically averred in the earlier Subparts of this Part, this Defendant 's acts and failures to act deliberately inflicted a highly unreasonable risk of known flooding harm into Plaintiffs' homes in conscious disregard of the rights of Plaintiffs to the exclusive and quiet use and possession of their homes. As such, this Defendant 's actions and

~~omissions to act constituted deliberate indifference to the Plaintiffs' rights to be free from foreseeable harms from catastrophic stormwater and/or sewer water home invasions~~.

450. ~~WILLFUL AND WANTON FAILURE TO INVESTIGATE: As specifically described earlier in this Part and its Subparts, this Defendant on multiple, repetitive occasions failed to discover the highly likely and highly foreseeable flood dangers when reasonable or careful inspection and/or investigation by this Defendant would have disclosed these flood dangers, including simply reading and/or remembering the 1990-1991 Harza Studies and the 2002 IDNR preliminary investigation notes, letters and documents. These known, available documents would have informed the Defendant that its actions and/or omissions posed a highly unreasonable risk of home invasive flooding from Advocate's North Development into Plaintiffs' homes. As such, this Defendant 's multiple, repetitive failures to discovery these highly foreseeable flood dangers constituted willful and wanton conduct.~~

451. ~~WILLFUL AND WANTON FAILURE TO ACT: As specifically described earlier in this Part, given the easily, highly knowable and highly foreseeble dangers from home invasive flooding into Plaintiffs' persons, homes and properties, or actually known dangers, this Defendant 's failure to exercise even ordinary care to prevent the flooding into the Plaintiffs' Class Robin Dee Community Area constitutes willful and wanton failures to act~~.

452. ~~GROSS NEGLIGENCE: As specifically described earlier in this Part, given that this Defendant knew or certainly should have known of the catastrophic flood risks poses by its acts and omissions, this Defendant 's acts and omissions constituted willful and wanton conduct, willful and wanton negligence and gross negligence. With this knowledge of certain flooding danger, this Defendant intentional decided and omitted from acting to remedy the persistent~~

~~flooding into Plaintiffs' Robin-Dee Class Community, which flooding was highly foreseeable and highly discoverable~~.

453. ~~TORTIOUS INTENT: As specifically described earlier in this Part, this Defendant acted with tort intent toward Plaintiffs by failing to take any reasonable actions detailed in earlier Subparts of this Part. Given this knowledge, the Defendant acted with callous indifference, with a desire to cause consequences or, alternatively, with a substantially certain belief that its acts and omissions to act would have the highly probable and highly foreseeable consequences of invasive flooding damaging the Plaintiffs' persons, homes and properties~~.

454. ~~As a proximate cause of these breaches, this Defendant caused actual injury and damage to the Plaintiffs set out in Complaint Damage Part XIII when excess accumulated stormwater grossly negligently and unreasonably entered with willful and wanton intent, invaded and penetrated the Plaintiffs' servient, downstream estates, persons and property~~.

IV.U. COMMON INTENTIONAL NUISANCE VIOLATIONS-WITHIN PARK RIDGE JURISDICTION LEGAL AVERMENTS

455. In this Subpart, "this Defendant" means Advocate, ~~Gewalt,~~ the District, Park Ridge, and the County and excludes Berger, Glenview and Maine Township.

456. Plaintiffs restate and incorporate all averments under the Subpart of this Part entitled "Common Gross Negligence Violations."

457. This Defendant owned, operated, managed, maintained and/or controlled drainage components and/or drainage structures on Advocate's North Development including the Ballard Basin, Pavilion Basin and Dempster Basin from which the nuisance of excess accumulated stormwater invaded the Robin-Dee Community Area Plaintiff Class' persons, homes and properties. This Defendant owned, operated, managed, maintained and/or controlled the

following properties and their drainage structures: (a) the Advocate North Development Property, including the **Ballard, Dempster and Pavilion Basin Structures** and (b) the Advocate South Development Property.

458. This Defendant failed to reasonably design, engineer, maintain, repair and/or operate Advocate North Development Property and Advocate South Development Property including the Primary Basin Structures such as by failing to increase the storage capacity for accumulating stormwater on the North Development Properties by changing the intake elevations of the Basins and, concurrently, increasing the bank elevations to store adequate stormwater generated by the September 13, 2008 storm.

459. This Defendant intentionally caused excess accumulated stormwater from Advocate North Development Property and Advocate South Development Property including the Primary Basin Structures to interfere with the Robin-Dee Community Area Class Plaintiffs' persons, homes and properties on September 13, 2008.

460. As a direct and proximate result of the foregoing conduct of this Defendant relating to Advocate North Development Property and Advocate South Development Property including the Primary Basin Structures, the Robin-Dee Community Area Class Plaintiffs suffered damage to their persons, homes, properties and other legally-protected economic and non-economic interests as alleged herein.

461. The Robin-Dee Community Area Class Plaintiffs did not consent for the stormwater which had accumulated on Advocate's properties to enter and settle in their homes and properties.

462. Given this Defendant's actual or constructive knowledge of the Earlier Flooding and Earlier Flooding Studies, by causing stormwater accumulated and controlled by this Defendant

to physically invade the Robin-Dee Community Area Plaintiff Class' persons, homes, and properties from Advocate's Advocate North Development Property and Advocate South Development Property including the Primary Basin Structures, this Defendant recklessly, willfully, wantonly and with a conscious disregard for the rights and safety of Plaintiffs created a dangerous nuisance of excess accumulated stormwater.

463. This excess accumulated stormwater invaded and flooded the Robin-Dee Community Area Class and substantially and unreasonably interfered with Plaintiffs' exclusive private use and enjoyment of their homes and properties.

IV.V. COMMON INTENTIONAL NUISANCE VIOLATIONS-STORMWATER WITHIN MAINE TOWNSHIP JURISDICTION LEGAL AVERMENTS

464. In this Subpart, "this Defendant" means the District, Maine Township and the County.

465. Plaintiffs restate and incorporate all averments under the Subpart of this Part entitled "Common Gross Negligence Violations."

466. This Defendant owned, operated, managed, maintained and/or controlled drainage components and/or drainage structures of the Main Drain's Robin-Dee Community Segment from which the nuisance of excess accumulated stormwater invaded the Robin-Dee Community Area Plaintiff Class' persons, homes and properties. This Defendant owned, operated, managed, maintained and/or controlled the Main Drain's Robin-Dee Segment of the Prairie Creek Stormwater System and its tributary stormwater sewers.

467. This Defendant failed to reasonably design, engineer, maintain, repair and/or operate the Main Drain's Robin-Dee Segment of the Prairie Creek Stormwater System.

468. This Defendant intentionally caused excess accumulated stormwater from the Main Drain's Robin-Dee Segment to interfere with the Robin-Dee Community Area Class Plaintiffs'

persons, homes and properties on September 13, 2008 by its acts and omissions including but not limited to failing to improve the MD Robin-Dee Community Segment by constructing an additional 60" or large.

469. As a direct and proximate result of the foregoing conduct of this Defendant relating to Advocate North Development Property and Advocate South Development Property including the Primary Basin Structures, the Robin-Dee Community Area Class Plaintiffs suffered damage to their persons, homes, properties and other legally-protected economic and non-economic interests as alleged herein.

470. The Robin-Dee Community Area Class Plaintiffs did not consent for the stormwater which had accumulated on Advocate's properties to enter and settle in their homes and properties.

471. Given this Defendant's actual or constructive knowledge of the Earlier Flooding and Earlier Flooding Studies, by causing stormwater accumulated and controlled by this Defendant to physically invade the Robin-Dee Community Area Plaintiff Class' persons, homes, and properties from Advocate's Advocate North Development Property and Advocate South Development Property including the Primary Basin Structures, this Defendant recklessly, willfully, wantonly and with a conscious disregard for the rights and safety of Plaintiffs created a dangerous nuisance of excess accumulated stormwater.

472. This excess accumulated stormwater invaded and flooded the Robin-Dee Community Area Class and substantially and unreasonably interfered with Plaintiffs' exclusive private use and enjoyment of their homes and properties.

IV.W. COMMON INTENTIONAL NUISANCE VIOLATIONS-SANITARY SEWER WATER LEGAL AVERMENTS

473. In this Subpart, "this Defendant" means Glenview, ~~Park Ridge~~ and the District.

474. Plaintiffs restate and incorporate all averments under the Subpart of this Part entitled "Common Gross Negligence Violations."

475. This Defendant owned, operated, managed, maintained and/or controlled sanitary sewers servicing the Robin-Dee Community Area Plaintiff Class' persons, homes and properties.

476. This Defendant failed to reasonably maintain, repair and/or operate the sanitary sewers including but not limited to failing to bulkhead surcharged sewer and failing to pump out excess sanitary sewer water before it invaded some Plaintiffs' homes.

477. This Defendant intentionally caused excess accumulated stormwater from this Defendant's sanitary sewers or sanitary sewers under its control to interfere with the some of the Robin-Dee Community Area Class Plaintiffs' persons, homes and properties on September 13, 2008 by its acts and omissions including but not limited to failing to bulkhead surcharged sewers and failing to pump out excess sewer water in its sanitary sewers into tanker trucks.

478. As a direct and proximate result of the foregoing conduct of this Defendant relating to sanitary sewers which it owned or under its control, some of the Robin-Dee Community Area Class Plaintiffs suffered damage to their persons, homes, properties and other legally-protected economic and non-economic interests as alleged herein from sanitary sewer water.

479. The Robin-Dee Community Area Class Plaintiffs whose homes were invaded by sewer water did not consent for the sanitary sewer water which had accumulated in this Defendant's sanitary sewers or sewers under its control to enter and settle in their homes and properties.

480. Given this Defendant's actual or constructive knowledge of the Earlier Flooding and Earlier Flooding Studies, including earlier floods which had caused sanitary sewer water to accumulate and surcharge sewers which it owned and/or controlled, this Defendant recklessly, willfully, wantonly and with a conscious disregard for the rights and safety of Plaintiffs created a dangerous nuisance of excess accumulated sanitary sewer water in its sewers or sewers under its control.

481. This excess accumulated sanitary sewer water invaded and flooded some of the Robin-Dee Community Area Class and substantially and unreasonably interfered with some Plaintiffs' exclusive private use and enjoyment of their homes and properties.

IV.X. COMMON INTENTIONAL TRESPASS VIOLATIONS-STORMWATER WITHIN PARK RIDGE LEGAL AVERMENTS

482. In this Subpart, "this Defendant" means Advocate, ~~Gewalt,~~ the District, Park Ridge, and the County and excludes Berger, Glenview and Maine Township.

483. Plaintiffs restate and incorporate all averments under the Subpart of this Part entitled "Common Gross Negligence Violations."

484. This Defendant knew to a substantial legal certainty and to a high degree of certainty that its actions and/or inactions would result in invasive flooding into the Plaintiffs' homes during a rainfall from (a) Advocate's North Development Property, specifically the Ballard Basin and the Dempster Basin, (b) the Main Drain Advocate North Development Segment, (c) the Main Drain Robin-Dee Community Segment and (d) the Robin-Dee Community Sanitary Sewerage System.

485. But for this Defendant's (a) intentional decisions including but not limited to (a) not pumping down the Primary Basin Structures before the storm, (b) not erecting temporary flood protection barriers on its property or property under its control and (c) not redesigning the

Primary Basins Structures after actual or constructive knowledge of their highly-foreseeable danger to Plaintiffs of overflow from these Basins during a rain such as the September 13, 2008 rainfall, and (d) other acts and omission set forth in the prior Subparts of this Part, this Defendant intentionally decided not to reasonably manage the excess stormwater on September 13, 2008, proximately causing the catastrophic invasive flooding sustained by the Robin-Dee Community Area Class Plaintiffs.

486. As a direct, immediate and foreseeable result of the foregoing intentional acts and omissions by this Defendant, this Defendant caused excessive stormwater from Advocate's North Development and Advocate's South Development to invade the Robin-Dee Community Plaintiffs' Class neighborhoods, homes and properties.

487. This Defendant had exclusive possession and control over the trespassing instrumentality of the excess stormwater from Advocate's North Development Property and Advocate's South Development Property, including the Drainage Structures, on said North and South Development Properties and the stormwater in such structures.

488. The Robin-Dee Community Area Plaintiff Class was entitled to the exclusive enjoyment of their homes and property, including enjoyment exclusive of any invasive flooding from excess stormwater from (a) Advocate's North Development Property including Stormwater Drainage Structures and Subsystems, (b) Advocate's South Development Property including Stormwater Drainage Structures and Subsystems, and (c) the Robin-Dee Segment of the Prairie Creek Main Drain.

489. Based upon Earlier Flooding Studies and Earlier Invasive Flooding, this Defendant knew to a substantial legal certainty and with a high degree of certainty that its intentional omissions and intentional actions including its failure to redevelop the Advocate's North and South

Development Properties' stormwater basins and structures after the 2002 Flooding would result in excess stormwater from the North Development invasively flooding into the Plaintiffs' homes and property during a rainfall such as the September 13, 2008 rainfall.

490. This Defendant intentionally omitted to monitor, investigate, study, inspect, clean, maintain, repair, improve, design, redesign, plan and/or operate (a) Advocate's North Development Property, specifically the Basin Structures, and (b) the MD Advocate North Development Segment of the PCSS, which intentional acts and omissions proximately caused the excess stormwater invasive floodings into the Robin-Dee Community Area Class Plaintiffs' persons, homes and properties.

491. As a direct and proximate result of the foregoing conduct with a high degree of certainty to cause injury to Plaintiffs, on September 13, 2008, this Defendant permitted and caused the release of excess accumulated stormwater to accumulate, enter, settle and physically invaded the Plaintiffs' persons, homes and properties from (a) Advocate's North Development Property, specifically the Ballard and the Dempster Basin, (b) the MD Advocate North Development Segment, and (c) the MD Robin-Dee Community Segment.

492. Based upon the legal certainty of knowledge of invasive flooding as set forth herein, this Defendant intentionally trespassed upon Plaintiffs' persons, homes, and properties.

493. This Defendant through its accumulated stormwater intentionally trespassed upon the Robin-Dee Community Area Class Plaintiffs' persons, homes, properties and economic interests.

494. The Plaintiffs did not consent for this Defendant's excess stormwater to physically invade and interfere with the exclusive use and occupancy of the Plaintiffs' persons, homes and property.

495. The Plaintiffs' injuries and damages were caused as a substantially direct and proximate result of Advocate's intentional conduct by the dangerous and calamitous occurrence of the Saturday, September 13, 2008 invasive stormwater floodings from (a) Advocate's North Development Property, (b) the MD Advocate North Development Segment, and (c) the MD Robin-Dee Community Segment.

496. The excess stormwater which physically invaded Plaintiffs' homes and properties interfered with the Plaintiffs' interests in the exclusive possession of their homes and properties.

497. The excess stormwater which entered, settled and physically invaded Plaintiffs' homes and properties constituted an intentional trespass by this Defendant against the Plaintiffs.

498. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's intentional conduct by intentional failing to collect the dangerous and calamitous storm occurrence of the 9-13-2008.

IV.Y. COMMON INTENTIONAL TRESPASS VIOLATIONS-STORMWATER WITHIN MAINE TOWNSHIP LEGAL AVERMENTS

499. In this Subpart, "this Defendant" means the District, Maine Township and the County.

500. Plaintiffs restate and incorporate all averments under the Subpart of this Part entitled "Common Gross Negligence Violations."

501. This Defendant knew to a substantial legal certainty and to a high degree of certainty that its actions and/or inactions would result in invasive flooding into the Plaintiffs' homes during a rainfall from the Main Drain Robin-Dee Community Segment and (d) the Robin-Dee Community Sanitary Sewerage System.

502. But for this Defendant's intentional decision not to redesign the Main Drain's Robin-Dee Segment from Robin Alley on east to Rancho Lane and onward toward Potter Road on the west,

after actual or constructive knowledge of their highly-foreseeable danger to Plaintiffs of overflow from the MD Robin-Dee Segment during a rain such as the September 13, 2008 rainfall and other acts and omission set forth in the prior Subparts of this Part, this Defendant intentionally decided not to reasonably manage the excess stormwater on September 13, 2008, proximately causing the catastrophic invasive flooding sustained by the Robin-Dee Community Area Class Plaintiffs.

503. As a direct, immediate and foreseeable result of the foregoing intentional acts and omissions by this Defendant, this Defendant caused excessive stormwater from Main Drain's Robin-Dee Community Segment to invade the Robin-Dee Community Plaintiffs' Class neighborhoods, homes and properties.

504. This Defendant had exclusive possession and control over the trespassing instrumentality of the excess stormwater from the Main Drain's Robin-Dee Community Segment.

505. The Robin-Dee Community Area Plaintiff Class was entitled to the exclusive enjoyment of their homes and property, including enjoyment exclusive of any invasive flooding from excess stormwater from from the Robin-Dee Community Segment of the Prairie Creek Main Drain.

506. Based upon Earlier Flooding Studies and Earlier Invasive Flooding, this Defendant knew to a substantial legal certainty and with a high degree of certainty that its intentional omissions and intentional actions including its failure to redesign and reconstruct the Main Drain's Robin-Dee Segment after the 1987 and 2002 Floodings would result in excess stormwater invasively flooding into the Plaintiffs' homes and property during a rainfall such as the September 13, 2008 rainfall.

507. This Defendant intentionally omitted to monitor, investigate, study, inspect, clean, maintain, repair, improve, design, redesign, plan and/or operate the MD Robin-Dee Segment of

the PCSS, which intentional acts and omissions proximately caused the excess stormwater invasive floodings into the Robin-Dee Community Area Class Plaintiffs' persons, homes and properties.

508. As a direct and proximate result of the foregoing conduct with a high degree of certainty to cause injury to Plaintiffs, on September 13, 2008, this Defendant permitted and caused the release of excess accumulated stormwater to accumulate, enter, settle and physically invaded the Plaintiffs' persons, homes and properties from the MD Robin-Dee Community Segment.

509. Based upon the legal certainty of knowledge of invasive flooding as set forth herein, this Defendant intentionally trespassed upon Plaintiffs' persons, homes, and properties.

510. This Defendant through its accumulated stormwater intentionally trespassed upon the Robin-Dee Community Area Class Plaintiffs' persons, homes, properties and economic interests.

511. The Plaintiffs did not consent for this Defendant's excess stormwater to physically invade and interfere with the exclusive use and occupancy of the Plaintiffs' persons, homes and property.

512. The Plaintiffs' injuries and damages were caused as a substantially direct and proximate result of Advocate's intentional conduct by the dangerous and calamitous occurrence of the Saturday, September 13, 2008 invasive stormwater floodings from the MD Robin-Dee Community Segment.

513. The excess stormwater which physically invaded Plaintiffs' homes and properties interfered with the Plaintiffs' interests in the exclusive possession of their homes and properties.

514. The excess stormwater which entered, settled and physically invaded Plaintiffs' homes and properties constituted an intentional trespass by this Defendant against the Plaintiffs.

515. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's intentional conduct by intentional failing to collect the dangerous and calamitous storm occurrence of the 9-13-2008.

IV.Z. COMMON INTENTIONAL TRESPASS VIOLATIONS-SANITARY SEWER WATER WITH LEGAL AVERMENTS

516. In this Subpart, "this Defendant" means Glenview, ~~Park Ridge~~ and the District.

517. Plaintiffs restate and incorporate all averments under the Subpart of this Part entitled "Common Gross Negligence Violations."

518. This Defendant knew to a substantial legal certainty and to a high degree of certainty that its actions and/or inactions would result in invasive flooding into some Plaintiffs' homes within the Robin-Dee Community Area during a rainfall from the the Robin-Dee Community Sanitary Sewerage System.

519. But for this Defendant's intentional decisions including not to (a) bulkhead surcharging and/or surcharged stormwater sewers and/or (b) pump out excess sanitary sewer water from its sewers or sewers under its control, after actual or constructive knowledge of their highly-foreseeable danger to Plaintiffs of sewer water invasive flooding during a rain such as the September 13, 2008 rainfall and other acts and omission set forth in the prior Subparts of this Part, this Defendant intentionally decided not to reasonably manage the excess sanitary sewer water on September 13, 2008, proximately causing the catastrophic invasive sanitary sewer water flooding sustained by the some members of the Robin-Dee Community Area Class Plaintiffs.

520. As a direct, immediate and foreseeable result of the foregoing intentional acts and omissions by this Defendant, this Defendant caused excessive sanitary sewer water to backup

and invade some of the Robin-Dee Community Plaintiffs' Class neighborhoods, homes and properties.

521. This Defendant had exclusive possession and control over the trespassing instrumentality of the excess sanitary sewer water from its sanitary sewers and/or sewers under its control.

522. The Robin-Dee Community Area Plaintiff Class was entitled to the exclusive enjoyment of their homes and property, including enjoyment exclusive of any invasive flooding from excess sanitary sewer water and sewage from this Defendant's Robin-Dee Community Area's sanitary sewer municipal subsystems to the regional District interceptor system.

523. Based upon Earlier Flooding Studies and Earlier Invasive Flooding, this Defendant knew to a substantial legal certainty and with a high degree of certainty that its intentional omissions and intentional actions including its failures to bulkhead sanitary sewers and failures to pump out sanitary sewers into tanker trucks or other locations, would result in excess sanitary sewer water invasively flooding into the Plaintiffs' homes and property during a rainfall such as the September 13, 2008 rainfall.

524. This Defendant intentionally omitted to monitor, investigate, study, inspect, clean, maintain, repair, improve, design, redesign, plan and/or operate its sanitary sewers or sewers under its control, which intentional acts and omissions proximately caused the excess sanitary sewer water invasive floodings into the Robin-Dee Community Area Class Plaintiffs' persons, homes and properties.

525. As a direct and proximate result of the foregoing conduct with a high degree of certainty to cause injury to Plaintiffs, on September 13, 2008, this Defendant permitted and caused the release of excess accumulated sanitary sewer water to accumulate, enter, settle and physically

invaded the Plaintiffs' persons, homes and properties from this Defendant's sanitary sewers or sanitary sewers under its control.

526. Based upon the legal certainty of knowledge of invasive sanitary sewer water flooding as set forth herein, this Defendant intentionally trespassed upon some of the Plaintiffs' persons, homes, and properties.

527. This Defendant through its accumulated stormwater intentionally trespassed upon some of the Robin-Dee Community Area Class Plaintiffs' persons, homes, properties and economic interests.

528. These Plaintiffs who sustained sanitary sewer invasive flooding did not consent for this Defendant's excess stormwater to physically invade and interfere with the exclusive use and occupancy of the Plaintiffs' persons, homes and property.

529. These Plaintiffs' injuries and damages were caused as a substantially direct and proximate result of this Defendant's intentional conduct by the dangerous and calamitous occurrence of the Saturday, September 13, 2008 invasive sanitary sewer stormwater floodings from the Robin-Dee Community Area Sanitary Sewer Subsegments.

530. The excess sanitary sewer water which physically invaded some Plaintiffs' homes and properties interfered with these Plaintiffs' interests in the exclusive possession of their homes and properties.

531. The excess sanitary sewer water which entered, settled and physically invaded some Plaintiffs' homes and properties constituted an intentional trespass by this Defendant against these Plaintiffs.

IV.AA. COMMON IRREPARABLE HARM-EQUITABLE RELIEF LEGAL AVERMENTS

532. In this Subpart, "this Defendant" means all defendants except Berger.

533. The Plaintiffs have sustained repetitive catastrophic man-made home-invasive flooding on both September 13, 2008 and again on July 24, 2010 due to the tortious conduct of this Defendant as specifically set forth in the prior Subparts of this Part.

534. Some members of the Plaintiffs' class also sustained man-made home-invasive flooding on prior dates including in 1987 and 2002.

535. Less invasive but nonetheless man-made trespassory invasions have occurred on other dates during lesser rainfalls.

536. Since 1990 and 1991, this Defendant knew or should have known of the findings, conclusions and recommendations of Harza Engineering including but not limited to (1) the existence of undersized culverts and pipes such as the undersized 60 " diameter **Howard Court Culvert** and the undercapacity 60" diameter Dee Neighborhood Stormwater Pipe which the Stormwater Defendants unreasonably expected to receive upwards of 120 " diameter flows from the upstream Robin Court Culvert less than 100 yards upstream, (2) the existence of tortuous curves such as the **Briar Court Elbow** as the Main Drain Robin-Dee Segment attempts a 90 degree, hard right-ankle turn north of the Briar Court Condominiums and (3) repetitive failures to clean obstructions and debris and otherwise maintain maximum flows through the Main Drain Robin-Dee Segment.

537. Since 2002, based upon the 2002 Catastrophic Flood and the investigations and preliminary reports from the Illinos Department of Natural Resources in 2002 through until the Study went dormant until again resurrected after the 2008 Catastrophic Flood, this Defendant knew or should have known of the catastrophic invasive flooding threatening the Plaintiff Class with almost every rainfall in excess of a 1-2 year event.

538. The continuous repetitive man-made home-invasive and land-invasive flooding and the

ongoing threat of man-made home-invasive and land-invasive flooding caused and continues to cause ongoing fear, apprehension, anxiety and other emotional distress experiences besides other non-economic and economic losses such as reduced market value set forth herein within the Plaintiff Class.

539. Equitable relief is appropriate for the ongoing, omni-present fear, anxiety and apprehension within the Plaintiffs of another catastrophic flood arising usually anytime it rains and especially if severe storms are predicted or forecasted for the Chicago Region.

540. As a proximate cause of the repetitive invasions, property values have been affected and the reputation relating to the value of property in Plaintiffs' neighborhoods have been damaged.

541. These repetitive tortious acts by this Defendant have caused and continue to cause irreparable harm to the Plaintiffs' Class, entitling the Plaintiffs to equitable relief.

IV.AB. COMMON LPE- GENERAL ADDITIONAL AVERMENTS

542. These averments apply to each Local Public Entities and should be answered as to this LPE Defendant's knowledge only. This is not intended to be a pleading of a "Joint Count".

543. Stormwater as Property: As used herein, stormwater is "property" or "personal property" as those terms are used in Chapter 745, Act 10, Article III at Section 10/3-101.

544. Contractual Relationship With LPEs: The Plaintiffs residences were serviced by the Prairie Creek Stormwater System or segments or components thereof based upon the responsible jurisdiction pursuant to a contractual, quasi-contractual relationship with the District, Glenview, Park Ridge and/or Maine Township.

545. The District is ultimately responsible for stormwater management within Cook County based upon Public Act 93-1049 of the Illinois General Assembly.

546. The District set forth in the Cook County Water Management Plan that it was vested with powers to assure coordination between jurisdictions relating to the management of multi-jurisdictional watersheds/stormwater management drainage areas.

547. Control of PCSS Components within Park Ridge Jurisdiction: If this defendant (the District, Park Ridge, Maine Township or County) had jurisdiction over the Prairie Creek Stormwater System including its real property public improvement components in Park Ridge, by its undertaking and/or exercise of control (by statute, ordinance or other act with the force of law besides actual control) and/or other acts of dominion, this Defendant owned, possessed and controlled the real property and related estates and interests in these Prairie Creek Stormwater System properties within Park Ridge: (a) the North Development Main Drain and its connected, related stormwater sewer components; (b) the Ballard Basin and the Pavilion Basin which are the North Development Main Drain's primary structures; and (c) (as to Park Ridge or Maine Township and not the District or County) tributary stormwater sewers to the Ballard and Pavilion Basins and/or North Development Main Drain. .

548. Control of PCSS Components within Maine Township Jurisdiction: If this defendant (the District, Park Ridge, Maine Township or County) had jurisdiction over the Prairie Creek Stormwater System (PCSS) including its real property public improvement components in Maine Township, by its undertaking and/or exercise of control (by statute, ordinance or other act with the force of law besides actual control) and/or other acts of dominion, this Defendant owned, possessed and controlled the real property and related estates and interests in these PCSS properties Maine Township: (a) the Robin-Dee Community Main Drain including the Robin Neighborhood Main Drain and the Dee Neighborhood Main Drain and their Subsegment systems; and (c) (as to Park Ridge or Maine Township and not the District or County) tributary

stormwater sewers to the Robin-Dee Community Main Drain including the Robin Neighborhood Main Drain and Subsegment system components and the Dee Neighborhood Main Drain and Subsegment system components..

549. Ownership of Stormwater: By its undertaking and/or exercise of control (by statute, ordinance or other legal document with the force of law besides actual control), jurisdiction, causing the accumulations through its overt acts or other acts pursuant to authority under law and/or other acts of dominion, this Defendant owned, controlled and operated in its entirety or partially or jointly the stormwater which was accumulated upon, received by, collected on, stored on or discharged through the PCSS real property public improvement components of the Prairie Creek Stormwater System over which it has jurisdiction.

550. Drainage Planning and System Engineering: This Defendant planned or caused to be planned and designed or caused to be designed the PCSS stormwater structures and components within its jurisdiction.

551. The Stormwater Plans for the North Development resulting in the existing drainage design and operation of the Ballard Basin and related drainage alterations was approved by this Defendant prior to 1998 and any changes to said Plans were approved by this Defendant substantially before September 13, 2008.

552. The application for the Plan for the drainage alterations to the North Development resulting in the existing drainage design and operation of the Pavilion Basin and related drainage alterations was and approved by this Defendant prior to 1998 and any changes to said Plans were approved by this Defendant substantially before September 13, 2008.

553. The Plan for the existing drainage of the Dempster Basin and related drainage alterations was approved by this Defendant before 2007.

554. Knowledge-Harza Study: In 1990, Harza reported that "... the flow capacity ... has been seriously eroded ... through the effects of inadequately designed modifications including undersized culverts, tortuous channel realignments, etc." This Defendant knew or should have known of these defects.

555. Knowledge that Maintenance Program Not Implemented: Based upon the Harza Study, the 2002 invasive flooding, and reasonable inquiry if undertaken, this Defendant knew or should have known that the responsible parties were not undertaking the "extensive cleaning program" recommended by the Harza report, thereby reducing the flow capacity of the Robin-Dee Community Main Drain of the PCSS.

556. Knowledge of Bottlenecks: Substantially before September 13, 2008, and with adequate time to plan, design, redesign or reconstruct its drainage structures so as to avoid foreseeable injury to the Robin-Dee Community Class, this Defendant knew or should have known based upon the facts evident from the (1) the Prior Invasive Floodings in 1987, 2002 and near invasive flooding on other dates before September 13, 2008 and (2) Earlier Flood Studies including the 1990-91 Harza Study of multiple bottlenecks and restrictions to flow within the North Development Main Drain including the Ballard Basin Discharge Culvert Bottleneck and the Robin-Dee Community Main Drain Bottleneck.

557. Known of 2-Year-Flooding-Frequency: Substantial before September 13, 2008, for a period of time during which sufficient to remedy the relevant stormwater conveyance and storage dangerous conditions set out in the Harza 1990 and the IDNR preliminary investigations, this Defendant knew or should have known that the Robin-Dee Community Segment and Advocate Corporation North Development Segment of the Prairie Creek Main Drain invasively floods into the Robin-Dee Community statistically every two years.

IV.AC. COMMON-LPE AVERMENTS: **ARTICLE III, SEC. 3-102A STATUTORY** DUTY TO MAINTAIN **PROPERTY**

558. Article III, Section 102(a) (745 ILCS 10/3-102(a)) governs.

559. Property Defined: Article III, Sec. 3-101 of the Tort Immunity Act governs.

560. **Property:** The Prairie Creek Stormwater System and all of its components like the Ballard Basin and the Howard Court Culvert are specific property as "property" is used within the meaning of Sec. 10/3-102(a).

IV.AD. COMMON LPE AVERMENTS: ARTICLE III, SEC. 103 STATUTORY DUTY TO REMEDY A DANGEROUS PLAN

561. LPE-Approved Plan Creating Dangerous Condition: Article III, Section 102(a) of the Tort-Immunity Act (745 ILCS 10/3-103(a)) governs..

562. This Defendant above all Plans: This Defendant approved all Prairie Creek Stormwater System Plans including the North Development Main Drain with the Ballard and Pavilion Basin, the Dempster Basin, the Robin Neighborhood Main Drain, the Howard Court Culvert, the Dee Neighborhood Stormwater Pipe and all other public improvements to the Prairie Creek Stormwater System including its Main Drain and all tributary sewers. This Defendant approved the RN Plat Plan and the DN Plat Plan in 1960-1961.

563. Duty to Redesign and Reconstruct to Remedy Dangerous Condition: By September 13, 2008, it was open and obvious that this Defendant's approved Plans for the Prairie Creek Stormwater System's public improvements including the Ballard, Pavilion and Dempster Basins were dangerously defective as ongoing flooding, including home-invasive flooding in 1987 and 2002, and other land-invasive flooding before September 13, 2008 had occurred showing the defectiveness and dangerousness of these approved Plans.

564. Duty to Correct Dangerous Plans: Pursuant to 745 ILCS 10/3-103, this Defendant owed a general duty to correct known unsafe conditions related to the design and/or engineering of the Prairie Creek Stormwater System

565. Before September 13, 2008, this Defendant knew or should of known of the unreasonable and defective conditions set forth in prior paragraphs herein which could be altered or changed by a redesign and/or replanning of the Prairie Creek Stormwater System.

566. In addition to the unreasonable and defective conditions set forth previously herein, this Defendant knew or should of known of the existence of the foregoing unsafe, unreasonable and dangerous conditions relating to the design and/or engineering of the Robin-Dee Community Segment and Advocate Corporation North Development Segment which segments were unsafe, unreasonable and dangerous conditions posed an unreasonable risk of foreseeable harmful invasive flooding to the Plaintiffs and included:

566.1. This Defendant knew or should have known that the Robin-Dee Community Segment, and the Advocate Corporation North Development Segment including the Ballard, Pavilion and Dempster Basins were defective relating to the collection, storage, transportation and/or discharge of stormwater during a rainfall; and/or

567. Reasonable Inspection: This Defendant could have discovered the foregoing unsafe conditions and their character by the use of reasonable inspections and/or investigations relating to the Robin-Dee Community Segment and the Advocate Corporation North Development Segment of the Prairie Creek Main Drain and connected and/or tributary drainage structures including the Ballard, Pavilion and Dempster Basins.

568. This Defendant knew or should have known of the inadequate design and/or engineering relating to the Robin-Dee Community Segment and the Advocate Corporation North

Development Segment of the Prairie Creek Main Drain and connected and/or tributary drainage structures including the Ballard, Pavilion and Dempster Basins given the prior flooding and prior governmental reports and the likelihood and magnitude of potential danger from failing to take corrective action to remedy such defectively designed and/or engineered Stormwater System.

569. Failures to Exercise Due Care: This Defendant failed to exercise due care in the redesign and reconstruction or in failing to cause redesign or reconstruction of the Defendant's properties or drainage structures under its management, control, and supervision including but not limited to the following failures to exercise due care over the Ballard Basin, Pavilion Basin and Dempster Basin and North Development Main Drain, drainage components of the Prairie Creek Stormwater System, and stormwater from private development on Advocate's North and South Developments.

570. Relating to the Prairie Creek Main Drain, its Segments and Subsegments, this Defendant failed exercise due care to reconstruct its Main Drain and in-line, immediately connected Retention Basins such as the Ballard Basin, the Pavilion Basin and, through the 60 inch Robin Alley Stormwater Sewer, the Dempster Basin, including but not limited to the following failings and omissions to act:

570.1. Failing to enlarge or require others including Advocate, or others to enlarge the Ballard Basin, Pavilion Basin and Dempster Basin including temporary enlargement by the use of sand bags, sand bins, water tubes or other storage or flood prevention systems around the perimeter of these basins;

570.2. Failing to raise the discharge elevations for these Basins by raising the discharge culvert elevations; and

570.3. Failing to increase the berms around the Basins' perimeters to increase storage.

571. **Proximate Cause**: As a proximate cause of these breaches of duties owed to the Plaintiff Class, these breaches of duties by this Defendant proximately caused damages to Plaintiffs set forth in this Complaint's "Damage" Part.

~~IV.AE. COMMON LPE AVERMENTS: 70 ILCS 2605/19: SANITARY DISTRICT LIABILITY~~

572. ~~70 ILCS 2605/19 governs.~~

573. ~~The Plaintiffs' homes constituted "real estate" within the meaning of 70 ILCS 2605/19.~~

574. ~~The Plaintiffs' homes were "within the district" within the meaning of 70 ILCS 2605/19.~~

575. ~~The governmental owned and operated tributary or lateral municipal sanitary street sewers to which the Plaintiffs' residences were connected by lead lines from their residences constituted a "channel, ditch, drain, outlet or other improvement" within the meaning of 70 ILCS 2605/19.~~

576. ~~The governmental owned and operated sanitary street sewers to which the Plaintiffs' homes were connected were provided "under the provisions of this Act" as that phrase is used within the meaning of 70 ILCS 2605/19.~~

577. ~~On September 13, 2008, sewer water overflowed the sanitary sewerage system sewers under the ownership, jurisdiction and/or control of a local public entity, said control being total, partial or joint.~~

578. ~~The sewer water overflow was an "overflow" as that term is used in 70 ILCS 2605/19 in violation of 70 ILCS 2605/19.~~

IV.AF. COMMON LPE AVERMENTS: ILLINOIS CONSTITUTION. ART. I. SEC. 15: TAKING REAL AND PERSONAL PROPERTY

579. Article I, Section 15 of the Illinois Constitution prohibits the taking of private property for public use without payment of just compensation to the victims of the taking.

580. Pursuant to Article I, Section 15 of the Illinois Constitution, this Defendant was under a duty to provide just compensation to the Plaintiffs for this Defendant's taking of Plaintiffs' real property and personal property.

581. The Plaintiff Class are parties beneficially interested to maintain this action because they are entitled to just compensation from this Defendant relating to the Defendants' taking of Robin-Dee Community Plaintiffs' real property including their homes and personal property without just compensation in violation of Article I, Section 15 of the Illinois Constitution.

582. This Defendant planned, supervised, designed, management, and/or caused to be constructed the straightening and widening of PCSS's Robin Neighborhood Main Drain and the installation of the 60" Dee Neighborhood Stormwater Sewer as a public improvement for the benefit of the public within the PCW.

583. This Defendant planned, supervised, designed, management, and/or caused to be constructed the PCSS's North Development Main Drain including the Ballard Basin, Pavilion Basin and Dempster Basin as a public improvement for the benefit of the public within the Prairie Creek Watershed.

584. Because stormwater from these public improvements invaded the Robin-Dee Community Plaintiff Class repeatedly, the catastrophic repeated physical overflows and invasions into Plaintiffs' homes, residences and properties by stormwater water unjustifiably and unlawfully, interfered, hindered, and prevented Plaintiffs from their exclusive right to use Plaintiffs' properties for their intended purposes as homes.

585. The repeated presence of accumulated water in Plaintiffs' home and the ongoing threat during rainfalls of the significant risk of additional invasions has resulted in a permanent and substantial interference with the Plaintiffs' use and enjoyment of their real properties including

but not limited to a permanent and substantial reduction if not total destruction of the market value of the Plaintiffs' real property including homes and personal property.

586. On September 13, 2008, the Robin-Dee Community Plaintiffs suffered a direct encroachment upon their real properties when stormwater invaded their real properties and which subjected Plaintiffs' real properties including homes to a public use as retention basins and/or detention basins of this Defendant's stormwater and/or stormwater under this Defendant's ownership, control, management, supervision and/or jurisdiction.

587. Despite these destructive invasive floodings, Plaintiffs have not received just compensation for this substantial interference of their real properties including their homes and residences.

588. This Defendant has proximately caused the Plaintiffs' real properties including their homes to become partial and/or totally uninhabitable by this Defendant's actions and/or inactions as set forth herein resulting in invasive floodings into the Plaintiffs' real properties including homes and residences.

589. This Defendant has proximately caused the stormwater invasive floodings from (a) the PCSS's Robin-Dee Community Main Drain, and (b) the PCSS's North Development Main Drain Segment including the Ballard Basin and the Dempster Basin, into Plaintiffs' real properties, thereby destroying and/or impairing the usefulness and market value of the Plaintiffs' real properties including homes and residences.

590. Given the repeated invasive floodings, including in 1987 and 2002, and the government reports including the Harza Study, the IDNR Study and the FEMA FIRMs, these acts by this Defendant were made with a conscious disregard for the rights and safety of Robin-Dee Community Plaintiffs being gross negligence.

591. The repeated invasive flooding and the repeated government studies show that this Defendant has unconstitutionally taken the Robin-Dee Community Plaintiffs' real property and real property interests including their residences and homes and personal property without just compensation being paid to the Plaintiffs as required by Article I, Section 15 of the Illinois Constitution, thereby requiring this Defendant now to pay just compensation for the permanent injury to the real property and personal property interests to the Class Plaintiffs.

IV.AH. COMMON LPE AVERMENTS: U.S. FIFTH AMENDMENT: TAKING OF AND PERSONAL REAL AND PERSONAL PROPERTY

592. The Plaintiffs incorporate the prior averments in the Subpart entitled "Illinois Constitution Art. I, Sec. 15-Taking of Real and Personal Property."

593. The Fifth Amendment of the United States Constitution prohibits the taking of private property for public use without payment of just compensation to the citizen-victim of the taking.

594. Pursuant to the Fifth Amendment of the United States Constitution, this Defendant was under a duty to provide just compensation for this Defendant's taking of Plaintiffs' real and personal property including residences and homes.

595. The Plaintiffs are parties beneficially interested to maintain this action because they are entitled to just compensation from this Defendant relating to the Defendants' taking of Plaintiffs' real and personal property .

596. This Defendant took Plaintiffs' homes and real property and personal property without just compensation in violation the Fifth Amendment to the U.S. Constitution.

597. Because stormwater from these public improvements for public uses invaded the Robin-Dee Community Plaintiff Class repeatedly, the catastrophic repeated physical overflows and invasions into Plaintiffs' homes, residences and properties by stormwater water unjustifiably and

unlawfully, interfered, hindered, and prevented Plaintiffs from their exclusive right to use Plaintiffs' properties for their intended purposes as homes.

598. The repeated presence of accumulated water in Plaintiffs' home and the ongoing threat during rainfalls of the significant risk of additional invasions has resulted in a permanent and substantial interference with the Plaintiffs' use and enjoyment of their real properties and personal properties including but not limited to a permanent and substantial reduction if not total destruction of the market value of the Plaintiffs' real and personal property including their residences and homes.

599. On September 13, 2008, the Robin-Dee Community Plaintiffs suffered a direct encroachment upon their real properties when stormwater invaded their real properties and which subjected Plaintiffs' real properties including residences and homes to a public use as retention basins and/or detention basins of this Defendant's stormwater and/or stormwater under this Defendant's ownership, control, management, supervision and/or jurisdiction.

600. On September 13, 2008, these invasive floodings into the Robin-Dee Community excluded or restricted the Robin-Dee Community Plaintiff Class' dominion and control over their real properties including their residences and homes.

601. Despite these destructive invasive floodings, Plaintiffs have not received just compensation for this substantial interference of their real properties including their homes and residences.

602. This Defendant has proximately caused the Plaintiffs' real properties including their homes and properties to become partial and/or totally uninhabitable by this Defendant's actions and/or inactions as set forth in this Section of the Complaint resulting in invasive floodings into the Plaintiffs' real properties including homes and residences.

603. This Defendant has proximately caused the stormwater invasive floodings from (a) the Robin-Dee Community Segment, and (b) the North Development Segment including the Ballard Basin and the Dempster Basin, into Plaintiffs' real properties including homes and residences, thereby destroying and/or impairing the usefulness and market value of the Robin-Dee Community Plaintiffs' real properties including homes and residences.

604. Given the repeated invasive floodings, including in 1987 and 2002, and the government reports including the Harza Study, the IDNR Study and the FEMA FIRMs, these acts by this Defendant were made with a conscious disregard for the rights and safety of Robin-Dee Community Plaintiffs.

605. The repeated invasive flooding and the repeated government studies show that this Defendant has unconstitutionally taken the Robin-Dee Community Plaintiffs' real and personal property and real and personal property interests including their residences and homes without just compensation being paid to the Plaintiffs as required by the Fifth Amendment of the United States Constitution, thereby requiring this Defendant now to pay just compensation for the permanent injury to the real and personal property interests to the Robin-Dee Community Class Plaintiffs.

VI.AJ. COMMON LPE AVERMENTS: 42 USC SEC. 1983

606. The Plaintiffs incorporate the preceding subparts entitled: "U.S. Fifth Amendment-Taking of Real and personal property", "U.S. Fifth Amendment-Taking of Personal Property", "Ill. Const. Art. I, Sec. 15-Taking of Real and personal property" and "Ill.Const. Art. I, Sec. 15-Taking of Personal Property."

607. Relating to 42 Section § 1983 entitled "Civil action for deprivation of rights" governs.

608. This Defendant is a "person" as used in the phrase "(E)very person who, under color of any statute, ordinance, regulation, custom or usage..."

609. This Defendants' foregoing actions authorized under its enabling legislation and pursuant to a charter and/or other enabling document with the force of law is acting "color of ...statute, ordinance, regulation, custom or usage" of the State of Illinois.

610. This Defendant has caused the Plaintiffs to be deprived of their Illinois Constitution rights under Article I, Section 15 of the Illinois Constitution and federal U.S. Constitution rights under the Fifth Amendment of the U.S. Constitution.

611. The flooding and sacrifice of private property of the Plaintiffs Class for the public convenience of this Defendant has been caused by this Defendant's public improvements of the Robin-Dee Main Drain and North Development Main Drain with its interconnected Ballard, Pavilion and Dempster basins, rendering such conduct by this Defendant an unconstitutional taking of private property under the U.S. Constitution and the Illinois Constitution

VI.AK.COMMON LPE AVERMENTS: EQUITABLE RELIEF PER TORT-IMMUNITY ACT.

612. This averment applies to each LPE, the District, Park Ridge, Maine Township, Glenview and the County. Plaintiffs also incorporate Part IV, Subpart AA "Irreparable Harm-Equitable Relief Legal Averments'.

613. The Tort Immunity Act at Sec. 2-101 (745 ILCS 10/2-101) does not affect the right to obtain relief other than damages against a local public entity.

614. The Plaintiffs have sustained repetitive man-made home-invasive flooding on both September 13, 2008 and many again on July 24, 2010 due to the tortious conduct of each LPE.

615. Some members of the Plaintiffs' Class also sustained man-made home-invasive flooding on prior dates including in 1987 and 2002.

616. Trespassory land invasive flooding but not structural or home-invasive flooding have occurred on other dates during lesser rainfalls before September 13, 2008.

617. The threat of ongoing, future flooding creates stress, anxiety and other forms of emotional harm, past, present and future to the Plaintiff Class.

618. Plaintiff Class suffers ongoing, reduced, if not eliminated market value due to (1) the repetitive flooding and (2) the necessity to disclose flooding to prospective buyers.

619. Based upon (1) the repeated invasive floodings, (2) the numerous government studies identifying the causes and solution, and (3) the failure of Park Ridge to act to protect the Plaintiffs from invasive flooding, these conditions constitute irreparable harm if action is not taken and justify equitable relief including an affirmative injunction compelling Park Ridge to act to remedy this ongoing flooding and ongoing flooding threat.

V. PART V: CLAIMS AGAINST ADVOCATE

V.A. OVERVIEW-ADVOCATE-CAUSATION AND RESPONSIBILITY

620. **CAUSATION**: Advocate North Development stormwater and Advocate South Development stormwater catastrophically invaded the Robin-Dee Community Area on September 13, 2008.

620.1. The Medical Pavilion Building on the North Development did not sustain **a single drop of** invasive stormwater flooding on September 13, 2008.

620.2. All stormwater which invaded the Plaintiffs' homes originated from Advocate property with the exception of insignificant tributary stormwater to the Robin-Dee Main Drain.

620.3. Advocate knows of this repetitive flooding history.

620.4. Advocate refused to take any action including creating a sandbag barrier between Robin Alley and the North Advocate Development and raising its discharge culvert elevations.

621. RESPONSIBILITY: The Advocate North Development is a completely man-made development complex with private improvements such as the Medical Pavilion and public improvements (or improvements for the benefit of the PWC public) such as the and

621.1. Not even a single drop of water invaded the Medical Pavilion located less than 15 yards from the Pavilion Basin during the September 13, 2008 storm while at less 500 citizens were sustaining catastrophic home-invasive flooding, in some cases completely filling their basements and flooding up into the first floor.

621.2. Nor did a single Advocate Building anywhere on the sustain **any** invasive flooding on September 13, 2008.

621.3. It is not an accident that (a) the Plaintiffs sustained catastrophic full-basement flooding in most cases and (b) Advocate did not: the same rain fell on each property. The

rain did not miraculously stop at Robin Court to spare Advocate North Development from flooding

V.B. ADDITIONAL FACTS RELATING TO ADVOCATE

622. As used here, unless otherwise evident from the context, "this Defendant" or "Defendant" means Advocate and "its" means "Advocate's".

623. Plaintiffs restate and incorporate all these paragraphs as the first paragraphs of this Part: (a) all paragraphs in Part I: Jurisdiction, Venue and Class Averments; (b) all paragraphs in Part II: Definitions including Stormwater Structures and Bottlenecks; and (c) all paragraphs in Part III: State of Common Facts.

624. **Real Property Ownership and Control:** Advocate owned, possessed, controlled, managed and/or controlled both the real property itself and the real property estates and interests in the following properties immediately contiguous to, upstream from and, generally, at higher elevations in relationship to the Plaintiff Robin-Dee Community Class' homes, lands and properties:

624.1. **Advocate's North Development Property** including but not limited to: (i) the Ballard Basin; (ii) The Ballard Basin Discharge Culvert; (iii) the Pavilion Basin; (iv) the Pavilion Basin Discharge Culvert(s); (v) the Dempster Basin; (vi) the Dempster Basin Discharge Culvert; (vii) Advocate's Dempster Basin Stormwater Subsystem (the 84 " stormwater sewer receiving, in part, stormwater from Advocate's South Development Property); (viii) Advocate's parking lots and parking garages immediately adjacent to and contiguous to the Robin-Dee Community, north of the Advocate's Dempster Basin; and (ix) all drainage and stormwater sewer subsystems on Advocate's North Development Property; and

624.2. **Advocate's South Development Property** including but not limited to: (i) All tributary,

upstream stormwater sewers on South Development Property connected to **Advocate's Dempster Basin Stormwater Sewer Subsystem** (the 84 " stormwater sewer receiving, in part, stormwater from Advocate's South Development Property, and discharging this stormwater into the **Dempster Basin** situated on the North Development Property); and (ii) any and all drainage and stormwater sewer subsystems on Advocate's South Development Property which drain to the North Development Property including into the Dempster Basin.

625. **Advocate Property Stormwater:** Advocate owned, managed, possessed, supervised, **and** controlled the Advocate Property Stormwater which was rainfall runoff which fell on its own properties and was generated by this direct rainfall onto its own properties being the **Advocate North Development Property and Advocate South Development Property** identified in the prior paragraph.

626. **PCW Upstream Stormwater:** Advocate owned, managed, possessed, supervised. **and/or** controlled the Prairie Creek Watershed ("PCW") Upstream Stormwater which is stormwater generated in areas of the PCW upstream of Advocate's North Development and not generated from Advocate Development's Properties. This PCW Upstream Stormwater accumulated on Advocate's Development Properties including accumulated on **Advocate North Development Property and Advocate South Development Property**.

627. **Advocate Controlled Stormwater:** Advocate owned, managed, possessed, supervised, and/or controlled both Advocate Property Stormwater and PCW Upstream Stormwater.

627.1. This Advocate Controlled Stormwater included stormwater which Advocate owned and/or controlled either in whole or in part with one or more other Defendants or entities.

627.2. This Advocate Controlled Stormwater included stormwater which Advocate owned and/or controlled individually or jointly with one or more other Defendants or entities.

627.3. This Advocate Controlled Stormwater included stormwater drained to, collected from, stored on, received from, accumulated on and discharged from the following land, real property, real property structures and/or real property improvements including real property public improvements such as the Ballard Basin, Pavilion Basin and Dempster Basin:

627.3.1. All stormwater accumulated on **Advocate's North Development** land and real property including but not limited to: (i) the Ballard Basin; (ii) the Pavilion Basin; (iii) the Dempster Basin; (iv) the Dempster Basin Stormwater Subsystem; (v) all drainage and stormwater sewer subsystems on Advocate's North Development Property; (vi) Advocate's parking lots and parking garage(s);

627.3.2. All stormwater accumulated on **Advocate's South Development Property** including but not limited to: (i) All tributary, upstream stormwater sewers on South Development Property connected to the **Dempster Basin Stormwater Sewer Subsystem**; and (ii) any and all drainage and stormwater sewer subsystems on Advocate's South Development Property which drain to the North Development Property.

627.3.3. All stormwater received from the Main Drain Upstream Segment of the Prairie Creek Stormwater System;

627.3.4. All stormwater received by the Ballard Basin and Pavilion Basin from upstream neighborhoods within the Prairie Creek Watershed which drain into the Main Drains Upstream Segment of the Prairie Creek Stormwater System ("PCSS").

627.3.5. All stormwater accumulated from neighborhoods **east** of the Advocate North Development which drain to the Prairie Creek Main Drain as the Prairie Creek Main Drain flows through these neighborhoods or receives stormwater from these neighborhoods; and

627.3.6. ~~All stormwater accumulated on Advocate's North Development Ballard Basin and~~

~~Pavilion Basins from the north upstream location of the Park Ridge North Ballard Neighborhood including the Park Ridge North Ballard Neighborhood tributary stormwater sewers *~~.

628. **Stormwater Contribution**: Advocate accounts for and causes total and/or partial contribution of stormwater into the Advocate Developments Properties.

629. **Stormwater System Planning and Engineering:** Advocate planned and/or designed and/or caused to be planned and/or designed the public improvements of the Ballard Basin, Pavilion Basin and Dempster Basin and their connected stormwater structures on its North Development Properties.

COUNT 1: ADVOCATE: NEGLIGENCE: DOMINANT ESTATE OVERBURDENING

630. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these Subparts being entitled: **IV.A., IV.B., IV.C.IV.F., IV.G., and IV.I.**

631. Defendant knew or should have known of the foreseeable harm of invasive flooding into the Robin-Dee Community Area given Earlier Floodings and Earlier Flooding Studies.

632. Defendant knew, agreed to and undertook to receive Upstream Prairie Creek Watershed stormwater.

633. Based upon this actual or constructive knowledge of reasonably foreseeable flooding harm to Plaintiffs as contiguous downstream property owners and possessors, Defendant owed non-delegable duties as a land owner to the Robin-Dee Community Area Plaintiff Class to properly manage stormwater under Defendant's ownership, control, supervision, and/or management so as to prevent foreseeable overburdening harm to foreseeable plaintiffs from

excessive, overburdening stormwater exceeding the capacity of Advocate's Developments Properties to capture and maintain in storage on Advocate's Developments Properties.

634. As an owner, possessor, operator, manager and party-in-control of the Advocate's North Development Property, Defendant was under a non-delegable duty not to increase or accelerate or the volume, flow, and other physical characteristics of stormwater from its property or otherwise overburden with stormwater the Plaintiffs' homes and properties, either with overburdening Advocate Property Stormwater, overburdening PWC Upstream Stormwater or both.

635. Defendant knew or should have known that its Post-Development Flows from Advocate lands exceeded Pre-Development Stormwater Flows from these lands, resulting in an overburdening from natural, pre-development stormwater flows onto Plaintiffs' lands*.

636. Defendant knew or should have known that the Post-Development Stormwater Flows from the upstream areas of the PC Watershed which it agreed and/or undertook to control and store exceeded the Pre-Development Stormwater Flows from the Upstream PWC resulting in an overburdening from natural, pre-development stormwater flows onto Plaintiffs' lands*.

637. Defendant knew or should have known that the overburdening stormwater was generated by Advocate Property Stormwater and/or PWC Upstream Stormwater and/or both combining.

638. Before 9-13-2008, Defendant had reasonably adequate time, opportunity and ability to take corrective measures to remedy and/or protect the Plaintiff Class against the foreseeable dangerous conditions existing on its Development Properties posed by excess stormwater.

639. On September 13, 2008, excess accumulated stormwater from Advocate's North Development Property catastrophically invaded the Plaintiff Class' homes, land and properties.

640. Defendant breached its duty not to overburden downstream Plaintiffs including by the following omissions: (a) failing to pump down the Basins before the September 13, 2008 storm; (b) failing to erect flood protection barrier systems between its property and the Plaintiff's properties and (c) failing to detain stormwater until it could safely drain to the Main Drain.

641. As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part.

642. WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

~~**COUNT 2: ADVOCATE: NEGLIGENCE BASED UPON FORESEEABLE HARM**~~

643. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV: IV.A., IV.C., IV.F., IV.G. and IV.I..~~

644. ~~Defendant knew or should have known of the foreseeable harm of invasive flooding into the Robin Dee Community Area given (a) Earlier Floodings in 1987 and 2002 from the North Development Property into the Robin Dee Community Area and (b) Earlier Flooding Investigation such as the 1976 IDOT Report, 1990-1991 Hazza Studies, 2000 and 2008 FEMA FIRMS and 2002 IDNR Studies.~~

645. ~~Based upon this actual or constructive knowledge of reasonably foreseeable flooding harm to Plaintiffs as contiguous downstream property owners and possessors, Defendant owed non-delegable legal duties to the Robin Dee Community Area Plaintiff Class to properly manage stormwater under Defendant's ownership, management, supervision and/or control so as to prevent foreseeable harm to foreseeable plaintiffs such as the Robin Dee Community Area~~

~~Plaintiff Class from excessive stormwater exceeding the capacity of Advocate's Developments Properties to capture and maintain in storage on Advocate's Developments Properties.~~

646. ~~Before September 13, 2008, Defendant had reasonably adequate time, opportunity and ability to take corrective measures to remedy and/or protect the Robin Dee Community Area Plaintiff Class against the foreseeable dangerous conditions existing on Advocate's Advocate North Development Property and South Development Property posed by excess stormwater, including excess Advocate Property Stormwater and excess PWC Upstream Stormwater~~.

647. ~~On September 13, 2008, excess accumulated stormwater from Advocate's North Development Property including the~~ **~~the Ballard and Dempster Basins~~** ~~and the Dempster Basin Parking Lot catastrophically invaded the Plaintiff Robin Dee Community Area Class homes.~~

648. ~~Defendant breached its duty including but not limited to the following acts: (a) failing to pump down the Basins before the September 13, 2008 storm; (b) failing to temporarily erect flood protection barrier systems between the Robin Dee Community and the North Development and (c) failing to detain all Advocate Property Stormwater and PWC Upstream Stormwater until the MD Robin Dee Segment could safely receive.~~

649. ~~As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part.~~

650. ~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

~~COUNT 3: ADVOCATE: NEGLIGENCE: MAINTENANCE AND OPERATION PERMIT CONTRACT PROVISION: CONTRACT AS BASIS FOR DUTY~~

651. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these~~

~~Subparts being: (i) "IV.B. Common Negligent Stormwater System Maintenance Breaches Based upon Undertaking/Assumed Contractual Duties Legal Averments"; (ii) "IV.C. Common Negligent Stormwater System Maintenance Breaches based upon Foreseeable Harm Legal Averments"; (iii) "IV.F. Common Negligent Stormwater Operational Control Breaches of Duty based upon Contractual/Assumed Duties Legal Averments"; and (iv) "IV.G. Common Negligent Stormwater Operational Control Breaches of Duty Based upon Foreseeable Harm Legal Averments".~~

652. ~~Defendant agreed to proper Basin and stormwater system maintenance and operation:~~

> ~~**5. Maintenance:** The sewer connections, lines, systems or facilities constructed hereunder or serving the facilities constructed hereunder shall be properly maintained and operated at all times in accordance with all applicable requirements.~~

653. ~~Defendant agreed not to discharge stormwaters into the sanitary sewers in Paragraph 3:~~

> ~~3. Allowable Discharges. ...Storm waters shall not be permitted to enter the sanitary sewer system.~~

654. ~~As the Permittee, Defendant undertook and agreed to a non-delegable duty of due care towards foreseeable plaintiffs to be injured by unreasonable maintenance and operational practices relating both to the Defendant designed and constructed public improvements of the Ballard, Pavilion and Dempster Basins and to Advocate private improvements which benefited only Advocate rather than the Prairie Creek Watershed residents.~~

655. ~~**Foreseeable Plaintiffs:** The Plaintiffs were foreseeable plaintiffs subject to highly foreseeable harms if Defendant did not act with due care in relationship to adjacent, downstream, servient property owners such as Plaintiffs in its maintenance and operation of the Basins and its North and South Development Properties.~~

656. ~~Plaintiffs as Intended 3rd Party Beneficiaries: The Plaintiffs were intended and/or third-party beneficiaries of these duties undertaken by Defendant based upon the facts set forth herein this Complaint including but not limited to the following material facts:~~

656.1. ~~Plaintiffs were contiguous, downstream property owners and/or possessors of property;~~

656.2. ~~Plaintiffs were foreseeable persons to be injured based upon the **Earlier Flood Studies;**~~

656.3. ~~Violations of paragraphs 1, 3 and 5 would foreseeably result in injury to the Plaintiffs including by inadequate operation of the Basins, including failing to pump down these Basins before and/or during the storm and failing to temporarily increase storage with sand barrels, temporary inflatable barriers and/or other readily, easily and timely mobilized temporary water retention/flood prevention systems, it caused invasively flooding into Plaintiffs' homes.~~

657. ~~Defendant breached these duties including but not limited to: (a) it failed to pump down the Basins before the September 13, 2008 storm; (b) it failed to erect temporary barriers to prevent its stormwater from invading Plaintiff's properties; and (c) it failed to store stormwater.~~

658. ~~As a proximate cause of these breaches of duties by Defendant, the stormwater was released by Defendant and escaped Advocate's North Development, invading some Plaintiff's home overland, then, invading some Plaintiff's homes through the sanitary sewers resulting in some Plaintiffs sustaining both stormwater and sanitary sewer invasions.~~

659. ~~The Plaintiffs sustained damages set forth under in this Complaint's "Damage" Part.~~

660. ~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

~~COUNT 4: ADVOCATE: NEGLIGENT MAINTENANCE AND OPERATION OF THE BASIN PUBLIC IMPROVEMENTS AND ITS PROPERTY~~

661. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these~~

Subparts being: IV.A., IV.B., IV.F., and IV.G.

662. Defendant agreed to and undertook a public trust owing to Plaintiffs and other citizens of the Prairie Creek Watershed when it undertook to construct the public improvements of the Ballard Basin and Pavilion Basin. This public trust and duty including the Dempster Basin if the Dempster Basin receives stormwater from Park Ridge municipal owned stormwater sewers.*.

663. Foreseeable Plaintiffs. The Plaintiffs were foreseeable plaintiffs subject to highly foreseeable harms if Defendant did not act with due care in relationship to adjacent, downstream, servient property owners such as Plaintiffs in its maintenance and operation of the Basins and its North and South Development Properties.

664. Defendant breached these duties on September 13, 2008 including but not limited to: (a) it failed to pump down the Basins before this storm; (b) it failed to erect temporary barriers to prevent its stormwater from invading Plaintiff's properties; and (c) it failed to store stormwater.

665. As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part.

666. WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 5: ADVOCATE; NEGLIGENT DESIGN; CONTRACTUAL DUTIES AND FORESEEABLE HARM DUTIES

667. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these Subparts being "IV.I. Common Negligent Stormwater System Design Breaches of Duty Legal Averments" including Subsubparts "IV.I.A" and "IV.I.B."

668. Defendant was the Permittee and Gewalt was the Permittee's representative and/or agent for whom Defendant is liable as principal relating to the District Stormwater Permit Applications

~~and Permits issued relating to stormwater management on the North and South Developments including but not limited to District Permit Nos. 06-032, 05-438, 04-557, 04-040, 00-643, 94-530, 94-243, and 94-084.~~

669. ~~This Defendant owed a specific non-delegable duty to Plaintiffs to adequately design the Ballard Basin, the Pavilion Basin and the Dempster Basin and to adequately design other land on the North Development and the South Development as mandated in Paragraph 1 of the Permit: s:~~

> ~~**1. Adequacy of Design.** The schedules, plans, specification and all other data and documents submitted for this permit are made a part hereof. The responsibility for the adequacy of the design shall rest solely with the Design Engineer and the issuing of this permit shall not relieve him of that responsibility.~~ …

670. ~~This Defendant also owed a duty to design the Stormwater Structures of the Prairie Creek Stormwater System including the Ballard, Pavilion and Dempster Basins and Advocate North and South Developments to prevent foreseeable invasive flooding harm to the downstream persons, homes and properties of home owners and residents serviced by this Segments of the Prairie Creek Stormwater System based upon Earlier Flooding and the Earlier Flooding Studies.~~

671. ~~This Defendant undertook and agreed to a general non-delegable duty of due care towards the plaintiffs as the foreseeable persons to be injured by unreasonably dangerous designs relating to the public improvements of the Ballard and Pavilion Basin and possibly the Dempster Basins and related Stormwater Structures, Systems and Subsystems.~~

672. ~~Defendant breached these duties including but not limited to the following breaches relating to original designs and constructions of the Basins and its North and South Development~~:

673. ~~failing to properly calculate stormwater flows through the Prairie Creek Stormwater System before designing the Ballard Basin, Pavilion Basin and Dempster Basin and other stormwater systems on the North and the South Development~~;

674. ~~failing to properly calculate flooding elevations with the Prairie Creek Stormwater System in light of reasonable estimates of stormwater to be accumulated on the North Development Property from the North Development, South Development and other areas upstream of the North Development in light of storms similar to the 2008 storm~~;

675. ~~failing to inspect the Main Drain Robin Dee Community Segment and/or study the ability or capacity, if any, to receive flows from the Main Drain North Development Segment, including but not limited to failing to obtain, read and/or remember (a) the 1990-1991 Harza Study and (b) public records from the 2002 IDNR Investigation~~;

676. ~~failing to use or cause to be used a reasonable then-state-of-the-art computer model to model the consequences of its changes to the drainage of the Basins and Advocate Development Properties including the probable flooding consequences of its design and/or construction of Advocate improvements~~;

677. ~~failing to use zero-tolerance flood standards including by failing to consider the effects of climate change and global warming in the Chicago Region and appropriate standards in light of these conditions~~;

678. ~~failed to employ any reasonable computer model, including the computer model used by the IDNR or available from the IDNR, to model any of its Plans submitted to the District, Park Ridge, Maine Township or any other Local Public Entity.~~

679. ~~Based upon the 2002 Flooding and the accessible 2002 IDNR Study preliminary investigations and analysis, and despite the foregoing knowledge of defects throughout the Prairie Creek Stormwater System (PCSS) including the known undersized 60" Howard Court Culvert and its connected undersized 60" Dee Neighborhood Pipe, Defendant was under a duty~~

~~to redesign, replan, reconstruct, correct and remedy defects in the Basins and its North and South Development stormwater systems.~~

680. ~~Defendant breached this duty to redesign, replan, reconstruct, correct and remedy the known defects including but not limited to:~~

681. ~~Relating to the Ballard and Dempster Basins, (i) failing to increase the bank elevations of the Basins together with corresponding culvert discharge elevations, (ii) failing to create a permanent barrier berm between the Robin Dee Community and the North Development Property perimeter; and (iii) in general, failing to increase detention basin storage on the North Development and/or the South Development;~~

682. ~~failing to redesign all available open areas and parking lots as temporary emergency stormwater detention basins for receiving excess accumulated stormwater from both Defendant's properties and areas of the Upstream Prairie Creek Watershed.~~

683. ~~As a proximate cause of these and other breaches of duties by Defendant, the Plaintiffs suffered and sustained the injuries and damages set forth under this Complaint "Damage" Part.~~

684. ~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

COUNT 6: ADVOCATE: NEGLIGENCE: RES IPSA LOQUITUR

685. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subparts **IV.J.** entitled "IV.J. Common Negligence-Res Ipsa Loquitur-Stormwater System-Breaches of Duty-Legal Averments" and Subpart **IV.K.** entitled "IV.K. Common Negligence-Res Ipsa Loquitur-Stormwater System-Within Jurisdiction of Park Ridge-Breaches of Duty Legal Averments".

686. This Defendant exclusive owned, controlled and operated the Ballard, Pavilion and Dempster Basins and the North and South Development and all connected stormwater structures.

687. This Defendant knew that the Plaintiffs' reasonably used the PCSS and/or Robin-Dee Community Area Sanitary Sewerage Systems for these systems' intended purposes.

688. The invasive flooding suffered by the Plaintiffs would not have ordinarily occurred but for the negligence of this Defendant relating to its negligent inspection, study, maintenance,, design, engineering, and/or operation of its exclusively controlled Basins and other properties.

689. This Defendant's operation of its exclusively controlled Basins and properties proximately caused the invasive flooding sustained by the Plaintiffs.

690. The Plaintiffs did not contribute to the flooding.

691. On 9-13-2008, Defendant breached these duties owed to Plaintiffs proximately causing damages to the Plaintiffs' persons, homes and properties.

692. As a proximate cause of these breaches of duties by this Defendant, the Plaintiffs suffered and sustained the injuries and damages set forth under the "Damage" Part of this Complaint.

693. WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 7: ADVOCATE: NEGLIGENT NUISANCE

694. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.N. entitled "IV.N. Common Negligent Stormwater Nuisance Violations-from Properties under Park Ridge's Jurisdiction-Legal Averments."

695. This Defendant owned, operated, managed, maintained and/or controlled the Basins, Advocate's North and South Developments and other stormwater drainage components and/or

drainage structures from which the excess accumulated stormwater nuisance invaded the Plaintiffs' persons, homes and properties on September 13, 2008.

696. As set out in the prior negligence Counts in this Part, this Defendant failed to reasonably design, engineer, maintain, and/or operate the Basins and Advocate Development Properties.

697. This Defendant negligently caused an accumulation of stormwater from the Basins and Advocate North Development Property and Advocate South Development Property to invade and interfere with the Plaintiffs' persons, homes and properties on September 13, 2008.

698. The Plaintiffs did not consent for the stormwater which had accumulated on this Defendant's properties to enter and settle in the Plaintiff Robin-Dee Community Class' homes.

699. By causing stormwater accumulated and controlled by this Defendant to physically invade the Plaintiff Class' homes, this Defendant negligently created a dangerous nuisance of excess accumulated stormwater which substantially and unreasonably interfered with Plaintiffs.

700. As a proximate cause of this nuisance caused and/or created by this Defendant, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, the Plaintiffs request against this Defendant the relief in the "Relief" Complaint Part.

COUNT 8: ADVOCATE: NEGLIGENT TRESPASS

701. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.Q. entitled "IV.Q. Common Negligent Trespass Violations From Advocate Stormwater- Legal Averments".

702. Because Defendant's failed to act as set forth in this Part including but not limited to the failure to discharge by pumping existing, accumulated stormwater before the storm, before the MD Robin-Dee Segment runs full and before the surcharging of the Ballard, Pavilion and

Dempster Basins and Howard Court Culvert, this Defendant failed to reasonably manage stormwater on September 13, 2008, proximately causing the Plaintiffs' invasive flooding.

703. As a direct, immediate and foreseeable result of the foregoing acts and/or omissions of this Defendant, this Defendant caused stormwater to invade the Plaintiffs' persons and homes.

704. This Defendant had exclusive possession and control over the trespassing instrumentality of the excess accumulated stormwater from the Basins and Advocate's Development Properties.

705. The Plaintiffs were entitled to the exclusive enjoyment of their properties.

706. This Defendant knew or should have known that its actions and/or inactions in failing to control stormwater from the Basins and North Development would result in invasive flooding.

707. This Defendant negligently failed to monitor, investigate, study, inspect, clean, maintain, repair, improve, design, redesign, plan and/or operate its properties as set forth in this Part.

708. As a direct and proximate result of the foregoing conduct by this Defendant, this Defendant's instrumentality of excess accumulated stormwater physically invaded Plaintiffs' homes on 9-13-2008, proximately causing the Plaintiffs' Damages set forth in the Damage Part.

709. The Plaintiffs did not consent for this Defendant's excess stormwater to physically invade and interfere with the exclusive use and occupancy of the Plaintiffs' homes and property.

710. The Plaintiffs' injuries and damages were caused by the dangerous and calamitous occurrence of invasive stormwater floodings on 9-13-2008 from this Defendant's properties.

711. The excess accumulated stormwater which entered, settled and physically invaded Plaintiffs' homes and properties interfered with the Plaintiffs' interests in the exclusive possession of their homes.

712. The excess accumulated stormwater which entered, settled and physically invaded Plaintiffs' homes and property constituted a negligent trespass upon and into the Plaintiffs' persons and homes.

713. This Defendant is liable to the Plaintiffs for negligent trespass because this Defendant caused harm to the legally protected interests of the Plaintiffs including harm to the exclusive, quiet enjoyment of their land, homes and properties by causing an instrumentality, namely "Stormwater", to enter upon the property of the Plainitffs without their consent.

714. As a proximate cause of this trespass caused and/or created by this Defendant, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, the Plaintiffs request against this Defendant the relief in the "Relief" Complaint Part.

~~COUNT 9: ADVOCATE: GROSS NEGLIGENCE~~

715. ~~Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.T.~~

716. ~~This Defendant's acts and omissions where committed under circumstances exhibiting a reckless disregard for the Plaintiffs' safety. These reckless omissions include but are not limited to this Defendant's deliberate and intentional failures to act to increase, either temporarily through pumping down and temporary barriers, or permanently, with a pump station and high berms, storage to receive the September 13, 2008.~~

716.1. ~~Specifically, this Defendant failed to exercise even ordinary care to increase either temporarily or permanently the storage capacity of the North Development Basins.~~

716.1.1. ~~This Defendant failed to make any effort at calculating the amount of stormwater from the September 13, 2008 storm although this storm was predicated and known days in advance of its arrival to affect the Chicago Region;~~

716.1.2. ~~This Defendant failed to deploy temporary pumps to pump down and empty the Ballard Basin, Pavilion Basin and Dempster Basin before the September 13, 2008 storm;~~

716.1.3. ~~This Defendant failed to either temporarily or permanently increase the storage capacity so that these Basins had adequate storage capacity.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

COUNT 10: ADVOCATE: INTENTIONAL NUISANCE

717. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.U. entitled "IV.U. Common Intentional Nuisance Violations-Within Park Ridge Jurisdiction Legal Averments".

718. Defendant controlled through design drainage components and/or drainage structures including the Ballard, Pavilion and Dempster Basins from which the excess accumulated stormwater nuisance invaded Plaintiff Class' persons and homes.

719. Defendant failed to reasonably design, engineer, maintain, and/or operate Advocate North and South Development Property including these three Primary Basin Structures.

720. Defendant intentionally caused excess accumulated stormwater from these Basins, and Advocate North and South Development Properties interfere with Plaintiffs' persons and homes.

721. As a direct and proximate result of the Defendant's intentional failures to instruct Advocate to pump down the Basins, and to increase temporary storage through temporary barrier methods such as sandbags, Plaintiffs suffered damage set out in this Complaint "Damages" Part.

722. The Plaintiffs did not consent for the stormwater to enter and settle in their homes.

723. By causing stormwater accumulated and controlled by Defendant through its gravity-designed stormwater system to physically invade the Plaintiffs' persons and homes from properties under Defendant's design control, Defendant recklessly, willfully, wantonly and with

a conscious disregard for the rights and safety of Plaintiffs created a dangerous nuisance of excess accumulated stormwater on 9-13-2008 which substantially and unreasonably interfered with Plaintiffs' exclusive use and enjoyment of their homes.

724. WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 11: ADVOCATE: INTENTIONAL TRESPASS

725. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart **IV.X.** entitled "**IV.X.** Common Intentional Trespass Violations-Stormwater within Park Ridge Legal Averments".

726. Defendant knew to a substantial legal certainty and to a high degree of certainty that its actions and/or inactions in failing to redesign or failing to advise Advocate to pump down its Basins and create temporary storage would result in invasive flooding into the Plaintiffs' homes during a rainfall like the September 13, 2008 rainfall from the Ballard Basin and the Dempster Basin.

727. Defendant proximately caused the Plaintiffs' Damages by its intentional omission to instruct Advocate to discharge by pumping pre-existing stormwater before the 2008 storm and its intentional omission to capture and store stormwater in temporary barriers around the Basins.

728. Based upon Earlier Flooding Studies and Earlier Invasive Flooding, Defendant knew to a substantial legal certainty and with a high degree of certainty that its intentional omissions and would result in stormwater invasive flooding Plaintiffs' homes from the Basins as these Basins were gravity feed and had known inadequate storage for a storm of the magnitude as the September 13, 2008 storm.

729. Defendant intentionally omitted to properly plan and/or operate the Basins through its

failure to redesign and to instruct, which intentional acts and omissions proximately caused the stormwater to damage Plaintiffs.

730. With a high degree of certainty to cause injury to Plaintiffs, on September 13, 2008, Defendant permitted through its designs stormwater to accumulate in the Basins then escape onto Plaintiffs' land.

731. Based upon the legal certainty of knowledge of invasive flooding as set forth herein, Defendant intentionally trespassed upon Plaintiffs' persons, homes, and properties through the instrumentality of Gewalt's excess accumulated stormwater.

732. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's intentional conduct by intentional failing to collect the dangerous and calamitous storm occurrence of the 9-13-2008.

733. WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

~~COUNT 12: ADVOCATE: RESPONDEAT SUPERIOR PRINCIPAL AGENCY RELATIONSHIP WITH GEWALT AND/OR NEGLIGENT SUPERVISION OF AGENT~~

~~734. The Plaintiffs reallege and incorporate the prior paragraphs of this Part and all the subsequent averments in the Gewalt Complaint Part as the first paragraphs of this Count.~~

~~735. RELATIONSHIPS: Advocate and Gewalt had both a contractual relationship and an agency relationship, where Gewalt was acting as Advocate's agent per contractual duties and undertaken duties*.~~

~~736. AGENCY: Under the agency relationship, Gewalt acted as Advocate's agent relating to all relevant permits for stormwater approval including relating to the existing North~~

~~Development stormwater improvements which including the Ballard, Pavilion and Dempster Basins and the South Development Property.~~

737. ~~CONTRACT: Under the contractual relationship, Advocate owed duties to Plaintiffs to inform Gewalt of information relevant to Gewalt's design, engineering and planning work material to plans prepared by Gewalt for Advocate so as not to harm Plaintiffs *.~~

738. ~~SCOPE AGENCY: Gewalt was acting within the scope of its employment and/or agency as an agent of Advocate under its contractual undertakings with Advocate in performing its stormwater planning, engineering and other services.~~

739. ~~SCOPE CONTRACT: Gewalt was acting an agent of its Principal Advocate based upon its contracts with Advocate*. Gewalt acted as Advocate's agent when Gewalt undertook obligations as Design Engineer on behalf of Advocate in Gewalt's application preparation including plan preparation in the Advocate Gewalt dealings with the District including all relevant Permit Applications and Plans for the Ballard, Pavilion and Dempster Basins.~~

740. ~~INHERENTLY DANGEROUS: The activities of stormwater management are inherently dangerous in the urbanized Prairie Creek Watershed as has been demonstrated by the most non-river repetitive flooding in Cook County and the repetitive inability of control stormwater and manage this stormwater.~~

741. ~~HARM: Under its duty to prevent foreseeable future harm to Plaintiffs, Advocate owed duties to Plaintiffs inform Gewalt of dangerous conditions and of the necessity for redesign, replanning and reconstruction.~~

742. ~~DUTY UNDERTAKING: In planning and undertaking the improvements to its North Development Property and South Development Property including its public improvements of the Ballard Basin and Pavilion and other interconnected stormwater structures of the PCSS and~~

~~its knowledge of Earlier Floodings and/or Earlier Flooding Studies, Advocate undertook a non-delegable duty to design and plan in conformity with contemporary, state-of-the-art duties of design and planning at the time of the specific developed design and plan as set forth in paragraph 1 of the Permit Application and as a common law duty to prevent foreseeable harm.~~

743. ~~DUTIES VICARIOUSLY: General Condition of Permit Paragraph 1 provides that Gewalt owed a specific duty of due care to Plaintiffs to adequately design its Plans to prevent home-invasive flooding relating to all design projects. This duty was non-delegable and Advocate vicariously resumed this and other contractual and undertaken duties owing to Plaintiffs.~~

744. ~~DUTY HARM: As principal, Advocate owed duties to prevent foreseeable harm from arising out its agency relationship with Gewalt as to Plaintiffs.~~

745. ~~DUTY TO INSTRUCT: As principal, Advocate owed duties to the Plaintiffs to properly inform Gewalt of dangers arising from Advocate's operation of stormwater subsystems planned, designed and engineered by Gewalt when Advocate learned that the Gewalt plans were and are dangerously defective and to supervise the redesign, replanning and reconstruction of the Gewalt Advocate improvements, including PCSS public improvements besides private improvements.~~

746. ~~NON-DELEGABLE DUTIES: As a property owner engaged in development and as the developer of public improvements of the PCSS on its property, Advocate's duties could not be delegated to Gewalt, regardless of whether or not Gewalt was an agent or independent contractor of Advocate as dangers inhere in development especially stormwater development as demonstrated by the repetitive serious flooding into the Plaintiffs' Area.~~

747. ~~BREACH: Advocate breached the foregoing supervisory duties over Gewalt including but not limited to:~~

748. ~~Advocate failed to inform Gewalt of the repetitive flooding from Advocate property *;~~

749. ~~Advocate failed to require Gewalt to replan, redesign and reconstruct the PCSS Public Improvements including the Basins and related stormwater improvements *; and~~

750. ~~Advocate failed to require Gewalt to replan, redesign and reconstruct the PCSS Public Improvements including the non-PCSS stormwater improvements on the South Development and North Development *.~~

751. ~~RESPONDEAT: Based upon the fact that Defendant Gewalt was an agent of the Defendant Advocate, Defendant Advocate is solely and/or jointly and severally responsible under principles of Respondeat Superior and agency for the acts and omissions of Advocate's Agent Gewalt including but not limited to Defendant Gewalt's negligence as set forth in the entitled "CLAIMS AGAINST GEWALT".~~

752. ~~NEGLIGENT SUPERVISION: Alternatively, Advocate negligently supervised Gewalt based upon knowing that Gewalt's designs were defective, failing to request Gewalt to redesign its constructed public and private improvements, such failure proximately causing Plaintiffs' damages.~~

753. ~~Based upon the legal certainty of knowledge of invasive flooding as set forth herein, Defendant intentionally trespassed upon Plaintiffs' persons, homes, and properties.~~

754. ~~The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Advocate's conduct as set forth herein.~~

755. ~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

~~COUNT 13: ADVOCATE: IRREPARABLE HARM-EQUITABLE RELIEF~~

756. ~~Plaintiffs restate and incorporate all prior paragraphs within this Part as the first paragraphs of this Count and Subparts IV.AA. and IV.AK.~~

~~**WHEREFORE**, Plaintiffs request against Advocate the relief in this Complaint's "Relief" Part.~~

VI. PART VI: CLAIMS AGAINST GEWALT

VI.A. OVERVIEW-GEWALT-CAUSATION AND RESPONSIBILITY

757. **Causation: Material Control by Design:** Gewalt exercised substantial and material, direct control by its **gravity design** over the entire PCSS Stormwater Subsystem on Advocate Property and other private stormwater improvements on Advocate Properties. Gewalt designed and planned a fully gravity-operated PCSS and Advocate stormwater management. Gewalt design and planned the PCSS structures without pumps or other mechanical operational systems to move the stormwater flows.

757.1. Gewalt planned a complete gravity flow system for both the PCSS Stormwater Improvements and the Advocate Private Stormwater Improvements. As set out earlier relating to Stages of Flooding, as the basins rose, gravity transported stormwater from the Ballard and Dempster Basins (**Points A3 and B3**) to the lower elevations Ballard and Dempster Robin Alley Culverts (**Points C1 and C2**) to the lower elevation undersigned Howard Court Culvert (**Point E**) and Dee Road Neighborhood Pipe (**Point E through Point H**).

758. ~~**Responsibility:** Under District Permit Condition 1, Gewalt as Design Engineer charged with the "**adequacy of design**" as a non-delegable, non-transferable duty either in its capacity as Design Engineer or agent/representative for the property owner **Advocate**. While Advocate and~~

~~Gewalt continue to refuse informal and formal requests for an inspection of their professional services contract, Gewalt also owed implied duties of workmanlike performance not limited by its Advocate contract to the Plaintiffs *. Further, Gewalt also owed express duties of workmanlike performance under its Advocate contract to the Plaintiffs *.~~

759. VI.B. ADDITIONAL FACTS RELATING TO GEWALT'S CONDUCT

760. As used here, unless otherwise evident from the context, "this Defendant" or "Defendant" means Gewalt and "its" means "Gewalt's".

761. Plaintiffs restate and incorporate all these paragraphs as the first paragraphs of this Part: Part I: Jurisdiction; Part II: Class Action Averments; Part III: Statement of Common Facts; Part IV: Subpart I (IV.I.) "Common Negligent Stormwater System Design Breaches of Duty Legal Averments", Part XIII "Damages" and Part XIV "Relief".

762. Public Improvement: The Ballard Basin and the Pavilion Basin are public improvements to the Prairie Creek Stormwater System as these Basins receive upstream stormwater from upstream areas of Prairie Creek Watershed.

763. Upstream stormwaters drain to the Upstream Main Drain from PCSS's Upstream Segment tributary sewers and the retention/detention basin(s) such as the Greenwood/Ballard Mall Retention Basin at Greenwood and Ballard;

764. Upstream stormwater enters the Upstream Main Drain upstream of the North Development, emptying all of its collected and conveyed stormwater into the North Development Main Drain at **Point A1**;

765. Tributary stormwater from the Park Ridge North Ballard Neighborhood drains into the North Development Main Drain at or between **Point A1 and Point A2** (drainage culverts/pipes near or between **Points A1 and A2**);

766. Tributary stormwater from the Maine Township North Ballard Neighborhood drains into the North Development Main Drain at or between **Point A1 and Point A2** and/or at other locations on the south side of Ballard (drainage culverts/pipes near or between **Points A1 and A2**); and

767. possible Upstream Stormwater tributary to the Pavilion Basin entering the Pavilion Basin from the east of the Advocate North Development.

768. The Dempster Basin is also a public improvement if it was integral to draining any stormwater from parcels of land contiguous to Advocate's Developments to the Dempster Basin from Park Ridge municipal tributary sewers *.

769. Gewalt knew that the Ballard Basin and the Pavilion Basin were components of an integrated stormwater system before its redesign of the Ballard Basin and its design of the Pavilion Basin.

770. As to the Ballard and Pavilion Basins, sometime after 1987, but before 2002, based upon, among other things, as-built drawings, record drawings, District permits, permit specifications, and exhibits prepared by Gewalt for issuance of permits for construction on the Advocate property, Gewalt undertook to provide professional stormwater planning, stormwater design, stormwater engineering, scientific hydrological and hydrologic services and other related professional services (herein "**stormwater management engineering services**") to Advocate relating to the replanning, reengineering and redesign of the Ballard Basin and original planning, engineering and design of the Pavilion Basin*.

771. As to the Dempster Basin, sometime after 2002, but before 2008, based upon, among other things, as-built drawings, record drawings, District permits, permit specifications, and exhibits prepared by Gewalt for issuance of permits for construction on the Advocate property,

Gewalt undertook to provide professional stormwater planning, stormwater design, stormwater engineering, scientific hydrological and hydrologic services and other related professional services (herein "**stormwater management engineering services**") to Advocate relating to the planning, engineering and design of the Dempster Basin*.

772. Since on, about or soon after the time of the 1987 Flooding, Gewalt provided stormwater management engineering services, in whole or in part, to Advocate relating to the following Advocate real property estates and interests: (a) **Advocate's North Development Property** including the **Primary Basin Structures of the Ballard Basin,** the **Pavilion Basin** and the **Dempster Basin**; (b) Advocate 's **South Development Property** including the **Dempster Basin Stormwater Subsystem (Points B1 and B2 on Exhibit 1)** receiving South Development stormwater and (c) other existing drainage and stormwater sewer subsystems on Advocate's Development Properties*.

773. **Public Improvements:** Before the 2002 Flooding, Gewalt engineered, designed, prepared and submitted on behalf of Advocate certain public improvements to the Prairie Creek Stormwater System to Park Ridge and the District, the Plans and related stormwater management documents for the management of stormwater through the redesign and reconstruction of the public improvement referred to herein as the Prairie Creek Stormwater System (PCSS).

774. Before 2002, Gewalt replanned, reengineered and redesigned the North Development Segment of the PCSS.

775. The North Development Segment of the PCSS is a public improvement consisting of the North Development Main Drain which essentially consists of drain(s) conveying the Upstream Main Drain's stormwaters onto the North Development including the drain at **Point A1** near Ballard Road along Ballard Road and the Ballard Basin into which the drains from **Points A1**

and A2 drain into the Ballard Basin and (b) the Pavilion Basin and interconnected sewers an pipes.

776. Gewalt replan, reengineered and redesigned the Ballard Basin before 2002;

777. Gewalt originally planned, reengineered and redesigned the Pavilion Basin before 2008*.

778. The Ballard Basin and the Pavilion Basin are public improvements because the majority of the stormwater received, collected, transported, conveyed and/or stored originates from the local public entities of Park Ridge and Maine Township.

779. The amount of stormwater collected in the Ballard and Pavilion Basins from the Prairie Creek Stormwater System substantially and significantly exceeds the amount of stormwater generated from the Advocate North Development itself. The Upstream Main Drain of the PCSS has only one, single discharge point: **Point A1**. A significant disproportion of the stormwater in the Ballard Basin originates from the PCSS.

780. **Approved Public Improvements of the Ballard and Pavilion Basin:** Before the 2002 Flooding, Gewalt's Plans as approved by Park Ridge and the District for the redesign and construction of improvements to the existing **Ballard Basin and Pavilion Basin** were implemented with these Basins becoming operational in their new and current design before the 2002 Flooding integrated as detention/retention basins for stormwater management within the Prairie Creek Stormwater System.

781. **Private/Public Improvement-Dempster Basin**: Before the 2008 Flooding, Gewalt engineered, designed, prepared and submitted on behalf of Advocate to Park Ridge, the District and/or other governments with jurisdiction the Plans and related stormwater management documents for the management of stormwater through the design and construction of a new **Dempster Basin** as an integrated stormwater retention structure within the Prairie Creek

Stormwater System of the Prairie Creek Watershed.

782. Before the 2008 Flooding, Gewalt's Plans for the construction of the new **Dempster Basin** were implemented by the construction of the existing Dempster Basin which was operational in its current design before the 2008 Flooding.

783. From approximately 1990 to the present, Gewalt planned or caused to planned and designed or caused to be designed the existing Advocate Stormwater Management System including all Drainage Stormwater Sewer Systems for both the Advocate North Development Property and the Advocate South Development Property, including submitting applications with and obtaining approvals and permits from the District and Park Ridge relating to the following drainage structures situated on Advocate's North Development: the Ballard Basin; the Pavilion Basin; the Dempster Basin; the Dempster Basin Stormwater Sewer Subsystem which collects water from Advocate's South Development Property; the Dempster Basin Parking Garage (situated immediately west of the existing Dempster Basin);the Dempster Parking Lot (situated north of the Dempster Basin Parking Garage and south of the Ballard Basin and the Pavilion Basin; all other drainage structures, components and improvements on the North Development Property; all other drainage improvements on South Development Property; and other Drainage Stormwater Subsystems situated on Advocate's Developments.

784. As a state certified professional engineer, Gewalt certified to reviewing governmental agencies and the public which they represent that its Plans were (1) not dangerous but were safe without posing a risk of invasive flooding to the Robin-Dee Community Plaintiffs and other adjacent property owners downstream and at lower elevations from the Advocate Property and (2) complied with all applicable standards, including minimal standards set forth in state laws, District Ordinances and Regulations, and other applicable sources of law.

785. Gewalt assumed and undertook the primary stormwater supervision and management responsibilities over the North Development Property and the South Development Property of Advocate and, pursuant to contractual and in fact undertakings, assumed the obligations owning by Advocate to the public including the Plaintiffs relating to stormwater management, being jointly liable with Advocate for any breaches of stormwater management duties.

786. Before September 13, 2008, based upon **Earlier Flooding Investigations and Earlier Floodings**, Gewalt knew or should have known that the existing design, planning, ~~maintenance, and operation~~ relating to Advocate's Ballard, Pavilion and Dempster Basins and other stormwater structures of the North Development's Main Drain caused invasive flooding to the Robin-Dee Community Area Plaintiff Class during storms within existing government design return-frequencies.

787. Before September 13, 2008, based upon **Earlier Flooding Investigations and Earlier Floodings**, Gewalt knew or should have known that the existing design, planning, ~~maintenance, and operation~~ relating to Advocate's Ballard, Pavilion and Dempster Basins and other stormwater structures of the North Development's Main Drain caused invasive flooding to the Robin-Dee Community Area Plaintiff Class during storms within reasonable design return-frequencies, that is, storm design frequencies which were greater than existing design frequencies but within reasonable, recognized storm return-frequencies standards.

788. Before September 13, 2008, based upon **Earlier Flooding Investigations and Earlier Floodings**, Gewalt knew or should have known that the receiving Robin Neighborhood Main was defective and could not safely transport stormwater from the Ballard, Pavilion and Dempster Basins and, in general, Advocate's Developments Properties without causing catastrophic home-invasive flooding from storms within existing government storm-design return frequencies and

from storms within reasonable storm-design return frequencies which were greater than the government storm-design frequencies.

789. Gewalt knew or should have known that any Plan relating to stormwater management of Advocate Developments Properties upstream should take into consideration the serious reduced capacity, if any capacity existed, of the Robin-Dee Community Main Drain to receive upstream stormwater flows including upstream stormwater flows from the Advocate's North Development and South Development.

790. Based upon available information including the prior invasive floodings and the prior government reports, Gewalt knew or should have known that its Plans were imminently dangerous and should be revised to prevent invasive flooding to the Robin-Dee Community Area Plaintiff Class based upon prior invasive flooding injuring and damaging the Plaintiff Class and upon other near-invasive flooding besides prior governmental reports and other studies.

791. If Gewalt had conducted a reasonable investigation of the Robin-Dee Community Main Drain's capacity to receive upstream stormwater flows including Advocate Developments' stormwater flows, then Gewalt would have discovered that the Robin Neighborhood Main could not receive the stormwater which Advocate discharged from its Advocate Developments Property during storms within government or reasonable storm-designs return frequencies due to the Howard Court Bottleneck, the Dee Neighborhood Stormwater Pipe and other bottlenecks and restrictions to flow downstream from Advocate's Developments.

792. Gewalt knew or should have known that the Main Drain including the Howard Court Bottleneck and the Dee Neighborhood Stormwater Pipe Bottleneck had not been improved or reconstructed to increase the flow capacity of the Main Drain Robin-Dee Community Segment before the 2008 Flooding, Gewalt knew or should have known that the Main Drain had not been

regularly and adequately cleaned or maintained and as a result of this lack of maintenance and cleaning, Gewalt should have known of ongoing obstructions to adequate flow which would cause flooding into Plaintiffs' homes during storms within government design standards and within reasonable design standards.

793. Before September 13, 2008, Gewalt had adequate time to cure the foregoing defects by re-engineering, re-designing and replanning the configuration of the stormwater management system on Advocate's North Development in order to prevent foreseeable catastrophic home-invasive flooding into the Plaintiffs' Robin-Dee Community Area.

794. Before September 13, 2008, Gewalt altered or caused to be altered through its Plans and other stormwater management engineering services to Advocate the natural conditions of the Advocate North Development Property and the Advocate South Development Property.

795. Gewalt's alterations in the natural topography of Advocate's Developments caused increases in stormwater flow quantity into the Plaintiffs' Robin-Dee Community Area during significant storms.

796. Gewalt's alterations in the natural topography of Advocate's Developments caused increased acceleration of the stormwater runoff flow into Plaintiffs' Robin-Dee Community Area during significant storms.

797. Before September 13, 2008, Gewalt's acts resulted in an increased burdening upon the Robin-Dee Community Plaintiff Class 'servient estates of real property and leasehold estates including but are not limited to the following affirmative acts by Gewalt:

798. Gewalt altered and changed or caused to be altered or changed the natural drainage of Advocate's North Development Property and Advocate's South Development Property since the 1987 Flooding including but not limited to one or more of the Advocate Development Projects,

identified by, and undertaken pursuant to MWRD drainage file permit numbers: 06-032, 05-438, 04-557, 04-040, 00-643, 94-530, 94-243, and 94-084.

799. Through these stormwater projects, Gewalt caused to be installed and/or further developed the Advocate Stormwater Subsystems on both the Advocate North Development and the Advocate South Development, thereby (1) increasing the stormwater quantity and (2) accelerating the stormwater flow, resulting in increased stormwater flows capable of invading the Plaintiff Class' servient Estates during significant storms.

800. Through the construction projects in which Gewalt participated on behalf of Advocate increased the amount of impervious cover over Advocate's dominant estates, including but not limited to constructing, developing and/or installing buildings, impervious driveways, impervious streets, impervious parking lots, impervious parking garages, and other impervious cover of land thereby (i) disturbing the natural drainage of the lands, (ii) resulting in reduced stormwater storage capacity on said lands and (iii) resulting in increased amount of stormwater rate of flow and volume of flow from Advocate North Development Property and Advocate 's South Development Property into the Plaintiffs' Robin-Dee Community Area, Gewalt did not recommend pervious or drainage pavers which would have increased the ability of the Advocate land including parking lot land to receive stormwater.

801. Based upon Gewalt's above conduct, Gewalt changed, altered and developed the natural topography and drainage relating to stormwater management, altering the natural drainage of Advocate North Property and Advocate South Property and singly, in combination or cumulatively, cause an overburdening of the downstream, servient estates of real properties and leasehold estates owned and/or possessed by the Plaintiff Class.

802. On or about September 13, 2008, Gewalt breached these foregoing duties by the

following acts, proximately causing a excess accumulated stormwater overburdening of the Plaintiffs' Downstream-Servient Estates.

803. Gewalt's prior stormwater management services including its prior Plans altered the natural conditions of land and caused increased quantity, increased velocity and increased flow rate of stormwater discharging from Advocate North Development Property and Advocate South Development Property upstream and dominant real properties, causing overburdening accumulations of stormwater from Advocate's Dominant Estates to flow, invade and flood onto and into Plaintiffs' homes and properties; most critically, Gewalt's Plans did not adequately provide for on-site storage on Advocate Properties.

804. On September 13, 2008, a rainfall occurred within the Prairie Creek Watershed which was less than a reasonable 100-year return frequency designed storm in light of North Eastern Illinois climate change.

805. At no time during Friday, September 12, 2008, Saturday, September 13, 2008 or Sunday, September 14, 2008, did any habitable building on Advocate's North Development Property (such as the Pavilion Building) or on Advocate's South Development Property (such as its Main Tower, Professional Buildings and other habitable buildings) dominant to and upstream of the Plaintiffs Robin-Dee Community Area sustain any invasive flooding of any occupied building or occupied structure.

806. As rainfalls increased in intensity and duration, such as exceeding one-year, then two-year, then five-year, then ten-year and/or higher stormwater event standards, Gewalt knew or should have known with increasing legal certainty that accumulated stormwater discharging from and/or escaping from Advocate's North Development Property and Advocate's South Development Property would invasively flood the Robin-Dee Community Plaintiff Class'

Servient Estates.

807. On September 13, 2008, stormwater from Advocate's North Development Property, Advocate's South Development Property and the Advocate Stormwater Subsystems on its North Development and its South Development catastrophically invaded and flooded into the Robin-Dee Community Plaintiff Class' residences and other properties, proximately causing catastrophic injury and harm to the Robin-Dee Community Plaintiff Class due to Gewalt's failure to (a) prevent discharges from the North Development and (b) store Upstream Stormwater and Advocate Stormwater.

808. As Advocate's stormwater management engineer, Gewalt assumed and undertook duties of due care owing to the Robin-Dee Class Plaintiffs in its conduct of Gewalt's professional stormwater management and drainage engineering services, stormwater management and planning services, stormwater management and drainage scientific services and other related professional services through its (a) its contractual relationships with Advocate, (b) its undertakings for Advocate, (c) its representations to Advocate as well as its representations made to the District, Park Ridge and others for issuance of construction permits, (d) its other conduct and performance of its stormwater management engineering services for Advocate.

809. This Defendant designed the Basins as gravity basins: consequently, all flows were based upon elevations in the Basins. Defendant's original designs failed to have pumps although the Defendant should have known after 2002 that its designs were negligent because of its failure to provide pre-storm pump stations to empty the Basins before storms.

810. This Defendant controlled through its designs of the Basins, Advocate's North and South Developments and other stormwater drainage components and/or drainage structures from which the excess accumulated stormwater nuisance invaded the Plaintiffs' persons, homes and

properties on September 13, 2008 as these Basins are gravity-operated without pumps.

~~COUNT 14: GEWALT: NEGLIGENT DESIGN OF PUBLIC IMPROVEMENTS: DISTRICT PERMIT DUTY~~

811. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these Subparts being entitled: IV.A., "IV.I. Common Negligent Stormwater System Design Breaches of Duty-Legal Averments" including Subsubparts "IV.I.A" and "IV.I.B."~~

812. ~~Gewalt certified to the public with its seal on its Plans that its designs were proper relating to stormwater management planning and that its Plans did not jeopardize the health, safety and welfare of the citizens who could be affected by its Plans.~~

813. ~~Gewalt was Advocate's representative and/or agent for the submission of the District's Stormwater Permit Applications and Permits relating to stormwater management on the North and South Developments including but not limited to District Permit Nos. 06-032, 05-138, 04-557, 04-040, 00-643, 94-530, 94-243, and 94-084.~~

814. ~~Each Permit imposed upon Gewalt a duty to adequately design the stormwater project. Paragraph 1 of the General Permit Conditions provided~~:

> ~~1. **Adequacy of Design.** The schedules, plans, specification and all other data and documents submitted for this permit are made a part hereof. The responsibility for the adequacy of the design shall rest solely with the Design Engineer and the issuing of this permit shall not relieve him of that responsibility. ...~~

815. ~~This Permit term and condition or a substantially identical permit and condition existed in all the above described Permits including all Permits relating to the Ballard Basin and the Pavilion Basin~~.

816. ~~As part of its duty to adequately design stormwater structures and system, this Defendant owed a duty to design the Stormwater Structures of the Prairie Creek Stormwater System~~

~~including the Ballard and Pavilion Basins and interconnected, interrelated sewers and structures on Advocate North Developments to prevent foreseeable invasive flooding harm to the downstream persons, homes and properties of home owners and residents serviced by the North Development Main Drain and the Robin Dee Community Main Drain including its component Robin Neighborhood Main Drain and Dee Neighborhood Main Drain~~.

817. ~~This duty arises from knowledge based upon Earlier Flooding and the Earlier Flooding Studies of Prairie Creek Stormwater System defects besides from the Permit Undertakings~~.

818. ~~This Defendant undertook and agreed to a general non-delegable duty of due care towards the plaintiffs as the foreseeable persons to be injured by unreasonably dangerous designs relating to the public improvements of the Ballard and Pavilion Basin and related public improvements to related stormwater structures, systems and subsystems.~~

819. ~~Defendant breached these duties including but not limited to the following breaches relating to original designs and constructions of the Prairie Creek Stormwater System's Ballard Basin and Pavilion Basin~~:

819.1. ~~failing to properly calculate stormwater flows through the Prairie Creek Stormwater System before designing the Ballard Basin and Pavilion Basin and other public stormwater systems on the North Development~~;

819.2. ~~failing to properly calculate flooding elevations with the Prairie Creek Stormwater System in light of reasonable estimates including from upstream Prairie Creek stormwater stored on the North Development Property in the Ballard and Pavilion Basin in light of storms similar to the 2008 storm~~;

819.3. ~~failing to inspect the Robin Dee Community Main Drain for defects as it is the downstream sole route of conveying Main Drain stormwater~~;

819.4. ~~failing to study the ability or capacity, if any, of the Robin Dee Community Main Drain to receive flows from the North Development's Ballard Basin and Pavilion Basin including but not limited to failing to research, obtain, read and/or remember (a) the 1990-1991 Harza Study and (b) public records from the 2002 IDNR Investigation;~~

819.5. ~~failing to use or cause to be used a reasonable then state of the art computer model to model the consequences of its changes to the drainage of these Basins and Advocate North Development Properties including the probable flooding consequences of its design and/or construction on downstream residents and owners such as Plaintiffs;~~

819.6. ~~failing to use zero tolerance flood standards for stormwater release from the North Development including the Ballard Basin;~~

819.7. ~~failing to consider the effects of climate change and global warming in the Chicago Region and appropriate standards in light of these conditions which conditions required more storage due to increased storm intensity and volumes;~~

819.8. ~~failed to employ any reasonable computer model, including the computer model used by the IDNR or available from the IDNR, to model any of its Plans submitted to the District, Park Ridge, Maine Township or any other Local Public Entity.~~

820. ~~Based upon the 2002 Flooding and the accessible 2002 IDNR Study preliminary investigations and analysis, and despite the foregoing knowledge of defects throughout the Prairie Creek Stormwater System (PCSS) including the known undersized 60" Howard Court Culvert and its connected undersized 60" Dee Neighborhood Pipe, Defendant was under a duty to redesign, replan, reconstruct, correct and remedy defects in the Basins and its North and South Development stormwater systems.~~

821. ~~Defendant breached this duty to redesign, replan, reconstruct, correct and remedy the~~

known defects including but not limited to:

821.1. Relating to the Ballard and Pavilion Basins: (i) failing to increase the bank elevations of the Basins together with corresponding culvert discharge elevations, (ii) failing to create a permanent barrier berms between the Robin Dee Community and the North Development Property perimeter; and (iii) in general, failing to increase detention basin storage on the North Development; and

821.2. failing to redesign available open areas and parking lots as temporary emergency stormwater detention basins for receiving excess accumulated stormwater from the PCSS.

822. As a proximate cause of these and other breaches of duties by Gewalt, the Plaintiffs suffered and sustained the injuries and damages set forth under this Complaint "Damage" Part.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 15: GEWALT: NEGLIGENT DESIGN OF PRIVATE IMPROVEMENTS: DISTRICT PERMIT DUTY

823. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these Subparts being entitled: "IV.I. Common Negligent Stormwater System Design Breaches of Duty Legal Averments" including Subsubparts "IV.I.A" and "IV.I.B."

824. As part of its duty to adequately design stormwater structures and system, this Defendant owed a duty to design Advocate's private stormwater structures of such as the Dempster Basin and interconnected, interrelated sewers and structures on Advocate North Development and the South Advocate Development to prevent foreseeable invasive flooding harm to the downstream persons, homes and properties of home owners and residents serviced affected by the discharging

~~of Advocate Stormwater into a public improvement such as the Robin Neighborhood Main Drain~~.

825. ~~This duty arises from knowledge based upon Earlier Flooding and the Earlier Flooding Studies of Prairie Creek Stormwater System defects besides from the Permit Undertaking~~.

826. ~~This Defendant undertook and agreed to a general non-delegable duty of due care towards the plaintiffs as the foreseeable persons to be injured by unreasonably dangerous designs relating to the private improvements of the Dempster Basin and related upstream private improvements to related stormwater structures, systems and subsystems~~.

827. ~~Defendant breached these duties including but not limited to the following breaches relating to original designs and constructions of the Dempster Basin and other private stormwater improvements on the North Development and the South Development:~~

827.1. ~~failing to properly calculate stormwater flows through the Prairie Creek Stormwater System before designing the Dempster Basin and other private stormwater systems on the North and South Developments~~;

827.2. ~~failing to properly calculate flooding elevations for Advocate's stormwater discharges from the Dempster Basin in light of storms similar to the 2008 storm~~;

827.3. ~~failing to inspect the Robin Dee Community Main Drain for defects as it is the downstream sole route of conveying Main Drain stormwater~~;

827.4. ~~failing to study the ability or capacity, if any, of the Robin Dee Community Main Drain to receive flows from the Dempster Basin~~;

827.5. ~~failing to use or cause to be used a reasonable then-state-of-the-art computer model to model the consequences of its changes to the drainage and discharges from the Dempster Basin on PCSS Robin Dee Community Main Drain including the probable~~

flooding consequences of its design and/or construction on downstream residents and owners such as Plaintiffs;

827.6. failing to use zero tolerance flood standards for stormwater release from the Dempster Basin;

827.7. failing to consider the effects of climate change and global warming in the Chicago Region and appropriate standards in light of these conditions which conditions required more on-site stormwater storage due to increased storm intensity and volumes;

827.8. failed to employ any reasonable computer model, including the computer model used by the IDNR or available from the IDNR, to model any of its Plans submitted to the District, Park Ridge, Maine Township or any other Local Public Entity.

828. Based upon the 2002 Flooding and the accessible 2002 IDNR Study preliminary investigations and analysis, and despite the foregoing knowledge of defects throughout the Prairie Creek Stormwater System (PCSS) including the known undersized 60" Howard Court Culvert and its connected undersized 60" Dee Neighborhood Pipe, Defendant was under a duty to redesign, replan, reconstruct, correct and remedy defects the Dempster Basin and its North and South Development stormwater systems.

829. Defendant breached this duty to redesign, replan, reconstruct, correct and remedy the known defects as set forth in the preceding counts in this Part and including but not limited to:

829.1. Relating to the Dempster Basin: (i) failing to increase the bank elevations of the Basins together with corresponding culvert discharge elevations, (ii) failing to create a permanent barrier berms between the Robin Dee Community and the North Development Property perimeter; and (iii) in general, failing to increase detention basin storage on the North Development; and

829.2. ~~failing to redesign available open areas and parking lots as temporary emergency stormwater detention basins for receiving excess accumulated stormwater from the PCSS.~~

830. ~~As a proximate cause of these and other breaches of duties by Gewalt, the Plaintiffs suffered and sustained the injuries and damages set forth under this Complaint "Damage" Part.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

COUNT 16: GEWALT: NEGLIGENCE ARISING OUT OF GEWALT'S DUTIES UNDER THE ADVOCATE-GEWALT CONTRACT

831. The Plaintiffs restate the prior paragraphs as the paragraphs herein.

832. The foregoing storm water management engineering services were undertaken under one or more written contracts by and between Gewalt and Advocate*. The precise terms of whatever written contracts were entered into by and between Gewalt and Advocate are presently unknown to Plaintiffs by reason of the refusal of both Gewalt and Advocate to provide a copy of those contracts in response to informal requests and formal discovery requests made by Plaintiffs' counsel Phillip G. Bazzo. Accordingly, Plaintiffs request leave to amend their claims against Gewalt, to the extent necessary, following production of the relevant documents through discovery.

833. Plaintiffs have both formally and informally requested through letter requests and formal discovery the Advocate-Gewalt Professional Services Contracts. Both Advocate and Gewalt have refused to voluntarily produce these documents. Discovery has been stayed preventing Plaintiffs from moving to compel Advocate and Gewalt to produce the Advocate-Gewalt Contract. Plaintiffs rely upon industry custom and practice relating to such contracts in making the averments in this Count besides upon information and belief.

834. Based upon Plaintiffs' information and belief concerning the contractual and other

relationships between Gewalt and Advocate, Gewalt had the a contractual duty to properly design all of its North and South Development Improvements including the Ballard, Pavilion and Dempster Basins to prevent invasive flooding from storms like the September 13, 2008 storm. The following duties, among others, with respect to the Advocate North Development Segment of the Prairie Creek Main Drain, the Advocate Ballard Basin, the Advocate Pavilion Basin, the Advocate Dempster Basin, the 84 inch Advocate Dempster Stormwater Subsystem discharging into the Dempster Basis, the Advocate Drainage and Stormwater Sewer Subsystem tributary to the Prairie Creek Main Drain on the Advocate North Development Property, and the Advocate Drainage and Stormwater Sewer Subsystem tributary to the Advocate South Development Property:

834.1. The duty to perform its professional services in a workman like manner including undertaking to perform Gewalt's professional stormwater and management services including professional stormwater management and drainage engineering services, professional stormwater management and planning services, professional stormwater management and drainage scientific services and other related stormwater management and professional services, all in a workmanlike manner while using the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances;

834.2. The duty to properly consider and analyze all of the available data provided by Advocate pertaining to stormwater management and drainage in performing its professional services;

834.3. The duty to properly consider and analyze all of the available data available from the Illinois Department of Natural Resources pertaining to stormwater management and drainage including preliminary studies, reports, analysis, issue review and other information relating to stormwater management and drainage;

834.4. The duty to properly consider and analyze all of the available data available from all governmental sources within the Prairie Creek Watershed including but not limited to Park Ridge, Maine Township and Des Plaines and including but not limited to prior U.S. Army Corp Studies, the Harza Study – 1990, the FEMA FIRM-2000 and the FEMA FIRM-2008.

834.5. The duty to inspect the Prairie Creek Main Drain especially the Robin-Dee Community Segment and its Subsegments to determine whether stormwater could be safely released from the Dempster Basin and the Ballard Basin;

835. In addition to the foregoing duties, Gewalt owed the following specific duties of due care to the Plaintiffs relating to the planning and designing of any drainage or stormwater management of Advocate's North Development and South Development so as to prevent invasive flooding from excess accumulated stormwater discharging into the Robin-Dee Community:

835.1. The duty to know what effects stormwater that accumulates on and then discharges from Advocate's property or property under its ownership, operation, control, management or jurisdiction shall have on downstream and/or contiguous property owners and/or occupants including the risks of flooding downstream property owners such as the Robin-Dee Community Plaintiffs;

835.2. The duty to properly determine the amount of runoff to be generated by various 100 year rainfall events based upon present, realistic standards within the Prairie Creek Watershed including Advocate's Property, Upstream Property and Tributary Property;

835.3. The duty to use state-of-the-art science for determining its drainage and stormwater calculations so as to prevent invasive flooding.

835.4. The duty to comply with higher and greater stormwater management standards than the

stormwater management standards required by the District or other Local Public Entities relating to stormwater management including stormwater storage quantities and durations;

835.5. The duty to use state-of-the-art computer modeling of the Prairie Creek Watershed including the Watershed's Farmer Creek and River Des Plaines Outfalls to determine what rainfalls would generate flooding into the Robin-Dee Community;

835.6. The duty to use revised 100 year return frequency standards based upon the effects of global warming on rainfall intensities;

835.7. The duty to know of all relevant characteristics of the capacity and/or lack of capacity of Advocate's Property, property under its operation, control, or management or Upstream Property to store stormwater so as to predict the likelihood of invasive flooding from Advocate's Property which included, but not duties to properly monitor, inspect, study and know the imperviousness, the slope and all other factors which affect the intensity, flow, quantity and other characteristics of the generation of stormwater runoff on and from Advocate's property or property under its control, management or supervision during a rainfall;

835.8. The duty to know what effect that stormwater which was generated on properties upstream of Advocate's property or property under its control, management or supervision has on Advocate's ability to store and discharge stormwater;

835.9. The duty to permanently increase storage capacity on Advocate's property or property under its control, supervision, or jurisdiction and all implied duties including but not limited to duties to seek and to obtain any and all necessary permissions and/or permits to permit such permanent increased storage capacity;

835.10. The duty to study and evaluate what likely rainfall amounts result in invasive flooding

from Advocate's Property into the Robin-Dee Community;

835.11. The duty to know of the capacity or lack of capacity including any bottlenecks or other obstructions to stormwater conveyance and flow of downstream drainage structures including the Robin-Dee Community Segment of the Prairie Creek Main Drain to receive stormwater from Advocate's property, properties under its control, management or supervision and Upstream Properties including the Upstream Segment of the Main Drain including but not limited to a duty to know of the existence of downstream bottlenecks, downstream obstructions, downstream blockages and/or downstream restrictions of the Prairie Creek Stormwater System including the Robin-Dee Community Segment and the Robin-Dee Subsegments such as the Robin Neighborhood Subsegment, the Dee Neighborhood Subsegment, the Briar Neighborhood Subsegment and the Rancho Neighborhood Subsegment which would affect Advocate's ability to safely discharge stormwater from its property or property under Advocate's ownership, operation, control, management or jurisdiction;

835.12. The duty to have prepare or caused to be prepared an emergency action plan to prevent invasive flooding for Advocate's Property or property under its control, management or supervision;

835.13. The duty to notify and/or complain to other responsible persons about the lack of cleaning, lack of maintenance, and/or lack of repair and/or disrepair of drainage structures not on Advocate's property or not on property under Advocate's Community ownership, operation, control, management or jurisdiction which unmaintained drainage structure(s) affects the ability of Gewalt to discharge and/or drain and/or optimally drain drainage structure(s) on Advocate's Property or property under Advocate's ownership, operation, control, management or jurisdiction; and

835.14. The duty to take other reasonably necessary actions and precautions to prevent foreseeable damage the Plaintiffs.

836. Gewalt owed and undertook the foregoing non-delegable general duties of due care to the Plaintiffs arising out of Gewalt's knowledge of the foreseeable harm of invasive flooding which the Defendant knew or should have known based upon accumulated stormwater from Advocate's North Development Property and the Robin-Dee Community Segment of the Prairie Creek Main Drain of the Prairie Creek Stormwater System previously invading and flooding the Robin-Dee Community and related governmental studies relating to the causes of this invasive flooding.

837. Before September 13, 2008, Gewalt had reasonably adequate time, opportunity and ability to recommend that Advocate take corrective measures to remedy and/or protect the Robin-Dee Community Plaintiff Class against the foreseeable dangerous conditions existing on Advocate's Advocate North Development Property and Advocate's South Development Property posed by excess stormwater.

838. Gewalt breached one or more of these foregoing specific duties of due care owed to Plaintiffs, including but not limited to the acts and omissions described in early counts, proximately causing this catastrophic invasive flooding which injured and damaged the Robin-Dee Community Class, these damages being described in Part XIV entitled "Damages".

WHEREFORE, Plaintiffs request against Defendant the relief in the "Relief" Complaint Part.

~~COUNT 17: GEWALT: NEGLIGENT NUISANCE~~

839. ~~Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.N. entitled "IV.N. Common Negligent Stormwater Nuisance Violations from Properties under Park Ridge's Jurisdiction Legal Averments.~~"

840. ~~This Defendant designed the Basins as gravity basins; consequently, all flows were based upon elevations in the Basins. Defendant's original designs failed to have pumps although the Defendant should have known after 2002 that its designs were negligent because of its failure to provide pre-storm pump stations to empty the Basins before storms.~~

841. ~~This Defendant controlled through its designs of the Basins, Advocate's North and South Developments and other stormwater drainage components and/or drainage structures from which the excess accumulated stormwater nuisance invaded the Plaintiffs' persons, homes and properties on September 13, 2008 as these Basins are gravity operated without pumps.~~

842. ~~As set out in the prior negligence Counts in this Part, this Defendant failed to reasonably design, engineer, maintain, and/or operate the Basins and Advocate Development Properties, its control of said Basins being through its design as these are gravity systems without pumps.~~

843. ~~This Defendant negligently caused an accumulation of stormwater from the Basins and Advocate North Development Property and Advocate South Development Property to invade and interfere with the Plaintiffs' persons, homes and properties on September 13, 2008.~~

844. ~~The Plaintiffs did not consent for the stormwater which had accumulated on this Defendant's properties to enter and settle in the Plaintiff Robin Dee Community Class' homes.~~

845. ~~By causing stormwater accumulated and controlled by this Defendant to physically invade the Plaintiff Class' homes, this Defendant negligently created a dangerous nuisance of excess accumulated stormwater which substantially and unreasonably interfered with Plaintiffs.~~

846. ~~As a proximate cause of this nuisance caused and/or created by this Defendant, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in the "Relief" Complaint Part.~~

~~COUNT 18: GEWALT: NEGLIGENT TRESPASS~~

847. ~~Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.Q. entitled "IV.Q. Common Negligent Trespass Violations From Advocate Stormwater Legal Averments".~~

848. ~~Because Defendant's failed to act as set forth in this Part including but not limited to the failure to instruct Advocate to discharge by pumping existing, accumulated stormwater before the storm, before the MD Robin Dee Segment runs full and before the surcharging of the Ballard, Pavilion and Dempster Basins and Howard Court Culvert, this Defendant failed to reasonably manage stormwater on September 13, 2008, stormwater which it had accumulated through its design, proximately causing the Plaintiffs' invasive flooding.~~

849. ~~As a direct, immediate and foreseeable result of the foregoing acts and/or omissions of this Defendant, this Defendant caused stormwater to invade the Plaintiffs' persons and homes.~~

850. ~~This Defendant had exclusive possession and control over the trespassing instrumentality of the excess accumulated stormwater from the Basins and Advocate's Development Properties.~~

851. ~~The Plaintiffs were entitled to the exclusive enjoyment of their properties.~~

852. ~~This Defendant knew or should have known that its actions and/or inactions in failing to control stormwater from the Basins and North Development would result in invasive flooding.~~

853. ~~This Defendant negligently failed to monitor, investigate, study, inspect, clean, maintain, repair, improve, design, redesign, plan and/or operate its properties as set forth in this Part.~~

854. ~~As a direct and proximate result of the foregoing conduct by this Defendant, this Defendant's instrumentality of excess accumulated stormwater physically invaded Plaintiffs' homes on 9-13-2008, proximately causing the Plaintiffs' Damages set forth in the Damage Part.~~

855. ~~The Plaintiffs did not consent for this Defendant's excess stormwater to physically invade and interfere with the exclusive use and occupancy of the Plaintiffs' homes and property.~~

856. ~~The Plaintiffs' injuries and damages were caused by the dangerous and calamitous occurrence of invasive stormwater floodings on 9-13-2008 from this Defendant's properties.~~

857. ~~The excess accumulated stormwater which entered, settled and physically invaded Plaintiffs' homes and properties interfered with the Plaintiffs' interests in the exclusive possession of their homes.~~

858. ~~The excess accumulated stormwater which entered, settled and physically invaded Plaintiffs' homes and property constituted a negligent trespass upon and into the Plaintiffs' persons and homes.~~

859. ~~This Defendant is liable to the Plaintiffs for negligent trespass because this Defendant caused harm to the legally protected interests of the Plaintiffs including harm to the exclusive, quiet enjoyment of their land, homes and properties by causing an instrumentality, namely "Stormwater", to enter upon the property of the Plainitffs without their consent.~~

860. ~~As a proximate cause of this trespass caused and/or created by this Defendant, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in the "Relief" Complaint Part.~~

~~COUNT 19: GEWALT: GROSS NEGLIGENCE~~

861. ~~Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.T. entitled "IV.T. Common Gross Negligence Violations - Legal Averments".~~

862. ~~This Defendant's acts and omissions where committed under circumstances exhibiting a reckless disregard for the Plaintiffs' safety. These reckless omissions include but are not limited to this Defendant's deliberate and intentional failures to plan, assist and instruct Advocate to increase, either temporarily through pumping down and temporary barriers, or permanently, with~~

~~a pump station and high berms, storage to receive the September 13, 2008.~~

863. ~~After acquiring knowledge of the actual danger of invasive flooding onto Plaintiffs' persons and into Plaintiffs' homes and properties from the 1987 and 2002 catastrophic floods and **Earlier Flooding Studies**, this Defendant failed to exercise even ordinary care to prevent these floodings into Plaintiffs' homes~~.

864. ~~Specifically, this Defendant failed to exercise even ordinary care to increase instruct Advocate to either temporarily or permanently the storage capacity of the North Development Basins~~.

865. ~~This Defendant failed to make any effort at calculating the amount of stormwater from the September 13, 2008 storm although this storm was predicated and known days in advance of its arrival to affect the Chicago Region and instruct Advocate of the likely consequences~~.

866. ~~This Defendant failed to instruct Advocate to deploy temporary pumps to pump down and empty the Ballard Basin, Pavilion Basin and Dempster Basin before the September 13, 2008 storm~~.

867. ~~This Defendant failed to instruct Advocate either temporarily or permanently increase the storage capacity so that these Basins had adequate storage capacity.~~

868. ~~This Defendant 's multiple, repetitive failures to discover the dangers to Plaintiffs resulted from this Defendant's recklessness and/or carelessness to inspect and investigate the causes of Plaintiffs' flooding including simply reading the 1990-1991 Harza Study and the 2002 IDNR preliminary analysis.~~

869. ~~This Defendant 's acts and failures to act deliberately inflicted a highly unreasonable risk of known flooding harm as to Plaintiffs in conscious disregard and deliberate indifference of the rights of Plaintiffs to the exclusive use and possession of their homes.~~

870. ~~Given the highly-foreseeable dangers from home-invasive flooding into Plaintiffs' homes, or actually known dangers, this Defendant 's failure to exercise even ordinary care to prevent the flooding by pumping down the Basins and increasing temporary storage constitutes willful and wanton failures to act.~~

871. ~~Given that this Defendant knew or certainly should have known of the catastrophic flood risks poses by its acts and omissions, this Defendant 's acts and omissions constituted willful and wanton conduct, willful and wanton negligence and gross negligence. With this knowledge of certain flooding danger, this Defendant intentional decided and omitted from acting to remedy the persistent flooding into Plaintiffs' Robin Dee Class Community, which flooding was highly foreseeable and highly discoverable.~~

872. ~~As a proximate cause of these breaches, Defendant caused actual injury and damage to the Plaintiffs when excess accumulated stormwater from Advocate's Upstream, Dominant Estates negligently and unreasonable entered, invaded and penetrated the Plaintiffs' servient, downstream estates, persons and property.~~

~~**WHEREFORE**, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

~~**COUNT 20: GEWALT: INTENTIONAL NUISANCE**~~

873. ~~Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.U. entitled "IV.U. Common Intentional Nuisance Violations Within Park Ridge Jurisdiction Legal Averments"~~.

874. ~~Defendant controlled through design drainage components and/or drainage structures including the Ballard, Pavilion and Dempster Basins from which the excess accumulated stormwater nuisance invaded Plaintiff Class' persons and homes.~~

875. ~~Defendant failed to reasonably design, engineer, maintain, and/or operate Advocate~~

~~North and South Development Property including these three Primary Basin Structures.~~

876. ~~Defendant intentionally caused excess accumulated stormwater from these Basins, and Advocate North and South Development Properties interfere with Plaintiffs' persons and homes.~~

877. ~~As a direct and proximate result of the Defendant's intentional failures to instruct Advocate to pump down the Basins, and to increase temporary storage through temporary barrier methods such as sandbags, Plaintiffs suffered damage set out in this Complaint "Damages" Part.~~

878. ~~The Plaintiffs did not consent for the stormwater to enter and settle in their homes.~~

879. ~~By causing stormwater accumulated and controlled by Defendant through its gravity-designed stormwater system to physically invade the Plaintiffs' persons and homes from properties under Defendant's design control, Defendant recklessly, willfully, wantonly and with a conscious disregard for the rights and safety of Plaintiffs created a dangerous nuisance of excess accumulated stormwater on 9-13-2008 which substantially and unreasonably interfered with Plaintiffs' exclusive use and enjoyment of their homes.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

~~**COUNT 21: GEWALT: INTENTIONAL TRESPASS**~~

880. ~~Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart **IV.X.** entitled "**IV.X.** Common Intentional Trespass Violations Stormwater within Park Ridge Legal Averments".~~

881. ~~Defendant knew to a substantial legal certainty and to a high degree of certainty that its actions and/or inactions in failing to redesign or failing to advise Advocate to pump down its Basins and create temporary storage would result in invasive flooding into the Plaintiffs' homes during a rainfall like the September 13, 2008 rainfall from the Ballard Basin and the Dempster Basin.~~

882. ~~Defendant proximately caused the Plaintiffs' Damages by its intentional omission to instruct Advocate to discharge by pumping pre-existing stormwater before the 2008 storm and its intentional omission to capture and store stormwater in temporary barriers around the Basins.~~

883. ~~Based upon Earlier Flooding Studies and Earlier Invasive Flooding, Defendant knew to a substantial legal certainty and with a high degree of certainty that its intentional omissions and would result in stormwater invasive flooding Plaintiffs' homes from the Basins as these Basins were gravity feed and had known inadequate storage for a storm of the magnitude as the September 13, 2008 storm~~.

884. ~~Defendant intentionally omitted to properly plan and/or operate the Basins through its failure to redesign and to instruct, which intentional acts and omissions proximately caused the stormwater to damage Plaintiffs.~~

885. ~~With a high degree of certainty to cause injury to Plaintiffs, on September 13, 2008, Defendant permitted through its designs stormwater to accumulate in the Basins then escape onto Plaintiffs' land.~~

886. ~~Based upon the legal certainty of knowledge of invasive flooding as set forth herein, Defendant intentionally trespassed upon Plaintiffs' persons, homes, and properties through the instrumentality of Gewalt's excess accumulated stormwater.~~

887. ~~The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's intentional conduct by intentional failing to collect the dangerous and calamitous storm occurrence of the 9-13-2008.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

~~COUNT 22: GEWALT: IRREPARABLE HARM EQUITABLE RELIEF~~

888. ~~Plaintiffs restate and incorporate all prior paragraphs within this Count~~.

~~WHEREFORE, Plaintiffs request against Defendant the equitable relief in the "Relief" Complaint Part including that this Defendant without cost redesign the Basins and PCSS per Court-ordered standards~~.

VII. PART VII: CLAIMS AGAINST BERGER

889. VII.A. OVERVIEW-BERGER- CAUSATION AND RESPONSIBILITY

890. **Causation**: Berger was Glenview and Maine Township's contractor performing underground water main-sanitary sewer-stormwater work on Dee Road in the days before and including on September 12, 2008. Berger caused the stormwater inlets on Dee Road to be covered by fabric and failed to provide for alternative stormwater drainage. Berger had no one on site at anytime on September 13, 2008 to make certain that Plaintiffs did not sustain invasive flooding from Berger's infrastructure work.

891. **Responsibility**: Under its contract with Glenview and Maine Township, Berger contracted to a duty to "take all necessary precautions for the safety of' Plaintiffs under Safety and Precautions Plan Note ¶1, Sub¶1.

892. VII.B. ADDITIONAL FACTS RELATING TO BERGER

893. Incorporation: Relating to all counts and claims herein, the Plaintiffs incorporate all averments set out in this Complaint in Complaint Parts I (Jurisdiction), II (Statement of Facts), XIII (Damages) and XIV (Relief) and this Part as though fully set forth herein.

894. In 2008, before the invasive flooding on September 13, Berger entered into a construction contract relating to underground utility work to be performed on Dee Road (herein the "Dee Road Underground Utilities Contract and/or Project) with the City of Glenview for the benefit of both Maine Township and the City of Glenview.

895. On Friday, September 12, 2008, Berger was on-site on Dee Road performing construction services pursuant to the Dee Road Underground Utility Contract.

896. On Friday, September 12, 2008 and Saturday, September 13, 2008, Berger was responsible for stormwater management duties including any and all applicable drainage duties set forth in its contract with Glenview relating to the Dee Road Stormwater Drainage Area and System.

897. Berger was acting a representative and agent of Glenview and Maine Township.

898. For storm activity per the Project Contract, Berger was the eyes and ears and on-site representative and agent of Glenview and Maine Township as its principals.

899. COUNT 23: BERGER: NEGLIGENCE BASED UPON UNDERTAKING DURING CONSTRUCTION PROJECT

900.

901. The Plaintiffs restate and incorporate the prior paragraphs of this Part.

902. **Duty per Project Contract**: Berger owed a general duty of due care to the Plaintiffs set forth in its Project Contract with Glenview and Maine Township including to a duty to perform its work in a reasonably safe manner to prevent reasonably foreseeable harm to the Plaintiffs.

903. **Foreseeable Plaintiffs:** Berger owed a general duty to the Plaintiff Class to exercise due care to perform its excavation and related construction work including drainage duties in such a manner so as not to create or cause an unreasonable risk of foreseeable harm to the Plaintiffs.

904. **Berger Contract Terms**: Berger undertook and owed per contract and/or the common law the following specific duties of due care to the Plaintiffs so as to prevent the reasonably foreseeable harm of dangerous invasive flooding into the Plaintiffs' homes:

905. a duty to "take all necessary precautions for the safety of' Plaintiffs and Plaintiffs' property, said standard of care and duty required by Safety and Precautions Plan Note ¶1, Sub¶1;

906. a duty to "provide the necessary protection to prevent damage, damage or loss to" the Plaintiffs and Plaintiffs' property, said standard of care and duty required by ¶1, Sub¶1;

907. a duty to "take all necessary precautions for the safety of' the Plaintiffs' Residences, and other Plaintiffs' property, said standard of care and duty required by ¶1, Sub ¶3;

908. a duty to provide "the necessary protection to prevent damage or loss to" the Plaintiffs' Residences and other Plaintiffs' property, said standard of care and duty required by ¶1, Sub ¶3 ;

909. a duty to "provide and maintain temporary connection outlets for all private and public drains, sewers, or catchbasins" so as to prevent foreseeable harm to the Plaintiffs, said standard of care and duty required by paragraph 1, sentence 1 of the Storm Sewers/Drainage Plan Note;

910. a duty to "provide facilities to take in all stormwater received by these drains and sewers and discharge the same amount" so as to prevent foreseeable harm to the Plaintiffs, said standard of care and duty required by paragraph 1, sentence 2 of the Storm Sewers/Drainage Plan Note;

911. a duty to "...provide and maintain an efficient pumping plant, if necessary, a temporary outlet, and be prepared at all times to dispose of the water from temporary connections until permanent connections with sewers are built and in service" so as to prevent foreseeable harm to the Plaintiffs, required by ¶1, Sub ¶ 3 of the Storm Sewers/Drainage Plan Note;

912. a duty to drain stormwater into "a settling basin system, approved by the engineer, before passing into the existing drainage system" so as to prevent foreseeable harm to the Plaintiffs, said standard of care and duty required by ¶1, Sub ¶3 of the Storm Sewers/Drainage Plan Note;

913. a duty to "maintain the surface drainage of all roadway surfaces during construction" to prevent foreseeable harm to the Plaintiffs, said standard of care and duty required by ¶1, Sub ¶3;

914. a duty to assure "that any loose materials... deposited in the flow line of the gutters or drainage structures... shall be removed at the close of each working day" so as to prevent foreseeable harm to the Plaintiffs, said standard of care and duty required by ¶1, Sub ¶8;

915. a duty to monitor and/or be aware of impending rainfall approaching the PC Watershed;

916. a duty to monitor and/or be aware of rain falling upon the PC Watershed;

917. A duty to take reasonable precautions and/or protections to protect the Plaintiffs and Plaintiffs' property from foreseeable harms relating to rain falling upon the Plaintiffs including:

918. a duty of planning including the mobilizing of flood protection methods like sandbags;

919. a duty to prevent obstructions, blockages and/or restrictions of water flow into DN MD;

920. a duty to adequately inspect with due care the Dee Neighborhood Stormwater System so as to prevent foreseeable harm to the Plaintiffs and Plaintiffs' property including:

921. a duty determine the existence of obstructions, blockages and/or restrictions to stormwater drainage into the Dee Road stormwater inlets & Dee Neighborhood Main Drain;

922. a duty to eliminate obstructions to stormwater flow into the Drain; and

923. a duty to perform its construction activities in a workmanlike manner to prevent harm.

924. Berger knew or should have known of the following unsafe conditions which posed an unreasonable risk of foreseeable invasive flooding to the Plaintiffs, set forth here for purposes of description but not limitation, and including, but not limited to the following unsafe conditions:

925. Berger knew or should have known of the presence of the flow-impeding material over the Dee Road stormwater catchbasin inlets which blocked, obstructed and/or restricted stormwater rainfall runoff flows from the Plaintiffs' lands into the Main Drain;

926. Berger knew or should have known of the impending rainfall approaching the PCW;

927. Berger knew or should have known that rain was falling in the Prairie Creek Watershed;

928. Berger knew or should have known that stormwater runoff was accumulating in Dee Road and on the lands on which the Plaintiffs' homes are situated;

929. Berger knew or should have known that accumulating stormwater runoff was gradually rising and posing a risk of water invasions into the Plaintiffs' property; and/or

930. Berger knew or should have known that flood protection such as sandbags was necessary to prevent invasive flooding for the safety and protection of the Plaintiffs'

931. Berger knew or should have known that alternative drainage was necessary for the safety and protection of the Plaintiffs including alternative pumping and/or retention storage for accumulating stormwater if stormwater was restricted from flow into the DNSP;

932. Berger should have inquired of Glenview and Maine Township relating to prior flooding based upon (1) its contract, (2) its contractual duties to protect the Plaintiffs during a storm while it was working at, on or near a stormwater drainage system;

933. Berger had reasonably adequate time, opportunity and ability prior to the Flooding suffered by Plaintiffs during the Occurrence Period to take corrective measures to remedy and/or protect against the foregoing unsafe conditions which existed within the local Stormwater System.

934. Berger failed to use due care relating to the inspections and/or investigations of the Dee Neighborhood Main Drain material to the foregoing unsafe conditions.

935. Berger breached said duties by one or more of the following acts and/or omissions to act, set forth here for purposes of description but not limitation and including, but not limited to, the following breaches and violations of specific duties of due care owing to the Plaintiffs:

936. Berger failed to have anyone on site at anytime after work ended on Friday, September 12 before or during the Plaintiffs' flooding;

937. Berger failed to adequately inspect with due care the DNMD including failing to employ an adequate inspection system to determine (i) the existence of obstructions, blockages, restrictions and/or debris interfering with flows into the Dee Road Stormwater System and/or Prairie Creek Stormwater System, (ii) the necessity of maintenance and/or other corrective actions to the Dee Road Stormwater System and/or Prairie Creek Stormwater System during its construction activities to prevent invasive flooding into Plaintiffs' Residences; and/or (iii) the necessity for flood prevention methods such as sandbagging and other similar methods;

938. Berger failed to prevent obstructions, blockages or restrictions of stormwater flows into the DNMD from the Dee Road Drainage Area including from the Plaintiffs' land;

939. Berger failed to "take all necessary precautions for the safety of" Plaintiffs and Plaintiffs' property in violation of the standard of care and duty required by Plan Note ¶1, Sub ¶1;

940. Berger failed to "provide the necessary protection to prevent damage, damage or loss to" the Plaintiffs in violation of the standard of care and duty required by ¶1, Sub ¶1;

941. Berger failed to "take all necessary precautions for the safety of" the Plaintiffs and Plaintiffs' property in violation of the standard of care and duty required by ¶1, Sub ¶1;

942. Berger failed to provide "the necessary protection to prevent damage or loss to" the Plaintiffs in violation of the standard of care and duty required by ¶1, Sub ¶3;

943. Berger failed to "provide and maintain temporary connection outlets for all private and public drains, sewers, or catchbasins" so as to prevent foreseeable harm to the Plaintiffs in violation of the standard of care and duty required by Plan Note ¶1, Sub ¶1;

944. Berger failed to "provide facilities to take in all stormwater received by these drains and sewers and discharge the same amount" so as to prevent foreseeable harm to the Plaintiffs in violation of the standard of care and duty required by Plan Note, ¶1, Sub ¶2;

945. Berger failed to "provide and maintain an efficient pumping plant, if necessary, a temporary outlet, and be prepared at all times to dispose of the water from temporary connections until permanent connections with sewers are built and in service" so as to prevent foreseeable harm to the Plaintiffs and Plaintiffs' property in violation of the standard of care and duty required by Plan Note ¶1, Sub ¶1 ;

946. Berger failed to drain stormwater into "a settling basin system, approved by the engineer, before passing into the existing drainage system" so as to prevent foreseeable harm to the Plaintiffs and Plaintiffs' property in violation of the standard of care and duty required by paragraph 1, sentence 4 of the Storm Sewers/Drainage Plan Note;

947. Berger failed to "maintain the surface drainage of all roadway surfaces during construction" to prevent foreseeable harm to the Plaintiffs and Plaintiffs' property in violation of the standard of care and duty required Plan Note ¶2;

948. Berger failed to assure "that any loose materials... deposited in the flow line of the gutters or drainage structures... shall be removed at the close of each working day" so as to prevent foreseeable harm to the Plaintiffs and Plaintiffs' property in violation of the standard of care and duty required by Storm Sewers/Drainage Plan Note paragraph 8, sentence 1; and/or

949. Berger failed to monitor and/or be aware of impending rainfall approaching the PCW;

950. Berger failed to monitor and/or be aware of rain falling upon the PC Watershed;

951. Berger failed to take reasonable precautions and/or protections to protect the Plaintiffs and Plaintiffs' property from foreseeable harms relating to rain falling upon the Plaintiffs; and

952. Berger failed to monitor and/or be aware of impending rainfall approaching the PCW;

953. Berger failed to monitor and/or be aware of rain falling upon the Plaintiffs

954. Berger failed to take reasonable precautions and/or protections to protect the Plaintiffs from foreseeable harms relating to rainfall runoff generated by rain over the Plaintiffs; and

955. Berger failed to perform its construction activities in a workmanlike manner so as to prevent foreseeable harm to the Plaintiffs and Plaintiffs' property.

956. Berger breached and violated one or more of the foregoing standards of care and duties owing to the Plaintiffs proximately causing stormwater to invade and flood the Plaintiffs' Residences and property during the Occurrence Period.

957. **Created Dangerous Accumulated Stormwater Condition**: By the acts and omissions of this Defendant set forth in this Part, this Defendant created unreasonably dangerous stormwater accumulations which dangerous condition posed an immediate, imminent and foreseeable threat and risk of invasive flooding into the Robin-Dee Community Plaintiffs' Class.

958. **Caused Surface Water Invasion into Robin-Dee Sanitary Sewerage System:** By the acts and omissions set forth in this Part, this Defendant caused surface stormwater to invade the Robin-Dee Sanitary Sewerage System, thereby posing a further immediate, imminent and foreseeable threat and risk of invasive flooding into the Robin-Dee Community Plaintiffs' Class.

959. As a direct and proximate result of the foregoing conduct by Berger, Plaintiffs' persons, residences and other real and personal property were invaded by stormwater with the Plaintiffs suffering the set forth in the "Damage" Part of this Complaint.

960. But for the above reckless and/or negligent actions and/or intentional omissions to act by Berger, the Plaintiffs would not have suffered their harm. See Complaint Damage Part herein.

961. Berger's actions and inactions constitute actionable negligence as Berger's acts and omissions to act breached standards of reasonable care foreseeably and proximately causing harm to the Plaintiffs who were foreseeable persons to be harmed by Berger's negligence.

962. WHEREFORE, Plaintiffs relief as to money damages only against Berger as set forth in this Complaint "Relief" Part. Equitable relief is not sought as to Berger.

~~COUNT 24: BERGER: GROSS NEGLIGENCE~~

963. ~~Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.T. entitled "IV.T. Common Gross Negligence Violations Legal Averments".~~

964. ~~This Defendant's acts and omissions where committed under circumstances exhibiting a reckless disregard for the Plaintiffs' safety. The Project Contract unequivocally imposed a duty to protect the Plaintiffs. Berger made no effort to protect Plaintiffs against this storm and resultant stormwater.~~

965. ~~Given that this Defendant knew or certainly should have known of the catastrophic flood risks poses by its acts and omissions, including its deliberate act in covering the Dee Road catch basin inlets with impervious fabric, this Defendant 's acts and omissions constituted willful and wanton conduct, willful and wanton negligence and gross negligence. With this knowledge of certain flooding danger, this Defendant intentional decided and omitted from acting to remedy the flooding into Plaintiffs' Robin Dee Class Community, which flooding was highly foreseeable.~~

966. ~~As a proximate cause of these breaches, Defendant caused actual injury and damage to the Plaintiffs when accumulated stormwater could not drain from Plaintiffs' properties.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part~~

PART VIII: CLAIMS AGAINST DISTRICT

VIII.A. OVERVIEW-DISTRICT-CAUSATION AND RESPONSIBILITY

967. **Causation**: Of any entity in Cook County, the District and is in the best position and superior position to control design flooding (that is, flooding by design). The District has specialized engineers whose job is to make certain that submitted designs do not cause flooding. The District has authority to set all guidelines for stormwater management design including the return frequency of design storms which all stormwater management plans must satisfy.

967.1. The most fundamental and highest priority of the District in reviewing stormwater plans is to make certain that foreseeable home-invasive or structurally-invasive flooding is prevented.

967.2. The District has final authority to approve all stormwater management Plans including those submitted by Gewalt and Advocate relating to the Prairie Creek Stormwater System.

967.3. The District failed to meet its statutory design by (a) approving the Gewalt and Advocate designs for the Prairie Creek Stormwater System's Advocate North Development Stormwater Subsystem-Segment and (b) approving Gewalt-Advocate designs for

967.4. The District by either design control or operation control affects all upstream sanitary sewerage systems. The District failed to pump out it sanitary sewers during the September 13, 2008 event to increase its sanitary sewer capacity to allow upstream sanitary sewage from ~~Park Ridge and~~ Glenview to safely discharge. Specifically, the District failed to pump its sewage into tanker trucks, adjacent stormwater drains, adjacent rivers, adjacent area depressions or into another independent system for

drainage. If it did not have such authority, the District failed to obtain permanent, temporary or emergency sanitary sewerage by-pass authority for the purpose of preventing serious harm to persons and property from the U.S. EPA or the IDNR as permitted by law*.

968. **Responsibility**: In 2004, stormwater responsibility was imposed upon the District by Public Act 93-1049 of the Illinois General Assembly. The Preface to the Cook County Stormwater Management Plan (CCSMP) developed by the District vested sole power in the District to supervise and coordinate stormwater management across jurisdictions.

968.1. ~~**Sanitary Sewage Responsibility**: 70 ILCS 2605/19 imposed upon the District the responsibility to control its sanitary sewage.~~

VIII.B. FACTS RELEVANT TO THE DISTRICT

969. **The PCSS as a Public Improvement**: As the regional local public entity charged with multi-jurisdiction operation of stormwater management, the District owns and/or controls all drains, basins, structures, components and other stormwater improvements within the public improvement referred to herein as the "Prairie Creek Stormwater System" ("PCSS") of the Prairie Creek Watershed ("PCW").

970. The PCSS stormwater improvements constitute "property" or "properties" under the Tort Immunity Act ("TIA").

971. These PCSS Stormwater Improvements include:

971.1. The PCSS North Development Segment consisting of (a) the North Development Main Drain (being at Point A1 and traversing to Point A3), (b) the Ballard Basin which essentially serves as the North Development Main Drain traversing Advocate North Development property, (c) the Pavilion Basin on the Advocate North Development property, (d) all Park

Ridge and/or Maine Township tributary stormwater sewers discharging into the North Development Main Drain, and (e) all other stormwater structures and related components on the North Development Property; and

971.2. The PCSS Robin-Dee Community Segment consisting of (a) the Robin-Dee Main Drain between Points C1-C2 (the twin Robin Alley Culverts) and continuing past Point J (the Rancho Lane Culverts) to Potter Road;.

972. Stormwater is also "property" or "personal property" within TIA Article III, § 10/3-101.

973. **District Services for Sanitary Sewage Disposal:** The Plaintiffs residences were serviced by the District's interceptors which received sanitary sewage from either Glenview or Park Ridge's local sewage sewer system. The District which also owned and operated the interceptors which receive the sewage from local sanitary sewers such as those owned and controlled by Glenview and Park Ridge and transport it for treatment to one of the District's wastewater treatment plants.

974. The District is liable for the sewage backups because the District controls the interceptors and, if the local sewers cannot discharge into the District interceptors, then sewage will backup into the Plaintiffs' homes *.

975. **Glenview, Park Ridge and/or Maine Township** owned and/or operated the local sanitary tributary municipal sewers which drained to the District's sewers and interceptors.

976. The District receives compensation for sewage disposal pursuant to a contractual, quasi-contractual relationship with Plaintiffs.

977. The District receives compensation for stormwater management services pursuant to a contractual, quasi-contractual relationship with Plaintiffs.

978. The District is ultimately and solely responsible for stormwater management within Cook County based upon Public Act 93-1049 of the Illinois General Assembly.

979. The District set forth in the Cook County Water Management Plan that it was vested with powers to assure coordination between jurisdictions relating to the stormwater management.

980. **Control of PCSS Components within Park Ridge Jurisdiction:** As PCSS owner, manager, operator and/or person in control, the District controlled the Prairie Creek Stormwater System including its real property public improvements in Park Ridge such as the North Development Main Drain and its attached Basins. By its undertaking and/or exercise of control (by statute, ordinance or other act with the force of law besides actual control) and/or other acts of dominion, the District owned, possessed and/or controlled the real property and related estates and interests in the Prairie Creek Stormwater System's public improvements within Park Ridge.

981. **Control of PCSS Components within Maine Township Jurisdiction:** As PCSS owner, manager, operation and person-in-control, the District had jurisdiction over the Prairie Creek Stormwater System (PCSS) including its real property public improvements in Maine Township, including the Robin-Dee Main Drain. By its undertaking and/or exercise of control (by statute, ordinance or other act with the force of law besides actual control) and/or other acts of dominion, District owned, possessed and/or controlled the real property and related estates and interests in PCSS stormwater improvements in Maine Township as described earlier herein.

982. **Drainage Planning and System Engineering:** This Defendant planned or caused to be planned and designed or caused to be designed the PCSS stormwater structures within its jurisdiction including all relevant PCSS North Development and Robin-Dee Segments' improvements.

983. The Stormwater Plans for the North Development resulting in the existing drainage design and operation of the **Ballard Basin, Pavilion Basin and Dempster Basin** and related drainage alterations was **approved by this Defendant** prior to 2008 and any changes to said Plans were approved by this Defendant substantially before September 13, 2008.

COUNT 25: DISTRICT: NEGLIGENCE: DOMINANT ESTATE OVERBURDENING-STORMWATER

984. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these Subparts being: **IV.A., IV.C., IV.F., IV.G.** and **IV.I. and IV.AB.**

985. Defendant knew or should have known of the foreseeable harm of invasive flooding into the Area given Earlier Floodings and Earlier Flooding Studies.

986. Defendant knew, agreed to and undertook to receive Upstream PC Watershed stormwater.

987. Based upon this actual or constructive knowledge of reasonably foreseeable flooding harm to Plaintiffs as contiguous downstream property owners and possessors, Defendant owed non-delegable duties as a owner, manager and/or party in control to properly manage stormwater under Defendant's ownership, control, supervision, and/or management so as to prevent foreseeable overburdening harm to foreseeable plaintiffs from excessive, overburdening stormwater exceeding the capacity of its PCSS stormwater main drains and basins to capture and maintain storage of excess stormwater

988. As an owner, possessor, operator, manager and party-in-control of the PCSS stormwater structures or the PCSS stormwater structures within its jurisdiction, this Defendant was under a non-delegable duty not to increase or accelerate or the volume, flow, and other physical characteristics of stormwater from its property or otherwise overburden with stormwater the

Plaintiffs' homes and properties, either with overburdening its Property Stormwater, overburdening PWC Upstream Stormwater or both.

989. Defendant knew or should have known that the overburdening stormwater was generated by This Defendant Property Stormwater and/or PWC Upstream Stormwater and/or both combining.

990. Before 9-13-2008, Defendant had reasonably adequate time, opportunity and ability to take corrective measures to remedy and/or protect the Plaintiffs against the foreseeable dangerous conditions existing on its PCSS Properties posed by excess stormwater.

991. On September 13, 2008, excess accumulated stormwater from its PCSS property including its stormwater structures catastrophically invaded the Plaintiffs.

992. Defendant breached its duty not to overburden downstream Plaintiffs including by the following omissions: (a) failing to pump down the Basins before the September 13, 2008 storm; (b) failing to erect flood protection barrier systems between its property and the Plaintiff's properties and (c) failing to detain stormwater until it could safely drain to the Main Drain.

993. As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

~~COUNT 26: DISTRICT: NEGLIGENCE BASED UPON FORESEEABLE HARM-STORMWATER AND SANITARY SEWER WATER~~

~~994. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and":~~

~~994.1. Relating to stormwater: (i) "IV.C. Common Negligent Stormwater System Maintenance Breaches based upon Foreseeable Harm Legal Averments"; (ii) "IV.C. Common Negligent~~

~~Stormwater Operational Control Breaches of Duty based upon Foreseeable Harm Legal Averments" and (iii) "IV.I. Common Negligent Stormwater System Design Breaches of Duty Legal Averments"~~; ~~and~~

994.2. ~~Relating to sanitary sewage/sewer water: IV.D., IV.E., and IV.H.~~

995. ~~Defendant owed non-delegable legal duties to the Plaintiffs to properly manage stormwater under Defendant's ownership, management, supervision and/or control so as to prevent foreseeable harm to foreseeable plaintiffs such as the Plaintiffs from excessive stormwater exceeding the capacity of the PCSS to capture in storage in the Basins~~.

996. ~~Before September 13, 2008, Defendant had reasonably adequate time, opportunity and ability to take corrective measures to remedy and/or protect the Plaintiffs against the foreseeable dangerous conditions existing on PCSS Stormwater Structures Property posed by stormwater~~.

997. ~~On September 13, 2008, stormwater from its Stormwater Structures Property including the~~ **the Ballard and Dempster Basins** ~~catastrophically invaded the Plaintiffs~~.

998. ~~Defendant breached its duty including but not limited to the following acts: (a) failing to pump down the Basins before the September 13, 2008 storm; (b) failing to temporarily erect flood protection barrier systems between Robin Alley and the Stormwater Structures and (c) failing to detain all This Defendant Property Stormwater and PWC Upstream Stormwater until the MD Robin Dee Segment could safely receive~~.

999. ~~As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part~~.

1000. ~~As sanitary sewage operator of the downstream intereceptors, the District owed a duty to maintain and operate the sanitary sewage system properly including~~:

1000.1. ~~A duty to prevent inflow and infiltration into the sanitary sewer system~~;

1000.2. ~~A duty to pump out sanitary sewer water to prevent a system surcharge resulting in upstream sewage backups in Maine Township from the local municipal sanitary subsystem under Glenview ownership and from the separate local municipal sanitary subsystem under Park Ridge's control~~.

1001. ~~The District breached these duties by~~:

1002. ~~Failing to maintain its sewers free from undersigned inflow and infiltration~~; ~~and~~

1003. ~~Failing to pump out its sanitary sewers and interceptors to prevent all plaintiffs' sewage backups~~.

1004. ~~As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part. WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part~~.

~~COUNT 27: DISTRICT: NEGLIGENCE: MAINTENANCE AND OPERATION~~

1004.1. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (i) relating to stormwater: Subparts (i) IV.B., (ii) IV.C., (iii) IV.F., and (iv) IV.G.and (ii) relating to sanitary sewage/sewer water: Subparts I.D., I.E. and IV.H.~~

1005. ~~Duty: Defendant undertook and agreed to a non delegable duty of due care towards foreseeable plaintiffs to be injured by unreasonable maintenance and operational practices relating both to the Defendant designed and constructed public improvements of the Ballard, Pavilion and Dempster Basins and other PCSS Stormwater Structures~~.

1006. ~~Breach Stormwater: Defendant breached these duties relating to stormwater maintenance and operation including but not limited to: (a) it failed to pump down the Basins before the September 13, 2008 storm; (b) it failed to erect temporary barriers to prevent its stormwater from invading Plaintiff's properties; (c) of all LPEs, given its engineering expertise, it failed to raise or~~

~~compel Advocate Gewalt to raise the culvert discharge levels and (c) it failed to store stormwater on the North Development site or in tanker trucks or other sources~~.

1007. ~~Breach Sanitary. Defendant breached these duties relating to sanitary sewer maintenance and operation including but not limited to: (a) it caused the very stormwater invasions into its sanitary sewage system in violation of its own standards set forth in Permit Paragraphs 3 and 5 prohibiting stormwater from invading the sanitary sewers and requiring the proper maintenance and operation of the sanitary sewer system; and (b) failing to activate emergency pump out procedures of its sanitary sewers either into adjacent unsurcharged stormwater systems, into tanker trucks or simply into the streets to prevent sanitary sewer invasions~~.

1008. ~~As a proximate cause of these breaches of duties by Defendant, the stormwater was released by Defendant and escaped Its PCSS Stormwater Structures, invading some Plaintiff's home overland, then, invading some Plaintiff's homes through the sanitary sewers resulting in some Plaintiffs sustaining both stormwater and sanitary sewer invasions and, in other cases where stormwater did not invade through surface openings, sanitary sewer water invaded from the sanitary sewer system.~~

1009. ~~The Plaintiffs sustained damages set forth under in this Complaint's "Damage" Part~~.

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part~~.

~~COUNT 28: DISTRICT: NEGLIGENT MAINTENANCE AND OPERATION OF THE PCSS PUBLIC IMPROVEMENT AND SANITARY SEWERS~~

1010. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) (i) relating to stormwater, all paragraphs in Subparts IV.C., IV.E. and IV.G.and (ii) relating to sanitary sewer water, Subparts I.D., I.E. and IV.H~~.

1011. ~~Foreseeable Plaintiffs: The Plaintiffs were foreseeable plaintiffs subject to highly foreseeable harms if Defendant did not act with due care in relationship to adjacent, downstream, servient property owners such as Plaintiffs in its maintenance and operation of the Basins and other PCSS Properties.~~

1012. ~~Stormwater Breaches: Defendant breached these duties on September 13, 2008 including but not limited to: (a) it failed to pump down the Basins before this storm; (b) it failed to erect temporary barriers and raise culvert elevations to prevent its stormwater from invading Plaintiff's properties; and (c) it failed to store stormwater on the North Development or other locations.~~

1013. ~~Breach Sanitary: Defendant breached these duties relating to sanitary sewer maintenance and operation including but not limited to: (a) it caused the very stormwater invasions into its sanitary sewage system in violation of its own standards set forth in Permit Paragraphs 3 and 5 prohibiting stormwater from invading the sanitary sewers and requiring the proper maintenance and operation of the sanitary sewer system; and (b) failing to activate emergency pump out procedures of its sanitary sewers either into adjacent unsurcharged stormwater systems, into tanker trucks or simply into the streets to prevent sanitary sewer invasions.~~

1014. ~~As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

~~COUNT 29: DISTRICT: NEGLIGENT DESIGN: FORESEEABLE HARM DUTIES~~

1015. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.I. including Subsubparts "IV.I.A" and "IV.I.B."~~

1016. ~~This Defendant owed a specific non-delegable duty to Plaintiffs to adequately design the District's public improvements of the PCSS's Ballard Basin and the Pavilion Basin of the North Development Main Drain and the private improvement of the Dempster Basin and to adequately design and/or properly review, reject with necessary revisions, compel modification, and take other action to prevent the design flooding occurring on the North Development into the Robin-Dee Community Plaintiff Class~~.

1017. ~~This Defendant also owed a duty to design and/or force revisions to the design of the public improvements such as PCSS Stormwater Structures including the Ballard and Pavilion Basins to prevent foreseeable invasive flooding harm to the downstream homes of home owners and residents serviced by the Robin Dee Community and the North Development Main Drains~~.

1018. ~~Defendant breached these duties including but breeches relating to original designs and constructions of the Basins and other PCSS Structures, and their redesign, set out in Part IV.I~~.

1019. ~~Based upon the 2002 Flooding and other information, Defendant was under a duty to redesign, replan, correct and remedy defects in the Basins and other PCSS Stormwater Structures~~.

1020. ~~Defendant breached these duties relating to the Ballard and Dempster Basins by (i) failing to increase the bank elevations of the Basins together with corresponding culvert discharge elevations, (ii) failing to create a permanent barrier berm between the Robin Alley and the Stormwater Structures Property perimeter, and (iii) in general, failing to increase detention basin storage~~.

1021. ~~As a proximate cause of these and other breaches of duties by Defendant, the Plaintiffs suffered and sustained the injuries and damages set forth under this Complaint "Damage" Part~~.

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part~~.

COUNT 30: DISTRICT: NEGLIGENCE: RES IPSA LOQUITUR-STORMWATER AND SANITARY SEWAGE

1022. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) (i) relating to stormwater control, Subpart IV.J., IV.K. and IV.L. and relating to sanitary sewage, Subparts V.D., **V.E.** , **IV. H.**, M...

1023. Relating to the PCSS public improvement, this Defendant exclusive owned, controlled and operated the Prairie Creek Stormwater System including any and all of its stormwater public improvements. The stormwater public improvements include: on the North Development, the North Development Main Drain, the Ballard and Pavilion Basins, and connected stromwater systems within its jurisdiction and, on the Robin-Dee Community, the Robin-Dee Community Main Drain including the Robin Neighborhood Main Drain (Points C1-C2 to E) and the Dee Neighborhood Stormwater Pipe and its Howard Court Culvert (Points E to H).

1024. The stormwater invasive flooding suffered by the Plaintiffs would not have ordinarily occurred but for the negligence of this Defendant relating to its negligent inspection, study, maintenance, design, engineering, and/or operation of its exclusively controlled PCSS properties.

1025. Its negligent operation of its exclusively controlled PCSS Properties including the public improvements referred to as the Basins and Main Drains proximately caused the stormwater invasive flooding sustained by the Plaintiffs. The Plaintiffs did not contribute to the flooding.

1026. This Defendant exclusive owned, controlled and operated the sanitary sewer interceptors into which the local municipal sanitary sewers from Maine Township and Park Ridge drained sanitary sewage.

1027. The sanitary-sewage invasive flooding suffered by the Plaintiffs would not have ordinarily occurred but for the negligence of this Defendant relating to its negligent inspection, study, maintenance, design, engineering, and/or operation of its exclusively controlled PCSS

properties which flooded its exclusively controlled interceptors, resulting in interceptor cause sewage backups *.

1028. Its negligent operation of its exclusively controlled sanitary sewers proximately caused the stormwater invasive flooding sustained by the Plaintiffs. The Plaintiffs did not contribute to the flooding.

1029. As a proximate cause of these breaches of duties by this Defendant, the Plaintiffs suffered and sustained the injuries and damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 31: DISTRICT: NEGLIGENT NUISANCE

1030. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in Part IV.N., IV.O and IV.P.

1031. This Defendant owned, operated, managed, maintained and/or controlled the Basins and its other PCSS Stormwater Structures.

1032. Stormwater: As set out in the prior negligence Counts in this Part, this Defendant failed to reasonably design, engineer, maintain, and/or operate the Basins and its other PCSS property.

1033. This Defendant negligently caused an accumulation of stormwater from the Basins and its Stormwater Structures Property to invade and interfere with the Plaintiffs on 9-13-2008.

1034. By causing stormwater accumulated and controlled by this Defendant to physically invade the Plaintiffs' homes, this Defendant negligently created a dangerous nuisance of excess accumulated stormwater which substantially and unreasonably interfered with Plaintiffs.

1035. Sanitary Water: As set out in the prior negligence Counts in this Part, this Defendant failed to reasonably maintain, and/or operate its sanitary sewer interceptors.

1036. This Defendant negligently caused an accumulation of sanitary sewer water into citizens' homes from its sanitary sewage system to invade and interfere with the Plaintiffs on 9-13-2008.

1037. By causing sanitary sewer water accumulated and controlled by this Defendant to physically invade the Plaintiffs' homes, this Defendant negligently created a dangerous nuisance of excess sanitary sewer water which substantially and unreasonably interfered with Plaintiffs.

1038. As a proximate cause of this nuisance caused and/or created by this Defendant, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, the Plaintiffs request against Defendant the relief in the "Relief" Complaint Part.

COUNT 32: DISTRICT: NEGLIGENT TRESPASS

1039. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subparts IV.Q., IV.R. and IV.S.

1040. Stormwater: Because Defendant failed to act as set forth in this Part including failed to discharge by pumping existing, accumulated stormwater before the storm, before the Robin-Dee Community Main Drain runs full and before the surcharging of the Ballard, Pavilion and Dempster Basins and Howard Court Culvert, this Defendant failed to reasonably manage stormwater on September 13, 2008, proximately causing the Plaintiffs' invasive flooding.

1041. Sanitary: Because Defendant's failed to act as set forth in this Part including (a) failed to prevent stormwater from inflowing into the sanitary sewers and (b) failed to pump out the sanitary sewers, this Defendant failed to reasonably manage stormwater on September 13, 2008, proximately causing the Plaintiffs' invasive flooding.

1042. As a direct, immediate and foreseeable result of the foregoing acts and/or omissions of this Defendant, this Defendant caused stormwater to invade the Plaintiffs' persons and homes.

1043. This Defendant had exclusive possession and control over the trespassing instrumentality of the excess accumulated PCSS stormwater and its sanitary sewer water.

1044. The Plaintiffs were entitled to the exclusive enjoyment of their properties.

1045. This Defendant knew or should have known that its actions and/or inactions in failing to control stormwater and sanitary water would result in invasive flooding.

1046. This Defendant negligently failed to monitor, investigate, study, inspect, clean, maintain, repair, improve, design, redesign, plan and/or operate its properties as set forth in this Part.

1047. As a direct and proximate result of the foregoing conduct by this Defendant, its instrumentality of excess accumulated stormwater physically invaded Plaintiffs' homes on 9-13-2008, proximately causing the Plaintiffs' Damages set forth in the Damage Part.

1048. The Plaintiffs did not consent for its excess stormwater to physically invade and interfere with the exclusive use and occupancy of the Plaintiffs' homes and property.

1049. The Plaintiffs' injuries and damages were caused by the dangerous and calamitous occurrence of invasive stormwater floodings on 9-13-2008 from its properties.

1050. The stormwater and sanitary water which entered and physically invaded Plaintiffs' homes interfered with Plaintiffs' interests in the exclusive possession of their homes.

1051. The stormwater and sanitary sewer water which entered, settled and physically invaded Plaintiffs' homes constituted a negligent trespass upon and into the Plaintiffs' homes.

1052. This Defendant is liable to the Plaintiffs for negligent trespass because this Defendant caused harm to the legally protected interests of the Plaintiffs including harm to the exclusive, quiet enjoyment of their land, homes and properties by causing an instrumentality, namely "Stormwater", to enter upon the property of the Plainitffs without their consent.

1053. As a proximate cause of this trespass caused and/or created by this Defendant, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, the Plaintiffs request against Defendant the relief in the "Relief" Complaint Part.

~~COUNT 33: DISTRICT: GROSS NEGLIGENCE~~

~~1054. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.T. entitled "IV.T. Common Gross Negligence Violations Legal Averments".~~

~~1055. The Districts' acts and omissions where committed under circumstances exhibiting a reckless disregard for the Plaintiffs' safety, which acts include but its deliberate and intentional failures to act to increase, either temporarily through pumping down and temporary barriers, or permanently, with a pump station and high berms, storage to receive the September 13, 2008 rainfall, which acts would have prevented both stormwater and sewer water flooding.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

COUNT 34: DISTRICT: INTENTIONAL NUISANCE

1056. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart **IV.U., IV.V. and IV.W.**.

1057. Defendant owned, operated, managed, maintained and/or controlled its PCSS Public Improvement including the Ballard, Pavilion and Dempster Basins from which the excess accumulated stormwater nuisance invaded Plaintiffs' persons and homes.

1058. Defendant failed to reasonably design, engineer, maintain, and/or operate the PCSS public improvements including the Ballard and Pavilion Basins and its sanitary sewers.

1059. Defendant owned its sanitary sewers including the downstream interceports.

1060. Defendant failed to reasonably operate it sanitary sewers including failing to prevent stormwater invasion from its PCSS basins from inflowing into the sanitary sewers and failing to pump out is sanitary sewers.

1061. Defendant intentionally stormwater from these the PCSS and its sanitary sewers interfere with Plaintiffs' persons and homes.

1062. As a direct and proximate result of the Defendant's intentional failures to act to pump down the Basins, and to increase temporary storage through temporary barrier methods such as sandbags, Plaintiffs suffered damage set out in this Complaint "Damages" Part.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 35: DISTRICT: INTENTIONAL TRESPASS

1063. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.X. IV.Y. and IV.Z.

1064. Defendant knew to a substantial legal certainty and to a high degree of certainty that its actions and/or inactions would result in invasive flooding into the Plaintiffs' homes during a rainfall like the September 13, 2008 rainfall from its PCSS including the Ballard Basin and the private improvement Dempster Basin and its sanitary sewers.

1065. Defendant proximately caused the Plaintiffs' Damages by its intentional omission to discharge by pumping pre-existing stormwater before the 2008 storm and its intentional omission to capture and store stormwater in temporary barriers around the Basins and its intentional omission not to pump out its sanitary sewers to prevent sanitary sewer surcharging.

1066. Defendant knew to a substantial legal certainty and a high degree of certainty that its intentional omissions would result in water invasively flooding Plaintiffs' homes from the PCSS Basins and its sanitary sewers.

1067. With a high degree of certainty to cause injury to Plaintiffs, on September 13, 2008, Defendant permitted storm and sanitary water to escape and invade Plaintiffs' homes.

1068. Based upon the legal certainty of knowledge of invasive flooding as set forth herein, Defendant intentionally trespassed upon Plaintiffs' persons, homes, and properties.

1069. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's intentional conduct.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 36: DISTRICT: ARTICLE III. SEC. 3-102A STATUTORY DUTY TO MAINTAIN PROPERTY

1070. The Plaintiffs restate the preceding paragraphs.

1071. **Article III, Section 102(a)** (745 ILCS 10/3-102(a)) provides that a a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition.

1072. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct (a) relating to stormwater, in failing to redesign its PCSS Public Improvements including the Basins to store adequate amounts of water and (b) relating to its sanitary sewers, failing to prevent its own stormwater or stormwater under its control from invading the sanitary system into Plaintiffs' homes.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 37: DISTRICT: ARTICLE III. SEC. 103 DUTY TO REMEDY DANGEROUS PLAN

1073. The Plaintiffs restate the preceding paragraphs.

1074. **LPE-Approved Plan Creating Dangerous Condition:** Article III, Section 102(a) of the Tort-Immunity Act (745 ILCS 10/3-103(a)) provides that a local public entity is liable for an

approved plan, if after the execution of such plan or design, the planned improvement's use has created a condition that it is not reasonably safe.

1075. This Defendant approved all defective Prairie Creek Stormwater System Plans including the North Development Main Drain with the Ballard and Pavilion Basin, the Robin Neighborhood Main Drain, the Howard Court Culvert, the Dee Neighborhood Stormwater Pipe and all other public improvements to the PCSS including its Main Drain and all tributary sewers.

1076. By September 13, 2008, it was open and obvious that its approved Plans for the Prairie Creek Stormwater System's public improvements were dangerously defective as ongoing flooding, including home-invasive flooding in 1987 and 2002, and other land-invasive flooding before September 13, 2008 had occurred.

1077. Pursuant to 745 ILCS 10/3-103, this Defendant owed a general duty to correct known unsafe conditions related to the design and/or engineering of the PCSS and breached these duties by not redesigning or compeling Advcoate-Gewalt to resign the PCSS Basin Plans and other PCSS Plans relating to Advocate's North and South Development Properties so as to prevent the Plaintiffs' invasive flooding.

1078. The Plaintiffs' damages set forth in this Complaint's "Damage" Part were caused as a substantially proximate result of Defendant's conduct in failing to maintain its PCSS Properties.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

~~COUNT 38: DISTRICT: 70 ILCS 2605/19: SANITARY DISTRICT LIABILITY~~

1079. ~~The Plaintiffs restate the preceding paragraphs.~~

1080. ~~70 ILCS 2605/19 provides that a sanitary district is liable for sanitary sewerage backups.~~

1081. ~~The Plaintiffs' homes constituted "real estate" within the meaning of 70 ILCS 2605/19.~~

1082. ~~The Plaintiffs' homes were "within the district" within the meaning of 70 ILCS 2605/19.~~

1083. ~~The Park Ridge and/or Glenview owned and operated tributary or lateral municipal sanitary street sewers to which the Plaintiffs' residences were connected by lead lines from their residences and the District's receiving intercepters constituted a "channel, ditch, drain, outlet or other improvement" within the meaning of 70 ILCS 2605/19~~.

1084. ~~The District approved both Park Ridge and Glenview's sanitary sewer plans and permits and all sanitary sewers were provided "under the provisions of this Act" as that phrase is used within the meaning of 70 ILCS 2605/19~~.

1085. ~~On 9-13-2008, sewer water overflowed the sanitary sewerage system sewers under the ownership, jurisdiction and/or control of the District, said control being total, partial or joint~~.

1086. ~~The sewer water overflow was an "overflow" as that term is used in 70 ILCS 2605/19 in violation of 70 ILCS 2605/19~~.

1087. ~~The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially proximate result of Defendant's conduct in failing to maintain its Properties~~.

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part~~

COUNT 39: DISTRICT: ILLINOIS CONST. ART. I, SEC. 15: TAKING REAL AND PERSONAL PROPERTY

1088. The Plaintiffs restate the preceding paragraphs.

1089. Article I, Section 15 of the Illinois Constitution prohibits the taking of private property for public use without payment of just compensation to the victims of the taking.

1090. Per Article I, Section 15 of the Illinois Constitution, this Defendant was under a duty to provide just compensation to the Plaintiffs for its taking of Plaintiffs' real and personal property.

1091. This Defendant has proximately caused the Plaintiffs' real properties including their homes to become partial and/or totally uninhabitable by its actions and/or inactions as set forth

herein resulting in invasive floodings into the Plaintiffs' real properties including homes and residences.

1092. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

COUNT 40: DISTRICT: U.S. FIFTH AMENDMENT: TAKING OF REAL AND PERSONAL PROPERTY

1093. The Plaintiffs incorporate the prior averments in the Subpart entitled "Illinois Constitution Art. I, Sec. 15-Taking of Real Property."

1094. The Fifth Amendment of the United States Constitution prohibits the taking of private property for public use without payment of just compensation to the citizen-victim of the taking including both real and personal property.

1095. This Defendant violated the U.S. Constitution's 5th Amended by its conduct.

1096. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

COUNT 41: DISTRICT: 42 USC SEC. 1983

1097. The Plaintiffs incorporate the preceding subparts entitled: "U.S. Fifth Amendment-Taking of Real Property", "U.S. Fifth Amendment-Taking of Personal Property", "Ill. Const. Art. I, Sec. 15-Taking of Real and personal property" and "Ill.Const. Art. I, Sec. 15-Taking of Personal Property."

1098. Relating to 42 Section § 1983, this Defendant was acting under color of law in violation of these constitutional provisions, thereby violating 42 U.S.C. Sec. 1983.

1099. This Defendant is a "person" as used in the phrase "(E)very **person** who, under color of any statute, ordinance, regulation, custom or usage..."

1100. This Defendants' foregoing actions authorized under its enabling legislation and pursuant to a charter and/or other enabling document with the force of law is acting "color of ...statute, ordinance, regulation, custom or usage" of the State of Illinois.

1101. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

COUNT 42: DISTRICT: EQUITABLE RELIEF PER TORT-IMMUNITY ACT

1102. Plaintiffs restate and incorporate all prior paragraphs within this Part as the first paragraphs of this Count including Subparts IV.AA. and Subparts IV.AK.

1103. the Tort Immunity Act at Sec. 2-101 (745 ILCS 10/2-101) states that the Act does not Act affects the right to obtain relief other than damages against a local public.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

PART IX. CLAIM AGAINST PARK RIDGE

IX.A. OVERVIEW-PARK RIDGE-CAUSATION AND RESPONSIBILITY

1104. Causation: Despite having the most actual knowledge of Advocate flooding among the LPEs and in the best position to make changes to the Advocate-Gewalt Plans given the serious repetitive flooding history, Park Ridge did not compel Advocate and Gewalt to revise their North and South Development Plans to provide more stormwater storage on the North Development or South Development*. Nor did Park Ridge advise the District of the serious repetitive flooding problems.

1104.1. ~~Causation-Park Ridge-Plaintiffs-Sanitary Sewage Invasions: The Park Ridge North Ballard Neighborhood sustained sewage invasions during this event by Park Ridge's failure to sand bag around the Basins and raise the Basins' discharge elevations, thereby causing stormwater to inflow into the Park Ridge sanitary sewers and Park Ridge Plaintiffs' basements~~.

IX. B. FACTS RELEVANT TO THIS DEFENDANT

1105. On September 13, 2008, Park Ridge deployed its police and/or Department of Public Safety to Dempster Road near the Plaintiffs' Robin-Neighborhood.

1106. On prior dates during flooding, Park Ridge deployed its police and/or Department of Public Safety to Dempster Road near the Plaintiffs' Robin-Neighborhood*.

1107. Before September 13, 2008, Park Ridge was well aware of the repetitive invasive flooding into the Robin-Dee Community Area because prior storms had generated sufficient stormwater to produce street flooding including street flooding on Dempster Road and Robin Alley.

1108. **Property under TIA**: The Prairie Creek Stormwater System including the Ballard Basin, Pavilion Basin are within the jurisdiction of Park Ridge and are public improvements and properties as defined in TIA Article III, Sec. 3-101. As used herein, stormwater is "property" or "personal property" per Chapter 745, Act 10, Article III at Section 10/3-101.

1109. ~~**Services for Sanitary Sewage Disposal:** The Park Ridge Plaintiffs residences in the Park Ridge North Ballard Neighborhood were serviced by a sanitary sewage disposal sewer system owned and/or operated by Park Ridge~~.

1110. ~~**Park Ridge** owned and/or operated the local sanitary tributary municipal sewers in the Park Ridge North Ballard Neighborhood which drained to the District's sewers and intercepters~~.

1111. ~~Park Ridge and the District assumed responsibilities for sewage disposal pursuant to a contractual, quasi-contractual relationship with Plaintiffs~~.

1112. Park Ridge is responsible for stormwater management within Park Ridge as it supervises all stormwater management projects including projects to public improvements such as the PCSS's Ballard Basin and Pavilion Basin.

1113. **Control of PCSS Components within Park Ridge Jurisdiction:** Park Ridge had and has jurisdiction over the Prairie Creek Stormwater System within Park Ridge including its real property public improvement components in Park Ridge, by its undertaking and/or exercise of control (by statute, ordinance or other act with the force of law besides actual control) and/or other acts of dominion, Park Ridge owned, possessed and/or controlled the PCSS Basins and North Development Main Drain and other related real property and related estates and interests in the Prairie Creek Stormwater System stormwater structures within Park Ridge.

1114. **Drainage Planning and System Engineering:** Park Ridge planned or caused to be planned and designed or caused to be designed the public improvements of the PCSS stormwater

structures within its jurisdiction, namely the Ballard Basin, Pavilion Basin and North Development Main Drain and possibly the Dempster Basin if it receives Park Ridge stormwater*.

1115. The Stormwater Plans for the North Development resulting in the existing drainage design and operation of the **Ballard Basin, Pavilion Basin and Dempster** and related drainage alterations was **approved by Park Ridge** before 2008 and any construction changes to said structures were approved by Park Ridge substantially before September 13, 2008 with construction occurring substantially before that date and time.

COUNT 45: PARK RIDGE: NEGLIGENCE: DOMINANT ESTATE OVERBURDENING

1116. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subparts in Part IV, these Subparts being entitled: IV.A., IV.C., IV.G., and IV.I. and IV.AB.

1117. Park Ridge knew or should have known of the foreseeable harm of invasive flooding into the Plaintiffs' Area given Earlier Floodings and Earlier Flooding Studies. Park Ridge knew of the earlier floodings as it deployed its police and/or public safety department to Dempster where it installed road blocks to prevent traffic from driving through Dempster south of the Advocate North Development and at the eastern border with Maine Township at Robin Alley*. Park Ridge police employees deploy saw or should have seen the invasive flooding into the Robin Neighborhood *.

1118. Park Ridge knew, agreed to and undertook to receive Upstream Prairie Creek Watershed stormwater into its North Development Segment including its North Deveopment Main Drain and attached Basins including the Ballard and Dempster Basins.

1119. Based upon this actual or constructive knowledge of reasonably foreseeable flooding harm to Plaintiffs as contiguous downstream property owners and possessors, Park Ridge owed non-delegable duties as a owner, manager and/or party in control of the PCSS within its jurisdiction (that is, the PCSS North Development Stormwater Public Improvements of the Basins and Main Drain) and under its control to properly manage stormwater so as to prevent foreseeable overburdening harm to foreseeable plaintiffs from stormwater exceeding the capacity of its PCSS stormwater main drains and basins to capture and store

1120. As an owner, possessor, operator, manager and party-in-control of the PCSS Stormwater Public Improvements within Park Ridge, Park Ridge was under a non-delegable duty not to increase or accelerate or the volume, flow, and other physical characteristics of stormwater from its property or otherwise overburden with stormwater the Plaintiffs' homes and properties, either with overburdening Park Ridge North Ballard Neighborhood Stormwater, PWC Upstream Stormwater or both.

1121. Park Ridge knew or should have known that the overburdening stormwater was generated by its Stormwater and/or PWC Upstream Stormwater and/or both combining.

1122. Before 9-13-2008, Park Ridge had reasonably adequate time, opportunity and ability to take corrective measures to remedy and/or protect the Plaintiffs against the foreseeable dangerous conditions existing on its PCSS Stormwater Public Improvements posed by excess stormwater.

1123. On September 13, 2008, excess accumulated stormwater from Park Ridge's PCSS Stormwater Public Improvements including its stormwater structures from these Basins catastrophically invaded the Plaintiffs.

1124. Park Ridge breached its duty not to overburden downstream Plaintiffs including by the following omissions: (a) failing to pump down the Basins before the September 13, 2008 storm; (b) failing to erect flood protection barrier systems with raised discharge culvert elevations between its PCSS Stormwater Public Improvements of the Basins on the North Development and the Plaintiff's properties and (c) failing to detain and store stormwater until it could safely drain to the Main Drain.

1125. As a proximate cause of these breaches of duties by Park Ridge, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part.

WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part.

~~COUNT 46: PARK RIDGE: COMMON LAW NEGLIGENCE BASED UPON FORESEEABLE HARM~~

~~1126. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in Subparts in Part IV.C., IV.G. and IV.I.~~

~~1127. Park Ridge owed non-delegable legal duties to the Plaintiffs to properly manage PCSS stormwater under Park Ridge's ownership, management, supervision and/or control so as to prevent foreseeable harm to foreseeable plaintiffs such as the Plaintiffs from excessive stormwater exceeding the capacity of the PCSS to capture in storage in the Basins.~~

~~1128. Before September 13, 2008, Park Ridge had reasonably adequate time, opportunity and ability to take corrective measures to remedy and/or protect the Plaintiffs against the foreseeable dangerous conditions existing on PCSS Stormwater Structures Property posed by stormwater.~~

~~1129. On September 13, 2008, stormwater from its Stormwater Structures Property including the the Ballard and Dempster Basins catastrophically invaded the Plaintiffs.~~

~~1130. Park Ridge breached its duty including but not limited to the following acts: (a) failing to pump down the Basins before the September 13, 2008 storm; (b) failing to temporarily erect~~

~~flood protection barrier systems with raised discharge culvert elevations between the Robin Alley and the PCSS North Development Stormwater Public Improvements including the Basins and (c) failing to detain all Park Ridge Property Stormwater and PWC Upstream Stormwater until the PCSS' Robin Dee Main Drain could safely receive, convey and transport this stormwater without flooding~~.

1131. ~~As a proximate cause of these breaches of duties by Park Ridge, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part~~.

~~WHEREFORE~~, ~~Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part~~.

~~COUNT 47: PARK RIDGE: NEGLIGENCE MAINTENANCE AND OPERATION~~

1132. P~~laintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in Subparts in Part IV.C. and IV.G~~.

1133. ~~Park Ridge undertook and agreed to a non-delegable duty of due care towards foreseeable plaintiffs to be injured by unreasonable maintenance and operational practices relating both to Park Ridge designed and constructed public improvements of the Ballard, Pavilion and Dempster Basins and other PCSS Stormwater Structures and Park Ridge approved designs on private property such the Dempster Basin and South Development Stormwater private improvements~~.

1134. ~~Park Ridge breached these duties including but not limited to: (a) it failed to pump down the Basins before the September 13, 2008 storm; (b) it failed to erect temporary barriers with raised culverts to prevent its stormwater from invading Plaintiff's properties; and (c) it failed to store stormwater~~.

1135. ~~As a proximate cause of these breaches of duties by Defendant, the stormwater was released by Defendant and escaped the PCSS Robin Dee Main Drain, invading some Plaintiff's~~

~~home's overland, then, invading some Plaintiff's homes through the sanitary sewers resulting in some Plaintiffs sustaining both stormwater and sanitary sewer invasions~~.

136. ~~The Plaintiffs sustained damages set forth under in this Complaint's "Damage" Part~~.

~~WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part~~.

~~COUNT 48: PARK RIDGE: NEGLIGENT MAINTENANCE AND OPERATION OF THE PCSS PUBLIC IMPROVEMENTS~~

137. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these Subparts being: (i) IV.C. and (ii) IV.G.~~.

138. ~~**Foreseeable Plaintiffs:** The Plaintiffs were foreseeable plaintiffs subject to highly foreseeable harms if Park Ridge did not act with due care in relationship to downstream property owners such as Plaintiffs in its maintenance and operation of the PCSS Properties~~.

139. ~~Park Ridge breached these duties on September 13, 2008 including but not limited to: (a) it failed to pump down the Basins before this storm; (b) it failed to erect temporary barriers to prevent its stormwater from invading Plaintiff's properties; and (c) it failed to store stormwater~~.

140. ~~As a proximate cause of these breaches of duties by Park Ridge, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part~~.

~~WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part~~.

~~COUNT 49: PARK RIDGE: NEGLIGENT DESIGN: FORESEEABLE HARM DUTIES~~

141. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these Subparts being entitled: "IV.I. Common Negligent Stormwater System Design Breaches of Duty Legal Averments" including Subsubparts "IV.I.A" and "IV.I.B~~."

1142. ~~Park Ridge owed a specific non-delegable duty to Plaintiffs to adequately design its PCSS Stormwater Public Improvements including the Ballard and Pavilion Basins and other private improvements such as the Dempster Basins affecting the performance of the PCSS and to adequately design other stormwater structures and/or to properly review, reject with necessary revisions, compel modification, and take other action to prevent the design flooding occurring on the North Development into the Robin Dee Community Plaintiff Class~~.

1143. ~~Park Ridge also owed a duty to design the public improvements such as Stormwater Structures of the Prairie Creek Stormwater System including the Ballard and Pavilion Basins and other private dangerous improvements such as the Dempster Basin to prevent foreseeable invasive flooding harm to the downstream persons, homes and properties of home owners and residents serviced by this Segments of the Prairie Creek Stormwater System~~.

1144. ~~Park Ridge breached these duties including but not limited to the original designs and constructions of the Basins and other PCSS Structures, such breaches set out in Part III~~.

1145. ~~Based upon the 2002 Flooding and other information, Park Ridge was under a duty to redesign, replan, correct and remedy defects in the other PCSS Stormwater Improvements including the Basin Structures~~.

1146. ~~Park Ridge breached these duties relating to the Ballard and Dempster Basins by (i) failing to increase the bank elevations of the Basins together with corresponding culvert discharge elevations, (ii) failing to create a permanent barrier berm between the Robin Alley and the Stormwater Structures Property perimeter; and (iii) failing to increase detention basin storage~~.

1147. ~~As a proximate cause of these and other breaches of duties by Park Ridge, the Plaintiffs suffered and sustained the injuries and damages set forth under this Complaint "Damage" Part~~.

~~WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part.~~

~~COUNT 50: PARK RIDGE: NEGLIGENCE: RES IPSA LOQUITUR-STORMWATER~~

1148. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subparts IV.I., IV.J. and IV.K.~~

1149. ~~Park Ridge exclusive owned, controlled and operated the PCSS Ballard and Pavilion Basins and connected stormwater systems within its jurisdiction.~~

1150. ~~The invasive flooding suffered by the Plaintiffs would not have ordinarily occurred but for the negligence of Park Ridge relating to its negligent inspection, study, maintenance, design, engineering, and/or operation of its exclusively controlled Basins and other properties.~~

1151. ~~Its operation of its exclusively controlled Basins proximately caused the invasive flooding sustained by the Plaintiffs. The Plaintiffs did not contribute to the flooding.~~

1152. ~~As a proximate cause of these breaches of duties by Park Ridge, the Plaintiffs suffered and sustained the injuries and damages set forth under the "Damage" Part of this Complaint.~~

~~WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part.~~

~~COUNT 51: PARK RIDGE: NEGLIGENCE: RES IPSA LOQUITUR-SANITARY SEWERS~~

1153. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in Subparts IV.D., IV.E., IV.H. and IV.M.~~

1154. ~~Park Ridge negligently maintained it sewers by failing to eliminate holes in manholes and gaps in manholes and joints of the sanitary system permitting stormwater to invade the sanitary sewer system.~~

1155. ~~Park Ridge negligently operated its sanitary sewers systems by failing to store the surface water which resulted in home invasive flooding which in part surcharged Park Ridge's municipal local sanitary sewer system in the Park Ridge North Ballard Neighborhood.~~

1156. ~~Park Ridge exclusive owned, controlled and operated the sanitary sewers servicing Park Ridge residents including the Park Ridge North Ballard Neighborhood~~.

1157. ~~The sewer water basement floor invasive flooding suffered by the Park Ridge Plaintiffs would not have ordinarily occurred but for the negligence of Park Ridge relating to its negligent inspection, study, maintenance, design, engineering, and/or operation of its exclusively controlled sanitary sewers~~.

1158. ~~Park Ridge's operation of its exclusively controlled sanitary sewers proximately caused the invasive flooding sustained by the Plaintiffs. The Plaintiffs did not contribute to the flooding~~.

1159. ~~As a proximate cause of these breaches of duties by Park Ridge, the Plaintiffs suffered and sustained the injuries and damages set forth under the "Damage" Part of this Complaint~~.

~~WHEREFORE, the Park Ridge Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part~~.

COUNT 52: PARK RIDGE: NEGLIGENT NUISANCE

1160. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in Part "IV.N. Common Negligent Stormwater Nuisance Violations-from Properties under Park Ridge's Jurisdiction-Legal Averments" and Part IV.P. " Common Negligent Sanitary Nuisance Violations."

1161. Park Ridge owned, operated, managed, maintained and/or controlled the PCSS Stormwater Improvements, the PCSS stormwater and the Park Ridge sanitary sewers within Park Ridge.

1162. As set out in the prior negligence Counts in this Part, Park Ridge failed to reasonably design, engineer, maintain, and/or operate the PCSS Stormwater Improvements such as the

Basins and its other stormwater improvement property and Park Ridge failed to reasonably operate its sanitary sewers by failing to prevent stormwater inflows and pumping out its sewers.

1163. Park Ridge negligently caused an accumulation of stormwater from the Basins and its Stormwater Structures Property to invade and interfere with all Plaintiffs on September 13,2008.

1164. Park Ridge negligently caused an accumulation of sanitary sewage to invade Park Ridge residents in the Park Ridge North Ballard Neighborhood on September 13, 2008.

1165. By causing stormwater accumulated and controlled by Park Ridge to physically invade the Plaintiffs' homes, Park Ridge negligently created a dangerous nuisance of excess accumulated stormwater which substantially and unreasonably interfered with all Plaintiffs.

1166. By causing sanitary sewer water accumulated and controlled by Park Ridge to physically invade the Park Ridge Plaintiffs' homes, Park Ridge negligently created a dangerous nuisance of sanitary sewage which substantially and unreasonably interfered with all Plaintiffs.

1167. As a proximate cause of these nuisances caused and/or created by Park Ridge, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, the both Maine Township and Park Ridge Plaintiffs request against Park Ridge the relief in the "Relief" Complaint Part.

COUNT 53: PARK RIDGE: NEGLIGENT TRESPASS

1168. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subparts IV.Q. and IV.S.

1169. Because Park Ridge's failed to act as set forth in this Part including but not limited to the failure to discharge by pumping existing, accumulated stormwater before the storm, before the Robin-Dee Community Main Drain runs full and before the surcharging of the Ballard, Pavilion

and Dempster Basins and Howard Court Culvert, Park Ridge failed to reasonably manage stormwater on September 13, 2008, proximately causing the Plaintiffs' invasive flooding.

1170. Because Park Ridge failed to fix its sanitary sewers from inflow/infiltration and to stop stormwater invasions, Park Ridge caused sanitary sewage invasions into the Park Ridge Plaintiffs' homes.

1171. As a direct, immediate and foreseeable result of the foregoing acts and/or omissions of Park Ridge, Park Ridge caused stormwater to invade all Plaintiffs' persons and homes either through surface water and/or sanitary sewage containing stormwater.

1172. Park Ridge had exclusive possession and control over the trespassing instrumentalities of the PCSS's excess accumulated stormwater from the PCSS' Basins and over its sewage system.

1173. The Plaintiffs were entitled to the exclusive enjoyment of their properties.

1174. Park Ridge knew or should have known that its actions and/or inactions in failing to control stormwater from the Basins and North Development would result in invasive flooding.

1175. Park Ridge negligently failed to monitor, investigate, study, inspect, clean, maintain, repair, improve, design, redesign, plan and/or operate its PCSS Basin and properties and its sanitary sewers.

1176. As a direct and proximate result of the foregoing conduct by Park Ridge, its instrumentality of excess accumulated stormwater physically invaded all Plaintiffs' homes on 9-13-2008, proximately causing the Plaintiffs' Damages set forth in the Damage Part.

1177. As a direct and proximate result of the foregoing conduct by Park Ridge, its instrumentality of sanitary sewage physically invaded Park Ridge Plaintiffs' homes on 9-13-2008, proximately causing the Plaintiffs' Damages set forth in the Damage Part.

1178. The Plaintiffs did not consent for Park Ridge's excess stormwater or sanitary sewer water to physically interfere with Plaintiffs' exclusive use and occupancy of the their homes.

1179. The Plaintiffs' injuries and damages were caused by the dangerous and calamitous occurrence of invasive stormwater floodings on 9-13-2008 from Park Ridge properties both PCSS stormwater structures and its sanitary sewerage system.

1180. The excess accumulated stormwater which entered and physically invaded Plaintiffs' homes and properties interfered with Plaintiffs' interests in the exclusive possession of their homes.

1181. The sanitary sewer water which entered and physically invaded Park Ridge Plaintiffs' homes interfered with Plaintiffs' interests in the exclusive possession of their homes.

1182. The excess accumulated stormwater which entered, settled and physically invaded Plaintiffs' homes and property constituted a negligent trespass upon and into the Plaintiffs' homes.

1183. The sanitary sewer water which entered, settled and physically invaded Park Ridge Plaintiffs' homes and property constituted a negligent trespass upon and into the Park Ridge Plaintiffs' homes.

1184. Park Ridge is liable to the Plaintiffs for negligent trespass because Park Ridge caused harm to the legally protected interests of the Plaintiffs including harm to the exclusive, quiet enjoyment of their land, homes and properties by causing instrumentalities, namely "Stormwater" and/or stormwater-santiary sewer water, to enter upon the property of the Plainitffs without their consent.

1185. As a proximate cause of this trespass caused and/or created by Park Ridge, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, the Plaintiffs request against Park Ridge the relief in the "Relief" Complaint Part.

~~COUNT 54: PARK RIDGE: GROSS NEGLIGENCE~~

~~1186. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.T. entitled "IV.T. Common Gross Negligence Violations Legal Averments".~~

~~1187. Its acts and omissions where committed under circumstances exhibiting a reckless disregard for the Plaintiffs' safety, which acts include but are not limited to its deliberate and intentional failures to act to increase, either temporarily through pumping down and temporary barriers, or permanently, with a pump station and high berms, storage to receive storms such as the September 13, 2008 storm.~~

~~WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part.~~

COUNT 55: PARK RIDGE: INTENTIONAL NUISANCE

1188. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subparts IV.U. and IV.W.

1189. Park Ridge owned, operated, managed, maintained and/or controlled drainage components and/or drainage structures including the Ballard, Pavilion and Dempster Basins from which the excess accumulated stormwater nuisance invaded Plaintiffs' persons and homes.

1190. As a direct and proximate result of Park Ridge's intentional failures to act to pump down the Basins, and to increase temporary storage through temporary barrier methods such as sandbags, Plaintiffs suffered damage set out in this Complaint "Damages" Part.

WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part.

COUNT 56: PARK RIDGE: INTENTIONAL TRESPASS

1191. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.X. and IV. Z.

1192. Park Ridge knew to a substantial legal certainty and to a high degree of certainty that its actions and/or inactions would result in invasive flooding into the Plaintiffs' homes during a rainfall like the September 13, 2008 rainfall from the Ballard Basin and the Dempster Basin.

1193. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Park Ridge's intentional conduct by intentional failing to collect stormwater from the known dangerous and calamitous storm occurrence of the 9-13-2008.

WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part.

COUNT 57: PARK RIDGE: ART. III. SEC. 3-102A STATUTORY DUTY TO MAINTAIN PROPERTY

1194. The Plaintiffs restate the preceding paragraphs.

1195. **Article III, Section 102(a)** (745 ILCS 10/3-102(a)) provides that a a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition.

1196. Stormwater invaded from Park Ridge's defectively maintained PCSS North Development's Ballard and Pavilion Basins and North Development Main Drain.

1197. ~~Sanitary sewage invaded Park Ridge Plaintiffs' by Park Ridge's defects in its sewers which allowed stormwater to invade and surcharge its sewers~~.

1198. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Park Ridge's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part

COUNT 58: PARK RIDGE: ART. III. SEC. 103 STATUTORY DUTY TO REMEDY A DANGEROUS PLAN

1199. The Plaintiffs restate the preceding paragraphs.

1200. **LPE-Approved Plan Creating Dangerous Condition:** Article III, Section 102(a) of the Tort-Immunity Act (745 ILCS 10/3-103(a)) provides that a local public entity is liable for an approved plan, if after the execution of such plan or design, the planned improvement's use has created a condition that it is not reasonably safe.

1201. Park Ridge approved all Prairie Creek Stormwater System Plans including the North Development Main Drain with the Ballard and Pavilion Basin and the Dempster Basin Plan.

1202. Park Ridge approved the RN Plat Plan and DN Plat Plan including relating to stormwater management.

1203. Park Ridge approved the Robin Neighborhood Main Drain, the Howard Court Culvert, the Dee Neighborhood Stormwater Pipe per the RN Plat Plan and DN Plat Plan*.

1204. Park Ridge approved all other public improvements to the PCSS including its Main Drain and all tributary sewers *.

1205. Park Ridge approved the RN Plat Plan and the DN Plat Plan in 1960-1961.

1206. By September 13, 2008, it was open and obvious that its approved Plans for the Prairie Creek Stormwater System's public improvements including its initial approved original Ballard Basin design and Pavilion Basin design were dangerously defective as ongoing flooding, including home-invasive flooding in 1987 and 2002, and other land-invasive flooding before September 13, 2008 had occurred.

1207. Pursuant to 745 ILCS 10/3-103, Park Ridge owed a general duty to correct known unsafe conditions related to the design and/or engineering of the PCSS and breached these duties by not redesigning its plans.

1208. Relating to its sanitary sewers, Park Ridge also knew about inflow and infiltration including from stormwater inflow and infiltration during prior storms into its sanitary sewers but failed to eliminate this source of stormwater inflow and infiltration including from stormwater surface flooding which occurred September 13, 2008.

1209. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Park Ridge's conduct in failing to maintain its PCSS Improvements and its sanitary sewerage system.

WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part.

~~COUNT 59: PARK RIDGE: 70 ILCS 2605/19: SANITARY DISTRICT LIABILITY~~

1210. ~~The Plaintiffs restate the preceding paragraphs including Subparts IV.A.,IV.D., IV.E., IV.H., IV.M., IV.S., IV.W., and IV.Z.~~

1211. ~~70 ILCS 2605/19 provides that a sanitary district is liable for sanitary sewerage backups.~~

1212. ~~The Park Ridge Plaintiffs' homes constituted "real estate" within the meaning of 70 ILCS 2605/19.~~

1213. ~~The Park Ridge Plaintiffs' homes were "within the district" within the meaning of 70 ILCS 2605/19.~~

1214. ~~Park Ridge owned and operated tributary or lateral municipal sanitary street sewers to which the Park Ridge Plaintiffs' residences in the Park Ridge North Ballard Neighborhood were connected by lead lines from their residences constituted a "channel, ditch, drain, outlet or other improvement" within the meaning of 70 ILCS 2605/19.~~

1215. ~~Park Ridge owned and operated sanitary street sewers to which the Park Ridge Plaintiffs' homes were connected were provided "under the provisions of this Act" as that phrase is used within the meaning of 70 ILCS 2605/19.~~

1216. ~~On September 13, 2008, sewer water overflowed the sanitary sewerage system sewers under the ownership, jurisdiction and/or control of Park Ridge~~.

1217. ~~The sewer water overflow was an "overflow" as that term is used in 70 ILCS 2605/19 in violation of 70 ILCS 2605/19~~.

1218. ~~The Park Ridge Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Park Ridge's conduct in failing to maintain its sanitary sewers~~.

~~WHEREFORE, Park Ridge Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part~~.

COUNT 60: PARK RIDGE: ILLINOIS CONST. ART. I, SEC. 15: TAKING REAL AND PERSONAL PROPERTY

1219. The Plaintiffs restate the preceding paragraphs.

1220. Article I, Section 15 of the Illinois Constitution prohibits the taking of private property for public use without payment of just compensation to the victims of the taking.

1221. Per Article I, Section 15 of the Illinois Constitution, Park Ridge was under a duty to provide just compensation to the Plaintiffs for its taking of Plaintiffs' real and personal property .

1222. Park Ridge has proximately caused the Plaintiffs' real properties including their homes to become partial and/or totally uninhabitable by its actions and/or inactions as set forth herein resulting in invasive floodings into the Plaintiffs' real properties including homes and residences.

1223. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Park Ridge's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part

COUNT 61: PARK RIDGE: U.S. FIFTH AMENDMENT: TAKING OF REAL AND PERSONAL PROPERTY

1224. The Plaintiffs incorporate the prior averments in the Subpart entitled "Illinois Constitution Art. I, Sec. 15-Taking of Real and personal property."

1225. The Fifth Amendment of the United States Constitution prohibits the taking of private property for public use without payment of just compensation to the citizen-victim of the taking real and personal property.

1226. Park Ridge violated the U.S. Constitution's 5th Amended by its repetitive flooding, flooding some plaintiffs twice, three times and more, said repetitive floodings constituting a taking of real and personal property.

1227. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Park Ridge's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part

COUNT 62: PARK RIDGE: 42 USC SEC. 1983

1228. The Plaintiffs incorporate the preceding subparts entitled: "U.S. Fifth Amendment-Taking of Real and personal property", "U.S. Fifth Amendment-Taking of Personal Property", "Ill. Const. Art. I, Sec. 15-Taking of Real and personal property" and "Ill.Const. Art. I, Sec. 15-Taking of Personal Property."

1229. Relating to 42 Section § 1983, Park Ridge was acting under color of law in violation of these constitutional provisions, thereby violating 42 U.S.C. Sec. 1983.

1230. Park Ridge is a "person" as used in the phrase "(E)very **person** who, under color of any statute, ordinance, regulation, custom or usage..."

1231. Park Ridges' foregoing actions authorized under its enabling legislation and pursuant to a charter and/or other enabling document with the force of law is acting "color of ...statute, ordinance, regulation, custom or usage" of the State of Illinois.

1232. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Park Ridge's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous and repetitive violation of the Plaintiffs' rights not to have their properties taken for retention basins.

WHEREFORE, Plaintiffs request against Park Ridge the relief in this Complaint's "Relief" Part

COUNT 63: PARK RIDGE: EQUITABLE RELIEF PER TORT-IMMUNITY ACT

1233. Plaintiffs restate and incorporate all prior paragraphs within this Part as the first paragraphs of this Count. The Plaintiffs incorporate Part IV, Subpart AA "Irreparable Harm-Equitable Relief Legal Averments'.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

PART X. CLAIM AGAINST MAINE TOWNSHIP

A. FACTS RELEVANT TO MAINE TOWNSHIP

1234. These averments apply to Maine Township (herein "Maine").

1235. In the hours before the September 13, 2008, the Maine Township Highway Department had mobilized and/or readied trucks for sand delivery to the Robin-Dee Neighborhood in anticipation of flooding from this storm. After the rain, Maine Township actual did send trucks with sand and sandbags to the Robin-Dee Community although too late, being sent after the flooding had already occurred.

1236. On many prior occasions, Maine Township was aware of the catastrophic flooding into the Robin-Dee Community and had mobilized its trucks and other vehicles for sandbag delivery.

1237. Maine Township before, during and/or after had plans developed to improve the Robin Neighborhood Main Drain. However, these Plans were abandoned, probably because they did not increase the capacity of the Dee Neighborhood Stormwater Pipe*.

1238. **Property under TIA**: All PCSS Robin-Dee Community Segment Stormwater Improvements (including the Howard Court Culvert and Dee Neighborhood Stormwater Pipe (which was the Robin-Dee Community Main Drain) and connected stormwater structures and drains) are within the jurisdiction of Maine Township and are public improvements and properties as defined in TIA Article III, Sec. 3-101. As used herein, stormwater is "property" or "personal property" per Chapter 745, Act 10, Article III at Section 10/3-101.

1239. Maine is responsible for stormwater management within Maine as it supervises all stormwater management projects including projects to public improvements such as the PCSS's Robin Neighborhood Main Drain (for which it drew up plans but abandoned these plans) and the Dee Neighborhood Main Drain (which is the 60" Dee Neighborhood Stormwater Pipe).

1240. **Control of PCSS Components within Maine:** Maine had and has jurisdiction over the Prairie Creek Stormwater System within Maine including its real property public improvement components in Maine. By its undertaking and/or exercise of control (by statute, ordinance or other act with the force of law besides actual control) and/or other acts of dominion, Maine owned, possessed and/or controlled the PCSS's Howard Court, Dee Neighborhood Stormwater Pipe and other related real property and related estates and interests in the Prairie Creek Stormwater System stormwater improvements within Maine.

1241. **Drainage Planning and System Engineering:** This Defendant planned or caused to be planned and designed or caused to be designed the public improvements of the PCSS stormwater structures within its jurisdiction.

1242. The Stormwater Plans resulting in the existing drainage design and operation of the Robin and Dee Neighborhood Main Drains and related drainage alterations was **approved by this Defendant** before 2008.

1243. No construction changes to said structures have been planned by this Defendant since the initial Howard Court and Dee Neighborhood Stormwater Pipe construction before or in the 1960s.

COUNT 64: MAINE TOWNSHIP: NEGLIGENCE: DOMINANT ESTATE OVERBURDENING

1244. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts: IV.A., IV.C., IV.F., IV.G., IV.I. and IV.AB.

1245. Defendant knew or should have known of the foreseeable harm of invasive flooding into the Plaintiffs' Area given Earlier Floodings and Earlier Flooding Studies.

1246. Defendant knew, agreed to and undertook to receive North Development and Upstream Prairie Creek Watershed stormwater into the Robin-Dee Community Main Drain between Points C1-C2 and Point J.

1247. Based upon this actual or constructive knowledge of reasonably foreseeable flooding harm to Plaintiffs as contiguous downstream property owners and possessors, Defendant owed non-delegable duties as a owner, manager and/or party in control of the PCSS Robin-Dee Main Drain within its jurisdiction and control to properly manage stormwater under Defendant's ownership, control, supervision, and/or management so as to prevent foreseeable overburdening harm to foreseeable plaintiffs from excessive, overburdening stormwater exceeding the capacity of its PCSS stormwater main drains and basins to capture and maintain storage of excess stormwater

1248. As an owner, possessor, operator, manager and party-in-control of the PCSS stormwater structures within its jurisdiction, this Defendant was under a non-delegable duty not to increase or accelerate or the volume, flow, and other physical characteristics of stormwater from its property or otherwise overburden with stormwater the Plaintiffs' homes and properties, either with overburdening its Property Stormwater, overburdening PWC Upstream Stormwater or both.

1249. Defendant knew or should have known that the overburdening stormwater was generated by its tributary stormwater sewer Stormwater and/or PWC North Development and Upstream Stormwater and/or both combining entering the Robin-Dee Community Main Drain.

1250. Before 9-13-2008, Defendant had reasonably adequate time, opportunity and ability to take corrective measures to remedy and/or protect the Plaintiffs against the foreseeable

dangerous conditions existing on its PCSS Improvements including the Howard Court Culvert and Dee Neighborhood Stormwater Pipe posed by excess stormwater.

1251. On September 13, 2008, excess accumulated stormwater from its PCSS property including its stormwater structures from these Basins catastrophically invaded the Plaintiffs.

1252. Defendant breached its duty not to overburden downstream Plaintiffs including by the following omissions: (a) failed to plug the Robin Alley Culverts, (b) failing to erect flood protection barrier systems between Advocate North Development property and the Plaintiff's property and (c) failing to detain stormwater until it could safely drain to the Main Drain.

1253. As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

~~COUNT 65: MAINE TOWNSHIP: NEGLIGENCE BASED UPON FORESEEABLE HARM~~

~~1254. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in IV.A., IV.C. IV.G. and IV.H.~~

~~1255. Defendant owed non-delegable legal duties to the Plaintiffs to properly manage stormwater under Defendant's ownership, management, supervision and/or control so as to prevent foreseeable harm to foreseeable plaintiffs such as the Plaintiffs from excessive stormwater exceeding the capacity of the PCSSs Robin Dee Community Main Drain to safely transport without flooding into the Robin Dee Community.~~

~~1256. Before September 13, 2008, Defendant had reasonably adequate time, opportunity and ability to take corrective measures to remedy and/or protect the Plaintiffs against the foreseeable dangerous conditions existing on PCSS Stormwater Improvements such as the Robin Dee Community Main Drain posed by stormwater.~~

1257. ~~On September 13, 2008, stormwater from its Stormwater Improvements including the the Robin Dee Community Main Drain and its tributary sewers catastrophically invaded the Plaintiffs' homes~~.

1258. ~~Defendant breached its duty including but not limited to the following acts: (a) failing to pump down the Basins before the September 13, 2008 storm; (b) failing to temporarily erect flood protection barrier systems between Advocate's west property line and Plaintiffs' properties along Robin Alley and (c) failing to cause stormwater to be detained on the PCSS' North Development until the Robin Dee Community Main Drain could safely receive and convey it to the Potter Street location of the Main Drain~~.

1259. ~~As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part~~.

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part~~.

~~COUNT 68: MAINE TOWNSHIP: NEGLIGENCE: MAINTENANCE AND OPERATION~~

1260. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these Subparts being: (i) "IV.C. Common Negligent Stormwater System Maintenance Breaches based upon Foreseeable Harm Legal Averments"; and (ii) "IV.G. Common Negligent Stormwater Operational Control Breaches of Duty Based upon Foreseeable Harm Legal Averments"~~.

1261. ~~Defendant undertook and agreed to a non-delegable duty of due care towards foreseeable plaintiffs to be injured by unreasonable maintenance and operational practices relating both to the Defendant designed and constructed public improvements of the Ballard, Pavilion and Dempster Basins and other PCSS Stormwater Structures~~.

1262. ~~Defendant breached these duties including but not limited to: (a) maintaining the Robin-Dee Community Main Drain free from natural and man-made obstructions; (b) maximizing flow by proper maintenance of the Dee Neighborhood Stormwater Pipe and Robin Neighborhood Main Drain; (c) failing to pump down the Basins before the September 13, 2008 storm; (d) failing to erect temporary barriers along all Robin Alley low elevations to prevent North Development Stormwater from invading Plaintiff's properties; and (e) failing to improve the capacity of the Robin-Dee Main Drain such as constructing an additional 60" or stormwater pipe similar to the existing IDNR 2009 design~~.

1263. ~~This Defendant also owed Plaintiffs' duties under the following sources of duty~~:

1263.1. ~~Maine Township knew that the Plaintiffs were highly likely to be flooded on September 13, 2008 as Maine Township mobilized trucks and manpower to pick up and deliver sand and sand bags, before and/or during the flooding but too negligently too later to prevent the flooding~~;

1263.2. ~~This Defendant had its own Emergency Management Director and presumably program under the Federal Emergency Management Act the Stafford Act relating to home land security and its rules and regulations relating to these enactments and/or undertook this duties by agreement with the County, State and/or Federal governments including~~:

1263.2.1. ~~This Defendant was under a duty to develop an emergency flood readiness, response and prevention plan~~;

1263.2.2. ~~This Defendant was under a duty to develop an emergency flood protection readiness, response and prevention plan~~;

1263.2.3. ~~In the hours and days before this storm, This Defendant was under a duty to respond before the September 13, 2008 storm per its emergency management and/or flood protection plan including~~:

1263.2.3.1. ~~To warn Plaintiffs of the likelihood of flooding~~;

1263.2.3.2. ~~To take steps to prevent the flooding such as sandbagging between Robin Alley and the North Advocate Properties so as to create a flood containment area within the North Development concomitant with sealing the discharge culverts~~; ~~and~~

1263.2.4. ~~This Defendant was under other duties pursuant to its federal, state, and county laws, rules and regulations to act to prevent the September 13, 2008 flooding~~.

1264. ~~This Defendant breached its duties of emergency management flood preparedness and response relating to the Plaintiffs including but not limited to the following acts and omissions~~:

1264.1. ~~This Defendant failed to create, develop and adopt a emergency flood readiness, response and prevention plan~~;

1264.2. ~~In the hours and days before this storm, This Defendant failed to make any response to the foreseeable home invasive flooding in the Robin Dee Community before or during the September 13, 2008 storm per its emergency management and/or flood protection plan~~;

1264.2.1. ~~This Defendant failed to warn the Robin Dee Community Area Plaintiffs of the likelihood of catastrophic invasive flooding including failing to develop and implement a reverse 911 flood warning system~~;

1264.2.2. ~~This Defendant failed to take steps to prevent the flooding such as sandbagging between Robin Alley and the North Advocate Properties so as to create a flood containment area within the North Development concomitant with sealing the discharge culverts; specifically, This Defendant failed to (a) order sand bags from nearby sources and/or have sand bags available~~

such as having shipments of 10,000 sandbags for more sent in from 911Sandbag.Com or similar sites; (b) possessing or renting a sandbagging machine and/or truck like the Power Sandking 800 (5,000 sandbags/hour) or other available sandbag system, and (c) developing a system and/or having a system in place and/or implementing an emergency system for major, emergency sandbagging.

1265. As a proximate cause of these breaches of duties by Defendant, the stormwater was released by Defendant and escaped the PCSS Robin Dee Main Drain, invading some Plaintiff's home's overland, then, invading some Plaintiff's homes through the sanitary sewers resulting in some Plaintiffs sustaining both stormwater and sanitary sewer invasions.

1266. The Plaintiffs sustained damages set forth under in this Complaint's "Damage" Part.

WHEREFORE, Plaintiffs request against Maine the relief in this Complaint's "Relief" Part.

COUNT 66: MAINE TOWNSHIP: NEGLIGENT MAINTENANCE AND OPERATION OF PUBLIC IMPROVEMENTS

1267. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these Subparts being: (i) "IV.C. Common Negligent Stormwater System Maintenance Duties based upon Foreseeable Harm Legal Averments" and (ii) "IV.G. Common Negligent Stormwater Operational Control Breaches of Duty based upon Foreseeable Harm Legal Averments".

1268. **Foreseeable Plaintiffs:** The Plaintiffs were foreseeable plaintiffs subject to highly foreseeable harms if Defendant did not act with due care in relationship to downstream property owners such as Plaintiffs in its maintenance and operation of the its PCSS Robin Dee Community Segment including the Howard Court Culvert and the Dee Neighborhood Stormwater Pipe.

1269. ~~Defendant breached these duties on September 13, 2008 as set forth in this Part including but not limited to failing to erect temporary barriers to prevent its stormwater from invading Plaintiff's properties and failing to store PCSS stormwater~~.

1270. ~~As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part~~.

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part~~.

~~COUNT 67: MAINE TOWNSHIP: NEGLIGENT DESIGN: FORESEEABLE HARM DUTIES~~

1271. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these Subparts being entitled: "IV.I. Common Negligent Stormwater System Design Breaches of Duty Legal Averments" including Subsubparts "IV.I.A" and "IV.I.B~~."

1272. ~~This Defendant owed a specific non-delegable duty to Plaintiffs to adequately design and/or adequately redesign and reconstruct the Robin Dee Community Segment of the PCSS including enlargement of the Robin Neighborhood and Dee Neighborhood Main Drains and the Howard Court Culvert and to adequately and properly review, reject with necessary revisions, compel modification, and take other action to prevent the design flooding occurring on the North Development into the Robin Dee Community Plaintiff Class relating to Advocate Gewalt plans~~.

1273. ~~This Defendant also owed a duty to design the public improvements such as Stormwater Structures of the Prairie Creek Stormwater System including the Robin Dee Community Main Drains to prevent foreseeable invasive flooding harm to the downstream persons, homes and properties of home owners and residents serviced by this Segment of the PCSS~~.

1274. ~~Defendant breached these duties including but not limited to the breaches relating the failure to replan, redesign and reconstruct the PCSS Robin Dee Main Drain.~~

1275. ~~Based upon the 2002 Flooding and other information, Defendant was under a duty to redesign, correct and remedy defects in the Robin Dee Community Main Drain of the PCSS.~~

1276. ~~Defendant breached these duties by (i) failing to redesign and reconstruct the PCSS' Robin Dee Main Drain and (ii) failing to create a permanent barrier berm between Robin Alley and the North Development.~~.

1277. ~~As a proximate cause of these and other breaches of duties by Defendant, the Plaintiffs suffered and sustained the injuries and damages set forth under this Complaint "Damage" Part.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

COUNT 68: MAINE TOWNSHIP: NEGLIGENCE: RES IPSA LOQUITUR-STORMWATER

1278. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subparts IV.J. entitled "IV.J. Common Negligence-Res Ipsa Loquitur-Stormwater System-Breaches of Duty-Legal Averments" and Subpart IV.K. entitled "IV.K. Common Negligence-Res Ipsa Loquitur-Stormwater System-Within Jurisdiction of Maine-Breaches of Duty Legal Averments".

1279. This Defendant exclusive owned, controlled and operated the PCSS Robin-Dee Community Main Drain including the Howard Court Culvert and Dee Neighborhood Stormwater Pipe.

1280. The invasive flooding suffered by the Plaintiffs would not have ordinarily occurred but for the negligence of this Defendant relating to its negligent inspection, study, maintenance, design, engineering, and/or operation of its exclusively controlled PCSS Improvements..

1281. Maine's operation of its exclusively controlled Robin-Dee Main Drain proximately caused the flooding sustained by the Plaintiffs. The Plaintiffs did not contribute to the flooding.

1282. As a proximate cause of these breaches of duties by this Defendant, the Plaintiffs suffered and sustained the injuries and damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 69: MAINE TOWNSHIP: NEGLIGENT NUISANCE

1283. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in Part IV.O.

1284. This Defendant owned, operated, managed, maintained and/or controlled the stormwater sewers within Maine and the PCSS Robin-Dee Community Main Drain.

1285. As set out in the prior negligence Counts in this Part, this Defendant failed to reasonably design, engineer, maintain, and/or operate the PCSS Robin-Dee Main Drain.

1286. This Defendant negligently caused an accumulation of stormwater from its PCSS Robin-Dee Main Drain to invade and interfere with the Plaintiffs on 9-13-2008.

1287. By causing stormwater accumulated and controlled by this Defendant to physically invade the Plaintiffs' homes, this Defendant negligently created a dangerous nuisance of excess accumulated stormwater which substantially and unreasonably interfered with all Plaintiffs.

1288. As a proximate cause of these nuisances caused and/or created by this Defendant, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, the Plaintiffs request against Defendant the relief in the "Relief" Complaint Part.

COUNT 70: MAINE TOWNSHIP: NEGLIGENT TRESPASS

1289. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.R..

1290. Because Defendant's failed to act as set forth in this Part including but not limited to the failure to sandbag the Robin Alley in all of its low elevations between Robin Alley and Advocate's North Development and failing to reconstruct the Robin-Dee Community Main Drain and Howard Court Culvert, this Defendant failed to reasonably manage stormwater on September 13, 2008, proximately causing the Plaintiffs' invasive flooding.

1291. As a direct, immediate and foreseeable result of the foregoing acts and/or omissions of this Defendant, this Defendant caused stormwater to invade all Plaintiffs' persons and homes either through surface water and/or sanitary sewage containing stormwater.

1292. This Defendant had exclusive possession and control over the trespassing instrumentalities of the PCSS's excess accumulated stormwater from the Main Drain.

1293. The Plaintiffs were entitled to the exclusive enjoyment of their properties.

1294. This Defendant knew or should have known that its actions and/or inactions in failing to control stormwater from the Main Drain and the North Development would result in flooding.

1295. This Defendant negligently failed to monitor, investigate, study, inspect, clean, maintain, repair, improve, design, redesign, plan and/or operate its PCSS Main Drain.

1296. As a direct and proximate result of the foregoing conduct by this Defendant, its instrumentality of excess accumulated stormwater physically invaded all Plaintiffs' homes on 9-13-2008, proximately causing the Plaintiffs' Damages set forth in the Damage Part.

1297. The Plaintiffs did not consent for its excess stormwater water to physically invade and interfere with the exclusive use and occupancy of the Plaintiffs' homes and property.

1298. The Plaintiffs' injuries and damages were caused by the dangerous and calamitous occurrence of invasive stormwater floodings on 9-13-2008 from Maine's Main Drain.

1299. The excess accumulated stormwater which entered and physically invaded Plaintiffs' homes and properties interfered with Plaintiffs' interests in their homes' exclusive possession.

1300. The excess accumulated stormwater which entered, settled and physically invaded Plaintiffs' homes and property constituted a negligent trespass upon and into the Plaintiffs' homes.

1301. This Defendant is liable to the Plaintiffs for negligent trespass because this Defendant caused harm to the legally protected interests of the Plaintiffs including harm to the exclusive, quiet enjoyment of their land, homes and properties by causing instrumentalities, namely "Stormwater" to enter upon the property of the Plainitffs without their consent.

1302. As a proximate cause of this trespass caused and/or created by this Defendant, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, the Plaintiffs request against Defendant the relief in the "Relief" Complaint Part.

~~COUNT 71: MADE TOWNSHIP: GROSS NEGLIGENCE~~

1303. ~~Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.T. entitled "IV.T. Common Gross Negligence Violations-Legal Averments".~~

1304. ~~Its acts and omissions where committed under circumstances exhibiting a reckless disregard for the Plaintiffs' safety, which acts include but are not limited to its deliberate and intentional failures to act to increase, either temporarily through pumping down and temporary barriers, or permanently, with a pump station and high berms, storage or protection sandbagging to receive the September 13, 2008.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

COUNT 72: MAINE TOWNSHIP: INTENTIONAL NUISANCE

1305. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.O.

1306. Defendant owned, operated, managed, maintained and/or controlled drainage components and/or drainage structures of the Robin-Dee Main Drain which the excess accumulated stormwater nuisance invaded Plaintiffs' persons and homes.

1307. Defendant failed to reasonably design, engineer, maintain, and/or operate the PCSS's Robin-Dee Main Drain (Points C1-C2 through Point J).

1308. Defendant intentionally caused excess accumulated stormwater to invade from upstream stormwater invading and surcharging the Robin-Dee Main Drain..

1309. As a direct and proximate result of the Defendant's intentional failures to act to create a barrier of sand bags between the Dee-Robin Community and Advocate Development Property, Plaintiffs suffered damage set out in this Complaint "Damages" Part.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 73: MAINE TOWNSHIP: INTENTIONAL TRESPASS

1310. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.V.

1311. Defendant knew to a substantial legal certainty and to a high degree of certainty that its actions and/or inactions would result in invasive flooding into the Plaintiffs' homes during a rainfall like the September 13, 2008 rainfall from the Ballard Basin and the Dempster Basin.

COUNT 74: MAINE TOWNSHIP: ART. III, SEC. 3-102A STATUTORY DUTY TO MAINTAIN PROPERTY

1312. The Plaintiffs restate the preceding paragraphs.

1313. **Article III, Section 102(a)** (745 ILCS 10/3-102(a)) provides that a a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition.

1314. Stormwater invaded from Maine's defectively maintained PCSS Main Drain.

1315. Sanitary sewage invaded by Maine's defects in its sewers which allowed stormwater to invade and surcharge its sewers.

1316. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Main Drain after knowing that the design and construction was dangerous as lacking conveyance capacity.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

COUNT 75: MAINE TOWNSHIP: ARTICLE III. SEC. 103 STATUTORY DUTY TO REMEDY A DANGEROUS PLAN

1317. The Plaintiffs restate the preceding paragraphs.

1318. **LPE-Approved Plan Creating Dangerous Condition:** Article III, Section 102(a) of the Tort-Immunity Act (745 ILCS 10/3-103(a)) provides that a local public entity is liable for an approved plan, if after the execution of such plan or design, the planned improvement's use has created a condition that it is not reasonably safe.

1319. This Defendant approved all Prairie Creek Stormwater System Plans relating to Maine Township including the North Development Main Drain with the Ballard and Pavilion Basin, the Robin Neighborhood Main Drain, the Howard Court Culvert, the Dee Neighborhood Stormwater Pipe and all other PCSS public improvements including its Main Drain and tributary sewers *.

1320. By September 13, 2008, it was open and obvious that its approved Plans for the Prairie Creek Stormwater System's public improvements were dangerously defective as ongoing

flooding, including home-invasive flooding in 1987 and 2002, and other land-invasive flooding before September 13, 2008 had occurred.

1321. Pursuant to 745 ILCS 10/3-103, this Defendant owed a general duty to correct known unsafe conditions related to the design and/or engineering of the PCSS and breached these duties by not redesigning its plans.

1322. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to maintain and redesign its PCSS Robin-Dee Main Drain.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 76: MAINE TOWNSHIP: ILLINOIS CONST. ART. I, SEC. 15: TAKING REAL AND PERSONAL PROPERTY

1323. The Plaintiffs restate the preceding paragraphs.

1324. Article I, Section 15 of the Illinois Constitution prohibits the taking of private property for public use without payment of just compensation to the victims of the taking.

1325. Per Article I, Section 15 of the Illinois Constitution, this Defendant was under a duty to provide just compensation to the Plaintiffs for its taking of Plaintiffs' real and personal property.

1326. This Defendant has proximately caused the Plaintiffs' real properties including their homes to become partial and/or totally uninhabitable by its actions and/or inactions as set forth herein resulting in invasive floodings into the Plaintiffs' real properties including homes and residences.

1327. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Robin-Dee Main Drain and in failing to sand bag a barrier to North Development stormwater after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

COUNT 77: MAINE TOWNSHIP: U.S. FIFTH AMENDMENT: TAKING OF REAL AND PERSONAL PROPERTY

1328. The Plaintiffs incorporate the prior averments in the Subpart entitled "Illinois Constitution Art. I, Sec. 15-Taking of Real and personal property" and IV.

1329. The Fifth Amendment of the United States Constitution prohibits the taking of private property for public use without payment of just compensation to the citizen-victim of the taking.

1330. This Defendant violated the U.S. Constitution's 5th Amended by its conduct.

1331. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

COUNT 78: MAINE TOWNSHIP: 42 USC SEC. 1983

1332. The Plaintiffs incorporate the preceding subparts entitled: "U.S. Fifth Amendment-Taking of Real Property", "U.S. Fifth Amendment-Taking of Personal Property", "Ill. Const. Art. I, Sec. 15-Taking of Real and personal property" and "Ill.Const. Art. I, Sec. 15-Taking of Personal Property."

1333. Relating to 42 Section § 1983, this Defendant was acting under color of law in violation of these constitutional provisions, thereby violating 42 U.S.C. Sec. 1983.

1334. This Defendant is a "person" as used in the phrase "(E)very **person** who, under color of any statute, ordinance, regulation, custom or usage..."

1335. This Defendants' foregoing actions authorized under its enabling legislation and pursuant to a charter and/or other enabling document with the force of law is acting "color of ...statute, ordinance, regulation, custom or usage" of the State of Illinois.

1336. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

COUNT 79: MAINE TOWNSHIP: EQUITABLE RELIEF PER TORT-IMMUNITY ACT

1337. Plaintiffs restate and incorporate all prior paragraphs within this Part as the first paragraphs of this Count.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

PART XI. CLAIM AGAINST GLENVIEW

A. 1 OVERVIEW-GLENVIEW CAUSATION AND RESPONSIBILITY

1338. Causation: Glenview failed to prevent stormwater from invading its local municipal sanitary sewer subsystem to the District's regional system by failing to fix its sewers and failing to sandbag a stormwater barrier between Robin Alley and the North Development.

1339. Responsibility: Glenview operated the local municipal sanitary sewer system within Maine Township in which the Robin-Dee Community Plaintiffs resides.

A B. FACTS RELEVANT TO THIS DEFENDANT

1340. ~~Property under TIA: The Prairie Creek Stormwater System including the Ballard Basin, Pavilion Basin are within the jurisdiction of Park Ridge and are public improvements and properties as defined in TIA Article III, Sec. 3-101. As used herein, stormwater is "property" or "personal property" per Chapter 745, Act 10, Article III at Section 10/3-101.~~

1341. ~~Services for Sanitary Sewage Disposal: The Park Ridge Plaintiffs residences in the Park Ridge North Ballard Neighborhood were serviced by a sanitary sewage disposal sewer system owned and/or operated by Park Ridge~~.

1342. ~~**Park Ridge** owned and/or operated the local sanitary tributary municipal sewers in the Park Ridge North Ballard Neighborhood which drained to the District's sewers and interceptors~~.

1343. ~~Park Ridge and the District assumed responsibilities for sewage disposal pursuant to a contractual, quasi-contractual relationship with Plaintiffs~~.

1344. ~~Park Ridge is responsible for stormwater management within Park Ridge as it supervises all stormwater management projects including projects to public improvements such as the PCSS's Ballard Basin and Pavilion Basin~~.

1345. ~~**Control of PCSS Components within Park Ridge Jurisdiction:** Park Ridge had and has jurisdiction over the Prairie Creek Stormwater System within Park Ridge including its real property public improvement components in Park Ridge, by its undertaking and/or exercise of control (by statute, ordinance or other act with the force of law besides actual control) and/or other acts of dominion, Park Ridge owned, possessed and/or controlled the PCSS Basins and North Development Main Drain and other related real and personal property and related estates and interests in the Prairie Creek Stormwater System stormwater structures within Park Ridge~~.

1346. ~~**Drainage Planning and System Engineering:** This Defendant planned or caused to be planned and designed or caused to be designed the public improvements of the PCSS stormwater structures within its jurisdiction, namely the Ballard Basin, Pavilion Basin and North Development Main Drain and possibly the Dempster Basin if it receives Park Ridge stormwater[#]~~.

1347. ~~The Stormwater Plans for the North Development resulting in the existing drainage design and operation of the Ballard Basin, Pavilion Basin and Dempster and related drainage alterations was approved by this Defendant before 2008 and any construction changes to said structures were approved by this Defendant substantially before September 13, 2008 with construction occurring substantially before that date and time~~.

~~COUNT 80: GLENVIEW: NEGLIGENCE MAINTENANCE AND OPERATION SANITARY SEWERS~~

1348. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in Subparts IV.A., IV.D., IV.E., IV.H. and IV.AB~~.

1349. ~~Defendant undertook and agreed to a non-delegable duty of due care towards foreseeable plaintiffs to be injured by unreasonable maintenance and operational practices relating both to the Defendant designed and constructed sanitary sewers which served the Maine Township Plaintiffs~~.

1350. ~~Defendant breached these duties including but not limited to: (a) failing to prevent stormwater from invading the sanitary sewer system such as by sandbag barriers between the North Development and Robin Alley; and (b) failing to prevent inflow and infiltration by installing backflows preventers in the lateral municipal lines to prevent the sewer floodings.~~.

1351. ~~As a proximate cause of these breaches of duties by Defendant, stormwater was released and escaped into its sanitary sewers, invading some Plaintiff's homes~~.

1352. ~~The Plaintiffs sustained damages set forth under in this Complaint's "Damage" Part~~.

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part~~.

COUNT 81: GLENVIEW: NEGLIGENCE: RES IPSA LOQUITUR-SANITARY SEWERS

1353. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the -Subparts IV.H.and IV.M..

1354. This Defendant negligently maintained it sewers by failing to eliminate holes in manholes and gaps in manholes and joints of the sanitary system permitting stormwater to invade the sanitary sewer system. The Defendant was also negligent by failing to sand bag to prevent invasive North Development stormwater from invading its sanitary sewers.

1355. This Defendant negligently operated its sanitary sewers systems by failing to prevent stormwater from invading its sanitary sewer system.

1356. This Defendant exclusive owned, controlled and operated the sanitary sewers servicing Maine residents.

1357. The sewer-water basement-floor invasive flooding suffered by the Plaintiffs would not have ordinarily occurred but for the negligence of this Defendant relating to its negligent inspection, study, maintenance, design, engineering, and/or operation of its exclusively controlled sanitary sewers.

1358. Its operation of its exclusively controlled sanitary sewers proximately caused the invasive flooding sustained by the Plaintiffs. The Plaintiffs did not contribute to the flooding.

1359. As a proximate cause of these breaches of duties by this Defendant, the Plaintiffs suffered and sustained the injuries and damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 82: GLENVIEW: NEGLIGENT NUISANCE

1360. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in Part IV.P.

1361. This Defendant owned, operated, managed, maintained and/or controlled the stormwater and sanitary sewers ~~within Park Ridge and the Basins and other PCSS Stormwater Structures within its jurisdiction~~.

1362. As set out in the prior negligence Counts in this Part, this Defendant failed to reasonably design, engineer, maintain, and/or operate ~~the PCSS Basins and its other stormwater property and~~ its sanitary sewers.

1363. ~~This Defendant negligently caused an accumulation of stormwater from the Basins and its Stormwater Structures Property to invade and interfere with the Plaintiffs on 9-13-2008~~.

1364. ~~This Defendant negligently caused an accumulation of sanitary sewage to invade its residents in the Park Ridge North Ballard Neighborhood on 9-13-2008.~~

1365. ~~By causing stormwater accumulated and controlled by this Defendant to physically invade the Plaintiffs' homes, this Defendant negligently created a dangerous nuisance of excess accumulated stormwater which substantially and unreasonably interfered with all Plaintiffs~~.

1366. ~~By causing sanitary sewer water accumulated and controlled by this Defendant to physically invade the Park Ridge Plaintiffs' homes, this Defendant negligently created a dangerous nuisance of sanitary sewage which substantially and unreasonably interfered with all Plaintiffs~~=.

1367. As a proximate cause of these nuisances caused and/or created by this Defendant, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, the Plaintiffs request against Defendant the relief in the "Relief" Complaint Part.

COUNT 83: GLENVIEW: NEGLIGENT TRESPASS

1368. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.S.

1369. Because Defendant's failed to act as set forth in this Part including but not limited to the sandbagging to prevent stormwater invasions into its sanitary sewers before the storm, this Defendant failed to reasonably manage stormwater on September 13, 2008, proximately causing the Plaintiffs' invasive flooding.

1370. Because Defendant failed to fix its sanitary sewers from inflow/infiltration and to stop stormwater invasions, this Defendant caused sanitary sewage invasions into the Park Ridge Plaintiffs' homes.

1371. As a direct, immediate and foreseeable result of the foregoing acts and/or omissions of this Defendant, this Defendant caused sanitary sewer water to invade some Plaintiffs' persons and homes through sanitary sewage containing stormwater.

1372. This Defendant had exclusive possession and control over its sewers.

1373. The Plaintiffs were entitled to the exclusive enjoyment of their properties.

1374. This Defendant knew or should have known that its actions and/or inactions in failing to control stormwater from the Basins and North Development would result in invasive flooding.

1375. This Defendant negligently failed to monitor, investigate, study, inspect, clean, maintain, repair, improve, design, redesign, plan and/or operate its sanitary sewers as set forth in this Part.

1376. As a direct and proximate result of the foregoing conduct by this Defendant, excess accumulated stormwater-sanitary sewer water physically invaded some Plaintiffs' homes on 9-13-2008 through basement sewers, proximately causing the Plaintiffs' Damages set forth in the Damage Part.

1377. As a direct and proximate result of the foregoing conduct by this Defendant, its instrumentality of sanitary sewage physically invaded Plaintiffs' homes on 9-13-2008, proximately causing the Plaintiffs' Damages set forth in the Damage Part.

1378. The Plaintiffs did not consent for Glenview's sanitary sewer water to physically invade and interfere with the exclusive use and occupancy of the Plaintiffs' homes and property.

1379. The Plaintiffs' injuries and damages were caused by the dangerous and calamitous occurrence of invasive stormwater floodings on 9-13-2008 into its sanitary sewerage system.

1380. The sanitary sewer water which entered and physically invaded Plaintiffs' homes and properties interfered with Plaintiffs' interests in the exclusive possession of their homes.

1381. The excess accumulated stormwater which entered, settled and physically invaded Plaintiffs' homes and property constituted a negligent trespass upon and into the Plaintiffs' homes.

1382. The sanitary sewer water which entered, settled and physically invaded Plaintiffs' homes and property constituted a negligent trespass upon and into the Plaintiffs' homes.

1383. This Defendant is liable to the Plaintiffs for negligent trespass because this Defendant caused harm to the legally protected interests of the Plaintiffs including harm to the exclusive, quiet enjoyment of their land, homes and properties by causing instrumentalities, stormwater-santiary sewer water, to enter upon the property of the Plainitffs without their consent.

1384. As a proximate cause of this trespass caused and/or created by this Defendant, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, the Plaintiffs request against Defendant the relief in the "Relief" Complaint Part.

~~COUNT 84: GLENVIEW: GROSS NEGLIGENCE~~

~~1385. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.T.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

COUNT 85: GLENVIEW: INTENTIONAL NUISANCE

1386. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.W.

1387. As a direct and proximate result of the Defendant's intentional failures to act, Plaintiffs suffered damage set out in this Complaint "Damages" Part.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 86: GLENVIEW: INTENTIONAL TRESPASS

1388. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.Z.

1389. Defendant knew to a substantial legal certainty and to a high degree of certainty that its actions and/or inactions would result in invasive flooding into the Plaintiffs' homes during a rainfall like the September 13, 2008 rainfall from the Ballard Basin and the Dempster Basin.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 87: GLENVIEW ART. III. SEC. 3-102A STATUTORY DUTY TO MAINTAIN PROPERTY

1390. The Plaintiffs restate the preceding paragraphs.

1391. **Article III, Section 102(a)** (745 ILCS 10/3-102(a)) provides that a a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition.

1392. Sanitary sewer water invaded from Maine's defectively maintained sanitary sewers as there was no sandbagging.

1393. Sanitary sewage invaded by Maine's defects in its sewers which allowed stormwater to invade and surcharge its sewers.

1394. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its ~~PCSS~~ Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

~~COUNT 88: GLENVIEW: 70 ILCS 2605/19: SANITARY DISTRICT LIABILITY~~

1395. ~~The Plaintiffs restate the preceding paragraphs~~.

1396. ~~70 ILCS 2605/19 provides that a sanitary district is liable for sanitary sewerage backups~~.

1397. ~~The Plaintiffs' homes constituted "real estate" within the meaning of 70 ILCS 2605/19~~.

1398. ~~The Plaintiffs' homes were "within the district" within the meaning of 70 ILCS 2605/19~~.

1399. ~~Maine owned and operated tributary or lateral municipal sanitary street sewers to which the Plaintiffs' residences were connected by lead lines from their residences constituted a "channel, ditch, drain, outlet or other improvement" within the meaning of 70 ILCS 2605/19~~.

1400. ~~Maine owned and operated sanitary street sewers to which the Maine Plaintiffs' homes were connected were provided "under the provisions of this Act" as that phrase is used within the meaning of 70 ILCS 2605/19~~.

1401. ~~On September 13, 2008, sewer water overflowed the sanitary sewerage system sewers under the ownership, jurisdiction and/or control of a local public entity, said control being total, partial or joint~~.

1402. ~~The sewer water overflow was an "overflow" as that term is used in 70 ILCS 2605/19 in violation of 70 ILCS 2605/19~~.

1403. ~~The Maine Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to maintain its sanitary sewers~~.

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part~~

COUNT 89: GLENVIEW: ILLINOIS CONST. ART. I, SEC. 15: TAKING REAL AND PERSONAL PROPERTY

1404. The Plaintiffs restate the preceding paragraphs.

1405. Article I, Section 15 of the Illinois Constitution prohibits the taking of private property for public use without payment of just compensation to the victims of the taking.

1406. Per Article I, Section 15 of the Illinois Constitution, this Defendant was under a duty to provide just compensation to the Plaintiffs for its taking of Plaintiffs' real and personal property.

1407. This Defendant has proximately caused the Plaintiffs' real properties including their homes to become partial and/or totally uninhabitable by its actions and/or inactions as set forth herein resulting in invasive floodings into the Plaintiffs' real properties including homes and residences.

1408. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Robin-Dee Main Drain and in failing to sand bag a barrier to North Development stormwater after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

COUNT 90: GLENVIEW: U.S. FIFTH AMENDMENT: TAKING OF REAL AND PERSONAL PROPERTY

1409. The Plaintiffs incorporate the prior averments in the Subpart entitled "Illinois Constitution Art. I, Sec. 15-Taking of Real and personal property" and IV.

1410. The Fifth Amendment of the United States Constitution prohibits the taking of private property for public use without payment of just compensation to the citizen-victim of the taking.

1411. This Defendant violated the U.S. Constitution's 5th Amended by its conduct.

1412. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

COUNT 91: GLENVIEW: 42 USC SEC. 1983

1413. The Plaintiffs incorporate the preceding subparts entitled: "U.S. Fifth Amendment-Taking of Real Property", "U.S. Fifth Amendment-Taking of Personal Property", "Ill. Const. Art. I, Sec. 15-Taking of Real and personal property" and "Ill.Const. Art. I, Sec. 15-Taking of Personal Property."

1414. Relating to 42 Section § 1983, this Defendant was acting under color of law in violation of these constitutional provisions, thereby violating 42 U.S.C. Sec. 1983.

1415. This Defendant is a "person" as used in the phrase "(E)very **person** who, under color of any statute, ordinance, regulation, custom or usage..."

1416. This Defendants' foregoing actions authorized under its enabling legislation and pursuant to a charter and/or other enabling document with the force of law is acting "color of ...statute, ordinance, regulation, custom or usage" of the State of Illinois.

1417. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

COUNT 92: GLENVIEW TOWNSHIP: EQUITABLE RELIEF PER TORT-IMMUNITY ACT

1418. Plaintiffs restate and incorporate all prior paragraphs within this Part as the first paragraphs of this Count.

PART XII: CLAIMS AGAINST COUNTY

A. OVERVIEW OF COUNTY CONDUCT AND COUNTY RESPONSIBILITY

1419. **Causation**: **Operational Negligence:** The County failed to prevent the flooding on September 12 and 13, 2008 by (a) failing to warn Plaintiffs about the certain failure of the PCSS that would result in invasive flooding, ~~and (b) as the sole government with supervisory emergency response ability per FEMA undertakings, failing to deploy flood protection equipment such as a 10,000/hour sand bag truck/machine or similar equipment which would have created within hours a water impervious barrier between Robin Alley and Advocate's North Development and prevented the flooding when it concurrently plugged the basin culverts~~.

1419.1. **Planning Negligence:** The County also failed before **2004** to properly review and properly approve stormwater management plans including failing to properly review the 1960 RN Plan, the 1961 DN Plan, the 1976 Advocate North Development Plan and other plans relating to stormwater management for the PCSS North Development Segment and PCSS Robin-Dee Community Segment and failing to require reconstruction of the Dee Neighborhood Stormwater Pipe upon learning its dangerous defectiveness.

1420. ~~**Responsibility: Operational:** The County reserved all emergency flood prevention, emergency flood protection and and emergency flood response including all pre-emergency preparation and planning duties in relationship to the District per an understanding between the District and the County relating to emergency responsibilities and undertaking with the Federal Emergency Management Agency.~~

1420.1. **Planning:** The County had approval responsibility for stormwater management before this duty through at least the mid-1970s until these duties were assumed by the District at a point in time currently unknown to Plaintiffs*.

B. FACTS RELEVANT TO THE COUNTY

1421. ~~Based upon Federal Emergency Management Agency rules and regulations and an understanding agreement/arrangement between the District and the County, the County Sheriff retained responsibility in relationship to the District for all emergency flood preparation, emergency flood prevention and emergency flood activities relating to Maine Township flooding. Maine Township is unincorporated and under additional jurisdiction of Cook County. These duties included a duty to warn of potential flooding *; and a duty to mobilize emergency response before flooding including sandbagging*.~~

1421.1. ~~The County breached all of these duties on September 13, 2008 by failing to mobilize any flood prevention systems to prevent the flooding despite this area being at the top of or near the top of any flooding protection area given its repetitive flooding history as being the most repetitive flooding area in Cook County not on or near the banks of or near a major river Chicago River Region.~~ Plaintiffs are at least one mile east of the Des Plaines River. The Des Plaines River did not play any role in this invasive flooding.

1422. ~~**District Services for Sanitary Sewage Disposal:** The Plaintiffs residences were serviced by the District's interceptors which received sanitary sewage from either Glenview or Park Ridge's local sewage sewer system. The District which also owned and operated the interceptors which receive the sewage from local sanitary sewers such as those owned and controlled by Glenview and Park Ridge and transport it for treatment to one of the District's wastewater treatment plants~~.

1423. ~~The District is liable for the sewage backups because the District controls the interceptors and, if the local sewers cannot discharge into the District interceptors, then sewage will backup into the Plaintiffs' homes *~~.

1424. ~~Glenview, Park Ridge and/or Maine Township owned and/or operated the local sanitary tributary municipal sewers which drained to the District's sewers and interceptors~~.

1425. ~~The District receives compensation for sewage disposal pursuant to a contractual, quasi-contractual relationship with Plaintiffs~~.

1426. ~~The District receives compensation for stormwater management services pursuant to a contractual, quasi-contractual relationship with Plaintiffs~~.

1427. ~~The District is ultimately and solely responsible for stormwater management within Cook County based upon Public Act 93-1049 of the Illinois General Assembly~~.

1428. ~~The District set forth in the Cook County Water Management Plan that it was vested with powers to assure coordination between jurisdictions relating to the stormwater management~~.

1429. ~~**Control of PCSS Components within Park Ridge Jurisdiction:** As PCSS owner, manager, operator and/or person in control, the District control over the Prairie Creek Stormwater System including its real property public improvement components in Park Ridge, including the North Development Main Drain and the Basins. By its undertaking and/or exercise of control (by statute, ordinance or other act with the force of law besides actual control) and/or other acts of dominion, this Defendant owned, possessed and/or controlled the real property and related estates and interests in the Prairie Creek Stormwater System stormwater structures within Park Ridge as detailed in this Complaint~~.

1430. ~~**Control of PCSS Components within Maine Township Jurisdiction:** As PCSS owner, manager, operation and person in control, the District had jurisdiction over the Prairie Creek Stormwater System (PCSS) including its real property public improvement components in Maine Township, including the Robin Dee Main Drain, by its undertaking and/or exercise of control (by statute, ordinance or other act with the force of law besides actual control) and/or other acts~~

~~of dominion, this Defendant owned, possessed and/or controlled the real property and related estates and interests in PCSS stormwater structures in Maine Township as described earlier herein~~.

1431. **Drainage Planning and System Engineering:** This Defendant planned or caused to be planned and designed or caused to be designed the PCSS stormwater structures within its jurisdiction.

1432. The Stormwater Plans for the North Development resulting in the existing drainage design and operation of the **Ballard Basin, Pavilion Basin and Dempster Basin** and related drainage alterations was **approved by this Defendant** prior to 2008 and any changes to said Plans were approved by this Defendant substantially before September 13, 2008.

~~COUNT 93: COUNTY: NEGLIGENCE: DOMINANT ESTATE OVERBURDENING~~

1433. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subparts IV.A., IV.C., IV.F. and IV.I.~~.

1434. ~~Defendant knew or should have known of the foreseeable harm of invasive flooding into the Area given Earlier Floodings and Earlier Flooding Studies~~.

1435. ~~Defendant knew, agreed to and undertook to receive Upstream PCW stormwater~~.

1436. ~~Based upon this actual or constructive knowledge of reasonably foreseeable flooding harm to Plaintiffs as contiguous downstream property owners and possessors, Defendant owed non-delegable duties as a owner, manager and/or party in control to properly manage stormwater under Defendant's ownership, control, supervision, and/or management so as to prevent foreseeable overburdening harm to foreseeable plaintiffs from excessive, overburdening~~

~~stormwater exceeding the capacity of its PCSS stormwater main drains and basins to capture and maintain storage of excess stormwater.~~

1437. ~~As an owner, possessor, operator, manager and party in control of the PCSS stormwater structures or the PCSS stormwater structures within its jurisdiction, this Defendant was under a non-delegable duty not to increase or accelerate or the volume, flow, and other physical characteristics of stormwater from its property or otherwise overburden with stormwater the Plaintiffs' homes and properties, either with overburdening its Property Stormwater, overburdening PWC Upstream Stormwater or both.~~

1438. ~~Defendant knew or should have known that the overburdening stormwater was generated by the County's PWC Upstream Stormwater, other PCSS stormwater and/or both combining.~~

1439. ~~Before 9-13-2008, Defendant had reasonably adequate time, opportunity and ability to take corrective measures to remedy and/or protect the Plaintiffs against the foreseeable dangerous conditions existing on its PCSS Properties posed by excess stormwater.~~

1440. ~~On September 13, 2008, excess accumulated stormwater from its PCSS property including its stormwater structures catastrophically invaded the Plaintiffs.~~

1441. ~~Defendant breached its duty not to overburden downstream Plaintiffs including by the following omissions: (a) failing to pump down the Basins before the September 13, 2008 storm; (b) failing to erect flood protection barrier systems between its property and the Plaintiff's properties and (c) failing to detain stormwater until it could safely drain to the Main Drain.~~

1442. ~~As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

~~COUNT 94: COUNTY: NEGLIGENCE BASED UPON FORESEEABLE HARM~~

1443. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these Subparts being entitled: (i) "IV.C. Common Negligent Stormwater System Maintenance Breaches based upon Foreseeable Harm Legal Averments"; (ii) "IV.G. Common Negligent Stormwater Operational Control Breaches of Duty based upon Foreseeable Harm Legal Averments" and (iii) "IV.I. Common Negligent Stormwater System Design Breaches of Duty Legal Averments"~~.

1444. ~~Defendant owed non-delegable legal duties to the Plaintiffs to properly manage stormwater under Defendant's ownership, management, supervision and/or control so as to prevent foreseeable harm to foreseeable plaintiffs such as the Plaintiffs from excessive stormwater exceeding the capacity of the PCSS to capture in storage in the Basins~~.

1445. ~~Before September 13, 2008, Defendant had reasonably adequate time, opportunity and ability to take corrective measures to remedy and/or protect the Plaintiffs against the foreseeable dangerous conditions existing on PCSS Stormwater Structures Property posed by stormwater~~.

1446. ~~On September 13, 2008, stormwater from its Stormwater Structures Property including the the Ballard and Dempster Basins catastrophically invaded the Plaintiffs~~.

1447. ~~Defendant breached its duty including but not limited to the following acts: (a) failing to pump down the Basins before the September 13, 2008 storm; (b) failing to temporarily erect flood protection barrier systems between the Robin Alley and/or Robin Dee Community and the Stormwater Structures and (c) failing to detain all This Defendant Property Stormwater and PWC Upstream Stormwater until the MD Robin Dee Segment could safely receive~~.

1448. ~~As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part~~.

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

~~COUNT 95: COUNTY: NEGLIGENCE: MAINTENANCE AND OPERATION~~

1449. ~~Plaintiffs restate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the following Subparts in Part IV, these Subparts being: (i) "IV.B. Common Negligent Stormwater System Maintenance Breaches Based upon Undertaking/Assumed Contractual Duties Legal Averments"; (ii) "IV.C. Common Negligent Stormwater System Maintenance Breaches based upon Foreseeable Harm Legal Averments"; (iii) "IV.F. Common Negligent Stormwater Operational Control Breaches of Duty based upon Contractual/Assumed Duties Legal Averments"; and (iv) "IV.G. Common Negligent Stormwater Operational Control Breaches of Duty Based upon Foreseeable Harm Legal Averments"~~.

1450. ~~Defendant undertook and agreed to a non-delegable duty of due care towards foreseeable plaintiffs to be injured by unreasonable maintenance and operational practices relating both to the Defendant designed and constructed public improvements of the Ballard, Pavilion and Dempster Basins and other PCSS Stormwater Structures~~.

1451. ~~Defendant breached these duties including but not limited to: (a) it failed to pump down the Basins before the September 13, 2008 storm; (b) it failed to erect temporary barriers to prevent its stormwater from invading Plaintiff's properties; and (c) it failed to store stormwater~~.

1452. ~~As a proximate cause of these breaches of duties by Defendant, the stormwater was released by Defendant and escaped Its PCSS Stormwater Structures, invading some Plaintiff's home overland, then, invading some Plaintiff's homes through the sanitary sewers resulting in some Plaintiffs sustaining both stormwater and sanitary sewer invasions~~.

1453. ~~The Plaintiffs sustained damages set forth under in this Complaint's "Damage" Part~~.

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part~~.

~~COUNT 96: COUNTY: NEGLIGENT MAINTENANCE AND OPERATION OF THE PCSS PUBLIC IMPROVEMENT AND NEGLIGENT EMERGENCY FLOOD RESPONSE~~

1454. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in Subparts IV.B., IV.C. and IV.G~~.

1455. ~~**Foreseeable Plaintiffs:** The Plaintiffs were foreseeable plaintiffs subject to highly foreseeable harms if Defendant did not act with due care in relationship to adjacent, downstream, servient property owners such as Plaintiffs in its maintenance and operation of the Basins and other PCSS Properties.~~

1456. ~~Defendant breached these duties on September 13, 2008 including but not limited to: (a) it failed to pump down the Basins before this storm; (b) it failed to erect temporary barriers to prevent its stormwater from invading Plaintiff's properties; and (c) it failed to store stormwater~~.

1457. ~~The County also owed Plaintiffs' duties under the following sources of duty~~:

1457.1. ~~The County retained and did not delegate to the District is duties relating to emergency flood planning, emergency flood preparation and emergency flood response by letter understanding with the District~~;

1457.2. ~~The County retained and did not delegate to the District duties under the Federal Emergency Management Act the Stafford Act relating to home land security and its rules and regulations relating to these enactments including~~:

1457.2.1. ~~The County was under a duty to develop an emergency flood readiness, response and prevention plan~~;

1457.2.2. ~~The County was under a duty to develop an emergency flood protection readiness, response and prevention plan~~;

1457.2.3. ~~In the hours and days before this storm, the County was under a duty to respond before the September 13, 2008 storm per its emergency management and/or flood protection plan including~~:

1457.2.3.1. ~~To warn Plaintiffs of the likelihood of flooding~~;

1457.2.3.2. ~~To take steps to prevent the flooding such as sandbagging between Robin Alley and the North Advocate Properties so as to create a flood containment area within the North Development concomitant with sealing the discharge culverts; and~~

1457.2.4. ~~The County was under other duties pursuant to its federal, state, and county law, rules and regulations to act to prevent the September 13, 2008 flooding~~.

1458. ~~The County breached its duties of emergency management flood preparedness and response relating to the Plaintiffs including but not limited to the following acts and omissions~~:

1458.1. ~~The County failed to create, develop and adopt a emergency flood readiness, response and prevention plan~~;

1458.2. ~~In the hours and days before this storm, the County failed to make any response to the foreseeable home invasive flooding in the Robin Dee Community before or during the September 13, 2008 storm per its emergency management and/or flood protection plan~~;

1458.2.1. ~~The County failed to warn the Robin Dee Community Area Plaintiffs of the likelihood of catastrophic invasive flooding including failing to develop and implement a reverse 911 flood warning system~~;

1458.2.2. ~~The County failed to take steps to prevent the flooding such as sandbagging between Robin Alley and the North Advocate Properties so as to create a flood containment area within the North Development concomitant with sealing the discharge culverts; specifically, the County failed to (a) order sand bags from nearby sources and/or have sand bags available such~~

~~as having shipments of 10,000 sandbags for more sent in from 911Sandbag.Com or similar sites; (b) possessing or renting a sandbagging machine and/or truck like the Power Sandking 800 (5,000 sandbags/hour) or other available sandbag system, and (c) developing a system and/or having a system in place and/or implementing an emergency system for major, emergency sandbagging~~.

1459. ~~As a proximate cause of these breaches of duties by Defendant, the Plaintiffs suffered and sustained actual injuries and damages set forth under in this Complaint's "Damage" Part~~.

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part~~.

~~COUNT 97: COUNTY: NEGLIGENT DESIGN: FORESEEABLE HARM DUTIES~~

1460. ~~Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs in the Subparts IV.I. and "IV.I.A" and "IV.I.B."~~

1461. ~~This Defendant owed a specific non-delegable duty to Plaintiffs to adequately design the Ballard Basin, the Pavilion Basin and the Dempster Basin and to adequately design other Structures and to adequately and properly review, reject with necessary revisions, compel modification, and take other action to prevent the design flooding occurring on the North Development into the Robin Dee Community Plaintiff Class~~.

1462. ~~This Defendant also owed a duty to design the public improvements such as Stormwater Structures of the Prairie Creek Stormwater System including the Ballard and Pavilion Basins to prevent foreseeable invasive flooding harm to the downstream persons, homes and properties of home owners and residents serviced by this Segments of the Prairie Creek Stormwater System~~.

1463. ~~Defendant breached these duties including but not limited to the breaches relating to original designs and constructions of the Basins and other PCSS Structures, such breaches in Part III~~.

1464. ~~Based upon the 2002 Flooding and other information, Defendant was under a duty to redesign, replan, correct and remedy defects in the Basins and other PCSS Stormwater Structures~~.

1465. ~~Defendant breached these duties relating to the Ballard and Dempster Basins by (i) failing to increase the bank elevations of the Basins together with corresponding culvert discharge elevations, (ii) failing to create a permanent barrier berm between the Robin Alley and/or Robin Dee Community and the Stormwater Structures Property perimeter, and (iii) in general, failing to increase detention basin storage~~.

1466. ~~As a proximate cause of these and other breaches of duties by Defendant, the Plaintiffs suffered and sustained the injuries and damages set forth under this Complaint "Damage" Part~~.

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part~~.

COUNT 98: COUNTY: NEGLIGENCE: RES IPSA LOQUITUR-STORMWATER

1467. Plaintiffs restate and incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subparts IV.J. entitled "IV.J. Common Negligence-Res Ipsa Loquitur-Stormwater System-Breaches of Duty-Legal Averments" and Subpart IV.K. entitled "IV.K. Common Negligence-Res Ipsa Loquitur-Stormwater System-Within Jurisdiction of Park Ridge-Breaches of Duty Legal Averments".

1468. This Defendant exclusive owned, controlled and operated the Ballard and Pavilion and connected stromwater systems within its jurisdiction.

1469. The invasive flooding suffered by the Plaintiffs would not have ordinarily occurred but for the negligence of this Defendant relating to its negligent inspection, study, maintenance, design, engineering, and/or operation of its exclusively controlled Basins and other properties.

1470. Its operation of its exclusively controlled Basins proximately caused the invasive flooding sustained by the Plaintiffs. The Plaintiffs did not contribute to the flooding.

1471. As a proximate cause of these breaches of duties by this Defendant, the Plaintiffs suffered and sustained the injuries and damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 99: COUNTY: NEGLIGENT NUISANCE

1472. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in Part "IV.N. Common Negligent Stormwater Nuisance Violations-from Properties under Park Ridge's Jurisdiction-Legal Averments."

1473. This Defendant owned, operated, managed, maintained and/or controlled the Basins and other PCSS Stormwater Structures within its jurisdiction.

1474. As set out in the prior negligence Counts in this Part, this Defendant failed to reasonably design, engineer, maintain, and/or operate the Basins and its other property.

1475. This Defendant negligently caused an accumulation of stormwater from the Basins and its Stormwater Structures Property to invade and interfere with the Plaintiffs on 9-13-2008.

1476. By causing stormwater accumulated and controlled by this Defendant to physically invade the Plaintiffs' homes, this Defendant negligently created a dangerous nuisance of excess accumulated stormwater which substantially and unreasonably interfered with Plaintiffs.

1477. As a proximate cause of this nuisance caused and/or created by this Defendant, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, the Plaintiffs request against Defendant the relief in the "Relief" Complaint Part.

COUNT 100: COUNTY: NEGLIGENT TRESPASS

1478. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.Q.

1479. Because Defendant's failed to act as set forth in this Part including but not limited to the failure to discharge by pumping existing, accumulated stormwater before the storm, before the MD Robin-Dee Segment runs full and before the surcharging of the Ballard, Pavilion and Dempster Basins and Howard Court Culvert, this Defendant failed to reasonably manage stormwater on September 13, 2008, proximately causing the Plaintiffs' invasive flooding.

1480. As a direct, immediate and foreseeable result of the foregoing acts and/or omissions of this Defendant, this Defendant caused stormwater to invade the Plaintiffs' persons and homes.

1481. This Defendant is liable to the Plaintiffs for negligent trespass because this Defendant caused harm to the legally protected interests of the Plaintiffs including harm to the exclusive, quiet enjoyment of their land, homes and properties by causing an instrumentality, namely "Stormwater", to enter upon the property of the Plainitffs without their consent.

1482. As a proximate cause of this trespass caused and/or created by this Defendant, the Plaintiffs suffered damages set forth under the "Damage" Part of this Complaint.

WHEREFORE, the Plaintiffs request against Defendant the relief in the "Relief" Complaint Part.

~~COUNT 101: COUNTY: GROSS NEGLIGENCE~~

1483. ~~Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.T.~~

~~WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.~~

COUNT 102: COUNTY: INTENTIONAL NUISANCE

1484. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.U.

1485. Defendant owned, operated, managed, maintained and/or controlled drainage components and/or drainage structures including the Ballard, Pavilion and Dempster Basins from which the excess accumulated stormwater nuisance invaded Plaintiffs' persons and homes.

1486. As a direct and proximate result of the Defendant's intentional failures to act to pump down the Basins, and to increase temporary storage through temporary barrier methods such as sandbags, Plaintiffs suffered damage set out in this Complaint "Damages" Part.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 103: COUNTY: INTENTIONAL TRESPASS

1487. Plaintiffs incorporate as the first paragraphs of this Count: (a) all prior paragraphs of this Part and (b) all paragraphs set forth in the Subpart IV.U.".

1488. Defendant knew to a substantial legal certainty and to a high degree of certainty that its actions and/or inactions would result in invasive flooding into the Plaintiffs' homes during a rainfall like the September 13, 2008 rainfall from the Ballard Basin and the Dempster Basin.

1489. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's intentional conduct by intentional failing to collect the dangerous and calamitous storm occurrence of the 9-13-2008.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 106: COUNTY: ART. III, SEC. 3-102A STATUTORY DUTY TO MAINTAIN PROPERTY

1490. The Plaintiffs restate the preceding paragraphs.

1491. **Article III, Section 102(a)** (745 ILCS 10/3-102(a)) provides that a a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition. If the District, and Maine Township are not deemed the owners and operators of the Robin-Dee Community Main Drain and its components, then the County owns and operates these PCSS improvements. The Count breached its duties to main these PCSS public improvements.

1492. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 104: COUNTY: ARTICLE III, SEC. 103 DUTY TO REMEDY DANGEROUS PLAN

1493. The Plaintiffs restate the preceding paragraphs.

1494. Article III, Section 102(a) of the Tort-Immunity Act (745 ILCS 10/3-103(a)) provides that a local public entity is liable for an approved plan, if after the execution of such plan or design, the planned improvement's use has created a condition that it is not reasonably safe.

1495. Before the District assume Plan Review for stormwater management, this Defendant approved all Prairie Creek Stormwater System Plans including the Robin Neighborhood Main Drain, the Howard Court Culvert, the Dee Neighborhood Stormwater Pipe and all other public improvements to the PCSS. This Defendant approved the RN and DN Plat Plans in 1960-1961.

1496. By September 13, 2008, it was open and obvious that its approved Plans for the Prairie Creek Stormwater System's public improvements were dangerously defective as ongoing flooding in 1987 and 2002 and land-invasive flooding before 9-13-2008 had occurred.

1497. Pursuant to 745 ILCS 10/3-103, this Defendant owed a general duty to correct known unsafe conditions related to the design and/or engineering of the PCSS and breached these duties by not redesigning or compeling the redesign of its approved plans.

1498. The Plaintiffs' damages set forth in this Complaint's "Damage" Part were caused as a substantially proximate result of Defendant's conduct in failing to maintain its PCSS Properties.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 105: COUNTY: ILLINOIS CONST. ART. I, SEC. 15: TAKING REAL AND PERSONAL PROPERTY

1499. The Plaintiffs restate the preceding paragraphs.

1500. Article I, Section 15 of the Illinois Constitution prohibits the taking of private property for public use without payment of just compensation. This Defendant was under a duty to provide just compensation to the Plaintiffs for its taking of Plaintiffs' real and personal property.

1501. This Defendant has proximately caused the Plaintiffs' real properties and personal properties to become partial and/or totally uninhabitable and damaged by its conduct as set forth herein resulting in invasive floodings into the Plaintiffs' real properties including homes.

1502. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

COUNT 106: COUNTY: U.S. FIFTH AMENDMENT: TAKING OF REAL AND PERSONAL PROPERTY

1503. The Plaintiffs incorporate the prior averments in the Subpart entitled "Illinois Constitution Art. I, Sec. 15-Taking of Real and personal property."

1504. The Fifth Amendment of the United States Constitution prohibits the taking of private property for public use without payment of just compensation to the citizen-victim of the taking including real and personal property. This Defendant violated the 5th Amended by its conduct.

1505. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part

COUNT 107: COUNTY: 42 USC SEC. 1983

1506. The Plaintiffs incorporate the preceding subparts entitled: "U.S. Fifth Amendment-Taking of Real and personal property", "U.S. Fifth Amendment-Taking of Personal Property", "Ill. Const. Art. I, Sec. 15-Taking of Real and personal property" and "Ill.Const. Art. I, Sec. 15-Taking of Personal Property."

1507. The County's (a) failure to compel the redesign of the PCSS Public Improvements including the Robin-Dee Community & North Development Main Drains and Basins and (b) failure to provide emergency response to Plaintiffs' foreseeable flooding violated 42 USC §1983.

1508. The Plaintiffs' damages set forth in the "Damage" Part of this Complaint were caused as a substantially direct and proximate result of Defendant's conduct in failing to redesign its PCSS Properties after knowing that the design and construction was dangerous.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

COUNT 108: EQUITABLE RELIEF PER TORT-IMMUNITY ACT

1509. Plaintiffs restate all prior paragraphs within this Part as the first paragraphs of this Count.

WHEREFORE, Plaintiffs request against Defendant the relief in this Complaint's "Relief" Part.

PART XIII: DAMAGES

1510. This Part is referred to in other Parts as the "Damages" Parts. This Part and all following averments are incorporated into each Count of this Complaint in all Parts.

1511. As set forth in this Part, each member of the Robin-Dee Community Area Plaintiff Class including each member of the Dee Neighborhood Plaintiff Subclass within the larger Robin-Dee Community Area Plaintiff Class has suffered personal injury ("personal injury" referring herein to a person's stress, anxiety and annoyance and related emotions) and property damage.

1512. All personal injury and property damage sustained by the Robin-Dee Community Area Plaintiff Class was the result of the *sudden, dangerous and calamitous occurrence* on September 13, 2008 resulted in personal injury and property damage when flooding stormwater violently invaded each person's land, residence and other property and violently invaded each person's life and person, all such persons being members of the Robin-Dee Community Area Plaintiff Class.

1513. As a direct and proximate result of the foregoing *sudden, dangerous and calamitous occurrence* of the September 13, 2008 Invasive Floodings damaging and injuring each member of the Robin-Dee Community Area Plaintiffs' Class, Plaintiffs' persons, homes, residences, real property and personal property were invaded by stormwater and the Plaintiffs suffering the following damages set forth for purposes of description but not limitation and including, but not limited to, the following damages:

1513.1. Stress, annoyance, inconvenience and related emotional harm, past, present and future;

1513.2. Relating to inconvenience, the evacuation of Plaintiffs from their residences, including the related annoyance, stress and inconvenience and the resulting costs related to hotels and other alternative housing and living expenses;

1513.3. Relating to inconvenience, the loss of use of all or part of their home for all or part of their ownership or occupancy;

1513.4. Structural damage to the foundation and foundation walls of the homes, residences and properties;

1513.5. Damages to the interiors walls and partitions, flooring and/or ceiling including but not limited to basement floors, interior walls, interior partitions, interior drywall and/or other wall coverings, flooring, ceilings, and floor joists, in many cases requiring complete tear-out of existing finished basement and/or lower-levels;

1513.6. Significant and/or total and/or partial destruction of vehicles of Plaintiffs which vehicles were parked within the Robin-Dee Community Area including on the Plaintiffs' homes and properties;

1513.7. Significant damage and/or total destruction to some or all of the Plaintiffs' ordinary personal belongings and other personal property including but not limited to furniture, home electronics, clothing and/or other items of personal property;

1513.8. Significant damage to and/or total destruction of some or all of the Plaintiffs' sentimental personal belongings and other personal property including but not limited to photographs of loved ones, photographs of important moments in their lives, family heirlooms and other belongings having sentimental meaning to Plaintiffs;

1513.9. Significant expenditure of a substantial amounts of time, effort and money to clean their homes, residences, properties and/or vehicles due to the conditions caused by the invasive flooding into their residences, properties and/or vehicles;

1513.10. Diminution and/or total destruction in market value of their homes, residences and properties;

1513.11. Loss of use and enjoyment of their Residences, personal belongings, and property in general;

1513.12. Defendant-caused increased insurance policy and/or premium costs included relating to the repeated invasive floodings including either (a) a requirement from their mortgage company to purchase flood insurance or, if flood insurance was purchased, increased costs for flood insurance; the FEMA Flood Plain Mapping herein is directly caused by the Defendant's tortious conduct as there is no natural flood plain as required by FEMA and the existing Flood Plain Maps and related increased NFIP flooding insurance and other insurance premiums are directly related to this Defendant's tortious conduce in creating a man-mad, artificial Flood Plain contrary to law; and

1513.13. Other economic and non-economic losses, past, present and future.

PART XIV: RELIEF

1514. This Relief Part is incorporate in all the earlier Wherefore paragraphs in each County of this Complaint.

Wherefore, the proposed Representative Plaintiffs Dennis Tzakis, Cathy Ponce, Zenon Gil, Zaia Giliana, Julia Cabrales, and Juan Solis, on behalf of themselves and on behalf of all others similarly situated, request the following relief against the Defendants Berger Excavating Contractors, Inc., Advocate Health and Hospitals Corporation d/b/a Advocate Lutheran General Hospital, Cook County, Gewalt Hamilton Associates, Inc., Village of Glenview, Maine Township, Metropolitan Water Reclamation District of Greater Chicago, and the City of Park Ridge, jointly and severally:

1514.1. That this Court grant certification of this case as to the Robin-Dee Community Area Plaintiff Class as to all defendants:

1514.2. That, on behalf of the Robin-Dee Community Area Plaintiff Class, that this Court enter equitable relief against Defendants including but not limited to ordering implementation of (a) temporary pumping stations, (b) temporary barriers around perimeters of the Basins and the North Development, and (c) temporary raising of the discharge culverts until a permanent plan can be implemented.

1514.3. That this Court enter a judgment awarding compensatory damages, actual damages, and incidental damages for all damages, damages and losses sustained by the Plaintiff Classes;

1514.4. That this Court award prejudgment and post-judgment interest;

1514.5. That this Court order Defendants to pay all court costs, court expenses, and related court fees;

1514.6. That this Court award Plaintiffs such other and further equitable and legal relief as may be just and proper against the Defendants under the facts and circumstances of this case.

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INDEX OF TERMS

APPENDIX

Document 7

APPEAL TO ILLINOIS APPELLATE COURT, FIRST DISTRICT FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION

DENNIS TZAKIS, ZENON GIL, CATHY PONCE, ZAIA GILIANA, JULIA CABRALES and JUAN SOLIS, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, A Proposed Class Action,	)	
Plaintiffs,	)	
v.	)	NO. 09 CH 6159
BERGER EXCAVATING CONTRACTORS, INC. ADVOCATING HEALTH AND HOSPITALS CORPORATION d/b/a ADVOCATE LUTHERAN GENERAL HOSPITAL, COOK COUNTY, GEWALT HAMILTON ASSOCIATES, INC., VILLAGE OF GLENVIEW, MAINE TOWNSHIP, METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, and CITY OF PARK RIDGE,	)	Consolidated with 10 CH 38809 11 CH 29586 13 CH 10423 14 CH 6755
Defendants.	)	

NOTICE OF APPEAL

NOW COME the Plaintiff-Appellants, DENNIS TZAKIS, ZENON GIL, CATHY PONCE, ZAIA GILIANA, JULIA CABRALES and JUAN SOLIS, ON BEHALF OF THEMSELVES AND ALLOTHER PERSONS SIMILARLY SITUATED and, pursuant to the Order entered March 10, 2017 by the Honorable Sophia H. Hall under Supreme Court Rule 304(a), hereby appeals to the Appellate Court of Illinois, First District, pursuant to Supreme Court Rule 301 and Rule 304(a) from the Order entered by Judge Sophia H. Hall on February 1, 2017 which reinstated the Order entered April 3, 2015 granting Defendants METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, CITY OF PARK RIDGE, MAINE TOWNSHIP, COUNTY OF COOK and the VILLAGE OF NILES Motion To Dismiss Plaintiffs' Amended Fifth Amended Complaint and, thereupon, dismissed Plaintiffs' Amended Fifth Amended Complaint with prejudice as to those Defendants.

On this appeal, the Plaintiff-Appellants will pray that the foregoing Orders entered

on April 3, 2015 and February 1, 2017 in favor of the Defendants METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, CITY OF PARK RIDGE, MAINE TOWNSHIP, COUNTY OF COOK and the VILLAGE OF NILES and against the Plaintiffs be reversed with directions that the Order entered by the Court on August 18, 2016 granting Plaintiffs' Motion To Reconsider be reinstated with directions that the case be reinstated as to all said Defendants and that the Plaintiff-Appellants be granted such other or further relief as may be appropriate.

SPINA, McGUIRE & OKAL, P.C.

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APPENDIX

Document 8

No. _____

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

DENNIS TZAKIS, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, A PROPOSED CLASS ACTION, Plaintiffs/Appellants/Respondents, v. BERGER EXCAVATING CONTRACTORS, INC., ET AL., INCLUDING A PROPOSED DEFNDANTS' CLASS, (Maine Township, City of Park Ridge and Metropolitan Water Reclamation District of Greater Chicago, Defendants/Appellees/Petitioners).	Petition for Leave to Appeal from the Appellate Court of Illinois, First Appellate District, Fourth Division, No. 1-17-0859, There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, Circuit Court Case No. 09 CH 6159 Consolidated with 10 CH 38809, 11 CH 29586, 13 CH 10423, and 14 CH 6755, Hon. Sophia H. Hall, Judge Presiding.

MAINE TOWNSHIP, CITY OF PARK RIDGE, AND METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO'S PETITION FOR LEAVE TO APPEAL

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PRAYER FOR LEAVE TO APPEAL

Pursuant to Illinois Supreme Court Rule 315 (eff. July. 1, 2018), Maine Township, the City of Park Ridge ("Park Ridge"), and the Metropolitan Water Reclamation District of Greater Chicago (the "District") (collectively Maine Township, Park Ridge, and the District are referred to as the "LPEs"), respectfully petition for leave to appeal from the Illinois Appellate Court's opinion finding that *Coleman v. East Joliet Fire Protection Dist.*, 2016 IL 117952 should apply retroactively to this case where the rain event giving rise to the action occurred over seven years prior to the decision, and the claims were dismissed as to the LPEs over nine months before this Court issued the *Coleman* decision. The LPEs also request this Court review the opinion because it conflicts with the holding of in *Sorrells v. City of Macomb*, 2015 IL App (3d) 140763.

JURISDICTION

On May 30, 2019, the Illinois Appellate Court, First District, (the "First District") issued an opinion affirming in part and reversing in part the trial court's dismissal of Plaintiffs' case against the LPEs. In its opinion, the First District held that *Coleman* applied retroactively to claims arising in 2008 and found that Plaintiffs stated a takings claim. Plaintiffs filed a petition for rehearing on June 20, 2019, but that filing was rejected by the Clerk for the First District. So, no timely petition for rehearing was filed.

STATEMENT OF POINTS RELIED UPON FOR REVIEW

The LPEs seek relief from this Court because the First District failed to properly apply this Court's existing precedent regarding retroactivity, and unjustly rewarded Plaintiffs for a near decade-long delay caused by their repeated violations of Illinois pleading standards. Additionally, in holding that the Plaintiffs' Amended Fifth Amended

Complaint Amending the Complaint Only On Its Face ("A5AC") stated a claim for a taking, the First District created a conflict with the Third District's decision in *Sorrells v. City of Macomb*, 2015 IL App (3d) 140763. The resolution of this newly-created conflict is of significant importance not only to the LPEs, but also to the over 1,000 Illinois municipalities charged with the responsibility of managing stormwater and conveying and treating wastewater for the benefit of the people of the State of Illinois.

First, the LPEs respectfully request this Court grant this petition under its supervisory authority to correct the First District's improper application of *Coleman* retroactively. Although the First District correctly determined that *Coleman* overruled clear past precedent in abandoning the public duty rule, the remainder of its analysis is contrary to this Court's precedent on retroactive application of new law. This Court should grant this petition to cure that error.

Second, the First District's opinion created a conflict between it and the Third District in finding that flooding alleged to have been caused in whole or in part by a private entity could constitute an unconstitutional taking. This Court's resolution of this conflict is critically important to all Illinois municipalities charged with the responsibility of managing stormwater and conveying and treating wastewater for the benefit of their residents. If the First District's opinion is upheld, the LPEs and other municipal corporations will be forced to suffer the extraordinary expense of litigation every time a significant rain event causes water to breach private property, even if the injured property owners allege the water intrusion was due in part to private entities.

For these reasons, the LPEs respectfully request that this Court grant this Petition for Leave to Appeal.

STATEMENT OF FACTS

In 2009, the Plaintiffs, a proposed class of individuals living in or near the City of Park Ridge, Illinois, filed a Second Amended Complaint[1] against the LPEs and others for alleged overtopping of area waterways and sewer backup flooding into their homes during heavy rainfall occurring between September 12, 2008 and September 14, 2008. C 10, 3160. Over the next three years, Plaintiffs filed a Third Amended Complaint, a Fourth Amended Complaint, a Fifth Amended Complaint, and an A5AC alleging several claims against the LPEs including negligence, violations of the Illinois Local Governmental and Governmental Tort Immunity Act, and a violation of the Illinois Constitution. C 18- 19, 22, 27, 38, 55. In response to the filing of each amended complaint, one or more of the LPEs timely filed a combined motion to dismiss the respective complaints under Section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2019)), arguing, among other things, that the complaint was insufficient as a matter of law and should be dismissed under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2019)) ("Section 2-615") based upon the public duty rule. C 3161, 56-58.

The LPEs first asserted the public duty rule on March 25, 2010. C 3161. The A5AC, the operative Complaint, was filed on January 20, 2012. C 55. In February 2012, the LPEs filed motions to dismiss the A5AC raising the public duty rule as a bar to liability. C 56-58. After the trial court entertained motion practice between Plaintiffs and other defendants, the LPEs filed amended motions to dismiss updating their public duty rule arguments. C 1071-83, 1099-113, 1118-484, 1092-94, 1486-505.

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[1] Plaintiffs initiated this action on February 11, 2009. C 10, 3160. Plaintiffs filed an Amended Complaint on August 6, 2009. C 18. The LPEs were not named as defendants in the initial Complaint, and the record is unclear as to whether they were named as defendants in the Amended Complaint.

On April 3, 2015, almost five years after the LPEs initially asserted the public duty rule, the trial court granted the LPEs' motions to dismiss under Section 2-615 finding that the alleged unlawful conduct of the LPEs was a "'governmental service' subject to the Public Duty Rule," that the "Public Duty Rule applied to the allegations of the [LPES'] conduct in the A5AC," and that no special duty exception to the rule should be applied. C 1885-92. The trial court did not evaluate the other arguments raised by the LPEs in their motions to dismiss. *Id.* The LPEs sought a Supreme Court Rule 304(a) finding. C 1910-21, 2130-62. In June 2015, the trial court requested additional briefing on the applicability of its April 3, 2015 ruling on the claims against the LPEs under Article 1, § 15 of the Illinois Constitution (Ill. Const. 1970, art. I, §15) (the "Takings Clause"). C 1924-25. The parties then engaged in briefing and oral argument on this issue. C 2217, 2226-41, 2305.

On January 22, 2016, this Court in *Coleman* abolished the public duty rule. On August 18, 2016, the trial court granted Plaintiffs' Motion to Reconsider its dismissal of the LPEs in light of *Coleman.* C 2698. However, on February 1, 2017, the trial court vacated this reconsideration and reinstated its earlier dismissal of all claims against the LPEs based on the public duty rule. C 3159-63. Following *Aleckson v. Village of Round Lake Park,* 176 Ill. 2d 82, 87-88 (1997), the trial court determined that this Court's abolition of the public duty rule in *Coleman* did not apply retroactively to the circumstances in this case or to the consolidated cases.[2] C 3162-63. Specifically, the trial court considered the procedural history, extensive motion practice, the LPEs consistent

[2] This matter, 2009 CH 6159, was consolidated for all purposes with the following cases in the Circuit Court of Cook County: 10 CH 38809, 11 CH 29686, 13 CH 10423, and 14 CH 06755.

assertion of and reliance upon the public duty rule for six and a half years before its abolition, and the unjust burden to be borne by the taxpayers considering the unexpected reversal of longstanding law and the passage of time. C 3160-63. After a Rule 304(a) finding, Plaintiffs filed a Notice of Appeal on April 4, 2017. C 3203-04.

On May 30, 2019, the First District affirmed the trial court's ruling in part and reversed it in part. A 02. In its opinion, the First District evaluated the same factors as the trial court, but found that *Coleman* applied retroactively to this case because "[i]n considering the three factors there is no clear-cut answer on either side *** [T]he *Aleckson* factors do not tilt in any one direction." A 29-30. The First District affirmed the trial court's dismissal of certain counts, but concluded that Plaintiffs' claims for negligent nuisance, claim for negligent trespass, and violation of the Takings Clause "were sufficient to withstand dismissal under section 2-615", and that "most of [the LPEs'] claims of immunity under the Tort Immunity Act [did] not provide an alternate basis for dismissal of those counts under section 2-619." A 51.

Under Illinois Supreme Court Rule 315 (eff. July 1, 2018), the LPEs now petition this Court for leave to appeal the First District's opinion, finding that *Coleman* should apply retroactively to this case, as an exercise of this Court's supervisory authority, in order to address a question of general importance to the people of the State of Illinois, and to address a conflict between opinions of two appellate courts.

ARGUMENT

This Court should grant this petition because the First District improperly applied *Coleman* retroactively. *Coleman* overruled clear precedent that the LPEs had steadfastly relied upon thereby creating inequity and hardship on the LPEs. Additionally, this Court

should grant the petition in order to resolve the conflict the First District created in holding that the A5AC sufficiently alleged a violation of the Takings Clause.

I. *COLEMAN* SHOULD NOT BE APPLIED RETROACTIVELY TO THIS CASE, AND THE PUBLIC DUTY RULE BARS THE LPES FROM LIABILITY FOR PLAINTIFFS' CLAIMS.

Although decisions in civil cases are generally presumed to apply both retroactively and prospectively, this Court has long recognized the need to avoid the retroactive application of a change in law that would cause undue hardship. *Molitor v. Kaneland Comm. Unit Dist. No. 302*, 18 Ill. 2d 11, 28 (1959). To prevent inequitable results, this Court has exercised its inherent power to determine whether one of its decisions should apply retroactively or only prospectively. See *Bd. of Commissioners of Wood Dale Pub. Library Dist. v. Du Page Cty.*, 103 Ill. 2d 422, 426 (1984). This Court has held prospective application can be announced of two ways: (1) when the issuing court expressly states so in the decision, or (2) when a later court declines to give the opinion retroactive effect with respect to the parties appearing before it. *Aleckson v. Village of Round Lake Pk.*, 176 Ill. 2d 82, 86 (1997). In determining whether a decision should apply retroactively,[3] this Court considers three factors:

> "(1) whether the decision to be applied nonretroactively established a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether, given the purpose and history of the new rule, its operation

[3] Although certain decisions have suggested these factors only apply when a later court is tasked with determining retroactivity, this Court has long considered these factors whenever retroactivity is discussed. Compare *Heastie v. Roberts*, 226 Ill. 2d 515, 536 (2007) (discussing factors only with respect to later court) with *Bogseth v. Emanuel*, 166 Ill. 2d 507, 515-16 (1995) (considering same factors in determining whether decision should apply retroactively). Accordingly, this petition cites both cases in which the retroactivity analysis was done at the time the opinion was filed and cases in which the analysis was conducted by a later court.

> will be retarded or promoted by prospective application; and (3) whether substantial inequitable results would be produced if the former decision is applied retroactively." *Tosado v. Miller*, 188 Ill. 2d 186, 197 (1999) (citing *Aleckson,* 176 Ill. 2d at 92-94.).

The first of these three considerations – whether the decision established a new principle of law – has been termed a "threshold requirement." *Tosado*, 188 Ill. 2d at 197 (quoting *Aleckson*, 176 Ill. 2d at 88.). Once the threshold is met, the Court turns to the next two factors. *Elg v. Whittington*, 119 Ill. 2d 344, 357 (1987). But where a new principle of law is announced, Illinois courts generally only apply the new principle prospectively unless equity overwhelmingly requires otherwise. Compare *inter alia Elg*, 119 Ill. 2d at 358-59 (holding prospective application of new principle of law) with *Tosado*, 188 Ill. 2d at 197 (finding retroactivity appropriate because no new principle was announced). Here, equity did not overwhelmingly require retroactive application of the *Coleman* decision.

A. The Abolition of the Public Duty Rule Created a New Principle of Law Because It Overruled Clear Precedent Relied upon by the LPEs.

The First District correctly found the *Coleman* decision represented a significant change in the law. A 20-23. *Coleman* abrogated the public duty rule – a doctrine that existed for over 100 years and this Court had recognized for over 40 years. *Coleman*, 2016 IL 117952, ¶¶ 37-40 (detailing history of the rule), ¶ 61 (abolishing the rule) (opinion of Kilbride, J. joined by Burke, J.).

In fact, each *Coleman* opinion recognized the significant change in law the decision represented. The lead opinion in *Coleman* explored the history of the public duty rule at length including that the rule survived the abolition of sovereign immunity and the passage of the Tort Immunity Act. *Coleman*, 2016 IL 117952, ¶¶ 45, 52. The concurring and dissenting justices noted that the court was abandoning or abolishing the rule. *Id.* ¶ 67 ("the time has come for this Court to abandon the public duty rule and its special duty

exception") (Freeman, J., specially concurring, joined by Theis, J.) ¶ 80 ("the court abandons these well-settled principles and abolishes the public duty rule") (Thomas, J., dissenting, joined by Garman, C.J. and Karmeier, J.). Given the clear significance the members of this Court placed on the *Coleman* decision, the First District easily found that the decision created a new principle of law. A 20-23.

Critically, this new principle overturned an existing rule that the LPEs and other municipal corporations relied upon for decades. This reliance should be determinative of the retroactivity analysis because both the United States Supreme Court and this Court have emphasized reliance on the existing law when deciding whether to apply a new principle of law retroactively. *Bd. of Commissioners of Wood Dale Pub. Library Dist.*, 103 Ill. 2d at 427-28. The three-factor retroactivity analysis employed by this Court originated with the United States Supreme Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971). *Aleckson*, 176 Ill. 2d at 87–91. Later, the United States Supreme Court emphasized "judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973). Illinois decisions considering retroactivity have also focused on the degree to which parties relied on the rule that existed prior to it being overturned. See, *e.g.*, *Bd. of Commissioners of Wood Dale Pub. Library Dist.*, 103 Ill. 2d at 427-28.

A decade before *Chevron Oil* was decided, this Court also focused on the "reliance test" in deciding that its abolition of local sovereign immunity should only apply prospectively. *Molitor*, 18 Ill. 2d at 28. This Court found that local governments

relied on that immunity by failing to adequately insure themselves or to adequately investigate past accidents. *Id.* at 28-29. The Court noted that great hardship could arise because of the municipalities' reliance on the immunity it was abolishing. *Id.* at 26-27. By abolishing local sovereign immunity, the Court fundamentally altered the potential liability municipal corporations faced. So, to avoid causing local public entities from suffering "undue hardship," the Court applied its decision prospectively. *Id.* at 28-29. The same should have occurred with the (abolition) of the public duty rule.

As they had previously relied upon sovereign immunity, the LPEs and other local municipalities have been relying on the public duty rule for decades. A 21-22. As the dissent in *Coleman* noted, the public duty rule allowed local public the "flexibility to prioritize and respond to community emergencies without having their judgment questioned." *Coleman*, 2016 IL 117952, ¶ 97. This allowed and encouraged municipalities to "provide needed services for their communities where the risk of potential liability to individuals would discourage local public entities from providing those services." *Id.* ¶ 98. From the time it was first announced, municipalities relied upon the public duty rule to continue to provide services and avoid liability based on having their judgment questioned while providing those services to the community at large. See, *e.g., Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 345 (1998); *Town of Cicero v. Metropolitan Water Reclamation District of Greater Chicago*, 2012 IL App (1st) 112164, ¶ 41 n.4; *Alexander v. Consumers Illinois Water Co.*, 358 Ill. App. 3d 774 (3d Dist. 2005); *Schaffrath v. Village of Buffalo Grove*, 160 Ill. App. 3d 999, 1003 (1st Dist. 1987).

Further, the LPEs first relied on the public duty rule repeatedly in this specific case beginning in 2010 – nearly six years before *Coleman* was decided. The LPEs first raised the issued when they filed their motions to dismiss the Third Amended Complaint. C 3161. They raised it again on numerous occasions and through numerous motions. See, *e.g.,* C 209 (motions to dismiss Fourth Am. Compl.), C 56–58 (motions to dismiss the A5AC in February 2012). Finally, they raised it again in their Amended Motions to Dismiss the A5AC in August 2014, which the Court ultimately granted. Park Ridge at C 1071–83, 1099–113; District at C 1118–484; Maine Township at C 1092–94, 1486–505. The LPEs' reliance on the public duty rule was clear, substantial, and repeated. Unfortunately, the First District failed to give proper weight to the negative effect of the LPEs' decades-long reliance on the public duty rule. A 29-30. Had the LPES' reliance on the public duty rule had been given the proper weight, this Court's precedent supports not applying *Coleman* retroactively.

When Illinois courts evaluate whether a new principle of law should be applied retroactively, they normally order prospective application. See, *e.g., Bogseth v. Emanuel*, 166 Ill. 2d 507, 516-17 (1995) (prospective application of decision rejecting use of fictitious "John Doe" respondents-in-discovery); *Deichmueller Construction Co. v. Industrial Comm'n*, 151 Ill. 2d 413, 416-18 (1992) (insufficiency of appeal bond signed by attorney); *Elg,* 119 Ill. 2d at 357-60 (new interpretation of Rule 304(a)); *Sunich v. Chicago & North Western Transportation Co.*, 106 Ill. 2d 538, 545 (1985) (intrastate forum non conveniens); *Bd. of Commissioners of Wood Dale Public Library District*, 103 Ill. 2d at 431-32; *Alvis v. Ribar*, 85 Ill. 2d 1, 28 (1981) (comparative negligence); *Renslow v. Mennonite Hospital,* 67 Ill. 2d 348, 359 (1977) (liability for negligent

infliction of prenatal injuries); *Molitor*, 18 Ill. 2d at 26-29 (abolition of local sovereign immunity). In each of these cases, this Court determined that either the reversal of past precedent or the announcement of an unforeseen rule inherently causes hardship on those that relied on the prior state of the law. Here, the LPEs and other municipalities overwhelmingly relied upon the public duty rule for decades. *Coleman* represented a significant departure from an established rule. Under this Court's opinions, *Coleman* should not have been retroactively applied unless equity retroactive application strongly supported a different result. In this case, it does not. So, this Court should grant this petition to exercise its supervisory authority on this well-established rule of application.

B. The Remaining *Aleckson* Factors Do Not Support Retroactive Application of *Coleman*.

After determining that a decision announced a new principle of law, the remaining factors to be assessed when determining to apply that new rule retroactively are: (1) whether operation of the new rule will be retarded or promoted by prospective application given its purpose and history; and (2) whether retroactive application would be inequitable. *Bd. of Commrs. of Wood Dale Pub. Library Dist.*, 103 Ill. 2d at 430. In this case, neither the second nor third factors support retroactive application.

First, prospective application would not hinder the purpose of the *Coleman* decision. As the First District recognized, given the differences in the lead and concurring Opinions, "it is difficult to glean any overarching 'purpose and history of the new rule.' " A 23. It further noted that a prospective application would not hinder any purpose. A 26. Even so, the Court determined that this factor did not support a non-retroactive application because it could lead to confusion on future application of the rule based on the Second District's decision in *Salvi v. Village of Lake Zurich*, 2016 IL App (2d)

150249. *Id.* The First District's concern about creating a conflict is illusory. The *Salvi* decision did not undertake retroactivity analysis at all. A 25-26. It simply noted that the public duty rule had been abolished and continued with its analysis of the Tort Immunity Act. *Salvi*, 2016 IL App (2d) 150249, ¶ 37. It is not clear that retroactivity was even raised in *Salvi*. A 26 ("we have no way of knowing what arguments were raised"). So, here, applying *Coleman* only prospectively does not create a conflict with silence of the *Salvi* court. There is no concern regarding "an increase in uncertainty." *Id.* Accordingly, because the purpose and history of the public duty rule's abolition would not be furthered by a retroactivity, the second *Aleckson* factor supports a prospective only application.

Finally, the equities clearly support a non-retroactive application in this case. The First District understood that retroactive application would create a hardship for the LPEs: "[c]ertainly, if *Coleman* is applied to their case, [LPEs] will undergo significant hardship." A 27. The Court went on to state that for the entirety of the case, the LPEs were "operating in a legal universe that included the availability of the public duty rule and governed their actions accordingly." A 28. This is exactly the scenario in which this Court has cautioned against retroactive application of a new rule. See, *e.g.*, *Bd. of Commrs. of Wood Dale Pub. Library Dist.*, 103 Ill. 2d at 427-28; *Molitor*, 18 Ill. 2d at 28. The inequity in this case is even more apparent because if not for the Plaintiffs' failures, the issue would have been decided years prior to this Court's ruling in *Coleman*.

As noted above, this case had a lengthy history at the trial court. The litigation was pending before the trial court for nearly a decade and had not advanced beyond the pleadings. Plaintiffs repeatedly filed complaints that failed to comply with the Illinois Code of Civil Procedure, and then filed amended complaints to cure these technical

defects (amendments that ultimately resulted in the pleading being reduced from 650 pages to 299 pages). C 202, 234. Nine months elapsed from the filing of the Fifth Amended Complaint on April 18, 2011 to the filing of the A5AC on January 20, 2012, and all Plaintiffs did was strike through claims and allegations that had already been stricken, dismissed, or withdrawn. C 38, 55. Due to the Plaintiffs' failure to file a competent pleading and delays in the trial court's rulings on other parties' motions, the LPEs' Section 2-615 motions to dismiss were not adjudicated until April 3, 2015—five years after the public duty rule was initially asserted by the LPEs. Importantly, resolution of the Plaintiffs' claims against LPEs would not terminate this litigation. The Plaintiffs' claims against certain private entities continue. Accordingly, the third retroactivity factor tilts heavily in favor of a prospective application of *Coleman*.

Considering all of these points, the Court should grant this petition, exercising its supervisory authority, to evaluate the First District's retroactive application of *Coleman's* abolition of the public duty rule.

C. When The Public Duty Rule Is Applied to this Case, Respondents' Claims Against LPES Are Barred.

The public duty rule precluded the LPEs from being found liable in this case because the A5AC did not contain any factual allegations showing that the LPEs owed Plaintiffs an individual duty. Under the public duty rule, as it existed prior to *Coleman* – and as should be applied to this case – a municipality could not be held liable for its failure to provide adequate governmental services. *Harinek,* 181 Ill. 2d at 345. The rationale underlying the rule was that the duty of a municipality to provide governmental services to the public at large takes precedence over any duty owed to a particular plaintiff. *Id.*

As the First District correctly noted, the public duty rule had long protected the LPEs and other municipal defendants from flooding claims. See A 21-22 (citing two reported First District decisions, unreported First District decisions, and six trial court rulings that had so held). For example, in *Town of Cicero*, 2012 IL App (1st) 112164, the First District noted "the 'public duty rule' would appear to bar" any tort claims for flooding from June and July 2010 heavy rain events. *Id.* ¶ 41 n.4.

Similarly, in *Alexander*, 358 Ill. App. 3d 774, the Third District held that, under the public duty rule, a municipality had no duty to individual plaintiffs to require that sewer lines be maintained to prevent the backup of sewage into the plaintiffs' homes. *Id.* at 779. There, the plaintiffs alleged that the Village of University Park should have mandated homeowners to keep their sewage lines cleared and maintained. By failing to issue such a mandate, even though it could have, the plaintiffs accused University Park of breaching a duty to the homeowners whose houses suffered sewage backup due to clogged lines. *Id.* at 777–78. The Court found that the public duty rule barred any liability against University Park for failing to prevent the sewer backups. *Id.* at 779.[4]

Here, Plaintiffs claim that the LPEs failed to manage and control stormwater, to maintain improvements, and to provide flood prevention and relief services. *E.g.* A5AC ¶ 1247, ¶ 1285, ¶ 1290, ¶ 1315, ¶ 1321 and ¶ 1326. These claims are based solely on the performance of ordinary government functions. Just as the District was not liable because of the public duty rule in *Town of Cicero* for failing to "implement and activate

[4] As the First District referenced, a number of unreported cases also applied the public duty rule to bar claims arising from flood water or sewer management. *E.g. River City Facilities Management Co. v. Metropolitan Water Reclamation District of Grater Chicago*, 2012 IL App (1st) 120464-U, ¶¶ 25, 30, and *Arezina v. City of Elmhurst*, 2013 IL App (2d) 120572-U, ¶ 24.

procedures of handling excess stormwater before backup flooding occurred," the LPEs had no duty to implement and activate procedures for handling excess stormwater, including designing an adequate drainage system or providing sandbagging. *Town of Cicero*, 2012 IL App (1st) 112164, ¶¶ 39-41 n.4. Further, the LPEs did not have a duty to any individual to maintain or clear stormwater sewers during or before a rainfall, whether the LPEs ordinarily operate and maintain the sewers or not. *Alexander*, 358 Ill. App. 3d at 779.

II. THE FIRST DISTRICT CREATED A CONFLICT WITH THE THIRD DISTRICT BY INCORRECTLY FINDING THAT PLAINTIFFS STATED A TAKINGS CLAIM.

The First District also created a conflict with the Third District's opinion in *Sorrells,* 2015 IL App (3d) 140763, when it incorrectly found Plaintiffs' A5AC sufficiently alleged a violation of the Takings Clause. In doing so, the First District ignored clear precedent regarding the allegations necessary to state a takings claim. This Court should grant this Petition to resolve the current split between the First and Third Districts.

A. The First District Should Have Found That A Takings Claim Cannot Survive If A Private Entity Is Even Partially At Fault.

To state a takings claim, a plaintiff must allege among other elements that the taking was either an intentional or foreseeable result of an authorized government action. *Hampton v. Metropolitan Water Reclamation Dist. Of Greater Chicago*, 2016 IL 119861, ¶25 (citing *Arkansas Game and Fish Comm. v. U.S.*, 568 U.S. 23, 38-39 (2012)). The complaint must allege "the invasion is 'direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.'" *Ridge Line, Inc. v. U.S.*, 346 F.3d 1346, 1355 (Fed. Cir. 2003) (quoting *Columbia Basin*

Orchard v. U.S., 132 Ct. C. 445, 132 F. Supp. 707, 709 (1955)). So, in order to state a takings claim, Plaintiffs were required to allege their property was taken due to the direct, natural, or probable result of the LPEs' direct actions as opposed to the actions of a private entity.

Importantly, government inaction or failure to act cannot sustain a takings claim. *St. Bernard Par. Gov't v. U.S.*, 887 F.3d 1354, 1361 (Fed. Cir. 2018), *cert. denied,* 139 S.Ct. 796 (2019) (citing *U.S. v. Sponenbarger*, 308 U.S. 256 (1939)). The complaint must contain allegations as to what would have happened absent the specific government action. *St. Bernard Par. Gov't*, 887 F.3d at 1362. The takings claims in the A5AC do not contain those necessary factual allegations and would be properly dismissed on that basis as well. Despite these failures, the First District found that the A5AC stated a claim for violation of the Takings Clause because "plaintiffs allege much more hands-on involvement and ongoing responsibility from" the LPEs. A 43. This holding was erroneous, and it created direct conflict a prior decision from the Third District.

In *Sorrells*, the Third District required that a property owner prove the alleged taking was solely the intended or foreseeable result of government actions. *Sorrells*, 2015 IL App (3d) 140763, ¶¶ 31-32. In that case, the plaintiffs were homeowners whose property was flooded when a private company developed the adjacent property into a subdivision and then dedicated the subdivision streets to the City of Macomb. *Id.* ¶ 1. After the streets were dedicated, plaintiffs filed a claim against the City of Macomb for inverse condemnation. *Id.* ¶ 18. Plaintiffs alleged that water from the development, including from the streets, was channeled and directed by the streets to unreasonably discharge from two stormwater detention basins onto their land. *Id.* ¶ 17. As a result,

plaintiffs alleged that the City of Macomb discharged surface water from the streets and other locations onto their land that "would not normally flow upon plaintiffs' lands." *Id.* ¶ 18 (Internal quotation marks omitted.). The homeowners appealed after the trial court dismissed the claim against Macomb pursuant to Section 2-615 and granted Rule 304(a) language (since the developer remained as a defendant). *Id.* ¶ 19. The Third District found the takings claim failed to state a cause of action because the homeowners had alleged "the private development as a whole caused the alleged unreasonable amount of surface water to drain onto their land from the detention and drainage basins." *Id.* ¶ 30. As such, "the flooding as alleged in this case was induced by the private developers, not government action" *Id.* ¶ 31.

The Third District also noted that the plaintiffs' complaint failed to allege that the water intrusion on their land "was the intended or foreseeable result, in whole or in part, of the City's actions rather than that of the development." *Id.* ¶ 32. It sustained the dismissal in part because "condemnation cases traditionally arise from government action alone; not from multiple causes that would include actions of private actors, as in this case where the water was from the whole development flowing into detention basins." *Id.* ¶ 33. The allegations contained in the A5AC fare no better.

In this case, as in *Sorrells*, Plaintiffs allege that the flooding was induced, at least in part, by private development. Compare C 1135-281 with *Sorrells*, 2015 IL App (3d) 140763, ¶ 31. Plaintiffs allege that Advocate developed the property over the course of a few decades, changed the natural drainage patterns, and built insufficient detention basins. C 1164-70. The Plaintiffs allege that the flooding initiated from those privately held detention basins and then overwhelmed the entire system. This is nearly identical to

the type of claim the *Sorrells* court rejected because the flooding is caused, at least in part, by private actors. *Sorells,* 2015 IL App (3d) 140763, ¶ 32. In fact, despite the First District's holding to the contrary, the allegations in this case are weaker than those rejected in *Sorrells* because Plaintiffs have failed to allege that the LPEs "owned" the entire system.

Importantly, Plaintiffs' Takings Claims also fail because they do not contain sufficient allegations to show the flooding was the intended or foreseeable result, in whole or in part, of any particular LPE's actions. This failure should also have been fatal to the takings claims. *Id.* Instead, the First District found that the alleged history of flooding indicates the LPEs "knew of the increased risk of flooding." A 43. A general knowledge that an area has flooded in the past does not indicate that the flooding is a direct or intended result of a particular government action. As the *Sorrells* court noted, more specific factual allegations are needed to tie a specific government action to the alleged injury. A flooding cannot constitute a taking by a government if other entities (whether private or public) contribute to the flooding. *Cf. St. Bernard Par. Gov't*, 887 F.3d at 1362 (holding causation for a taking claim require proof of what would have occurred absent government action). Each of the LPEs could not have individually effected a taking violation from overflows in their own jurisdiction if other LPEs are also alleged to own and control the system, and to have approved allegedly "defective" plans. The First District should have held that Plaintiffs' allegations were insufficient to state a takings claim and concurred with this Court's ruling in *Hampton,* 2016 IL 119861 and the Third District's holding in *Sorrells,* 2015 IL App (3d) 140763. Because it failed to do

so, this Court should grant this petition to evaluate this conflict between opinions of the First and Third Districts.

CONCLUSION

For all of the foregoing reasons, the LPEs respectfully request that this Court grant this petition, and review the First District's opinion involving questions of general importance to all Illinois municipal corporations charged with the responsibility of collecting and treating wastewater for the benefit of the people of the State of Illinois.

WHEREFORE, LPEs, Maine Township, City of Park Ridge, and the Metropolitan Water Reclamation District of Greater Chicago pray that under Illinois Supreme Court Rule 315 (eff. July 1, 2018), this Court grant this petition, reverse the Illinois Appellate Court's decision that this Court's holding in *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952 should be applied retroactively and affirm the decision of the Circuit Court of Cook County dismissing Plaintiffs' claims against the LPEs. In addition, LPEs pray that this Court reverse the Illinois Appellate Court's holding that the Amended Fifth Amended Complaint Amending the Complaint Only on Its Face only properly stated a claim for a taking under the Illinois Constitution. Further,

the LPEs pray for such other relief in this matter as this Court deems just and appropriate.

Respectfully Submitted,

Dated: July 3, 2019

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SUPREME COURT RULE 341(c)
CERTIFICATE OF COMPLIANCE

I, Susan T. Morakalis, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

Dated: July 3, 2019

By: /s/ Susan T. Morakalis
Susan T. Morakalis

Attorney for Defendant/Appellee/Petitioner,
Metropolitan Water Reclamation District of Greater Chicago

CERTIFICATE OF SERVICE

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, and that she is one of the attorneys for Defendant/Appellee/Petitioner Metropolitan Water Reclamation District of Greater Chicago and that she electronically filed on July 3, 2019 Maine Township, City of Park Ridge and Metropolitan Water Reclamation District of Greater Chicago's Petition for Leave to Appeal with the Clerk of the Illinois Supreme Court and will send copies of said filing to the following attorney(s) of record:

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By: /s/ Susan T. Morakalis
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APPENDIX

Lawyer

2019 IL App (1st) 170859

No. 1-17-0859

Fourth Division
May 30, 2019

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DENNIS TZAKIS, ZENON GIL, CATHY PONCE, ZAIA GILIANA, JULIA CABRALES, and JUAN SOLIS, on Behalf of Themselves and All Other Persons Similarly Situated, a Proposed Class Action, Plaintiffs-Appellants, v. BERGER EXCAVATING CONTRACTORS, INC.; ADVOCATE HEALTH AND HOSPITALS CORPORATION d/b/a Advocate Lutheran General Hospital; COOK COUNTY; GEWALT HAMILTON ASSOCIATES, INC.; THE VILLAGE OF GLENVIEW; MAINE TOWNSHIP; THE METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO; THE VILLAGE OF NILES; and THE CITY OF PARK RIDGE, Defendants (The Metropolitan Water Reclamation District of Greater Chicago, The City of Park Ridge, and Maine Township, Defendants-Appellees).	Appeal from the Circuit Court of Cook County. Nos. 2009 CH 6159 10 CH 38809 11 CH 29586 13 CH 10423 14 CH 6755 (cons.) The Honorable Sophia H. Hall, Judge Presiding.

JUSTICE GORDON delivered the judgment of the court, with opinion.
Presiding Justice McBride and Justice Reyes concurred in the judgment and opinion.

OPINION

¶ 1 The instant appeal arises from a lawsuit filed by plaintiffs concerning property damage to their homes resulting from storm water flooding. Plaintiffs, who reside in Maine Township,

allege that defendant, Advocate Health and Hospitals Corporation (Advocate), which operates a hospital adjacent to plaintiffs' neighborhood, constructed its hospital in such a way that the hospital's storm water drainage system discharged onto plaintiffs' properties and caused flooding. Plaintiffs further allege that the local public entities, namely, the Village of Glenview (Glenview), Maine Township, the Metropolitan Water Reclamation District of Greater Chicago (District), the Village of Niles (Niles), and the City of Park Ridge (Park Ridge),[1] breached a variety of duties owed to the homeowners with respect to the drainage system. The defendants participating in the instant appeal—Park Ridge, the District, and Maine Township—sought dismissal of the complaint on the basis of the public duty rule, claiming that they did not owe a duty to any individual plaintiff but only to the community at large. In 2015, the trial court dismissed the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615.(West 2014)), finding that the public duty rule applied. However, in 2016, the Illinois Supreme Court abolished the public duty rule in *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, and the trial court granted plaintiffs' motion to reconsider. Six months later, however, the trial court vacated its order and reinstated the dismissal. Plaintiffs now appeal, arguing that the supreme court's decision should be applied retroactively and the public duty rule is not available to defendants, and further arguing that no other basis existed for dismissing their complaint. For the reasons that follow, we affirm in part and reverse in part.

[1]Cook County was also named as a defendant, but plaintiffs voluntarily dismissed the counts aimed at the county without prejudice on April 25, 2013. Glenview was voluntarily dismissed from the case with prejudice on December 12, 2014. Niles is not a party to the instant appeal, but the trial court's dismissal expressly encompassed Niles, as well.

¶ 2 BACKGROUND

¶ 3 We considered the complaint with respect to defendant Advocate in *Tzakis v. Advocate Health & Hospitals Corp.*, 2015 IL App (1st) 142285-U. As it is the same complaint at issue in both appeals—plaintiffs' "amended fifth amended complaint"—we incorporate our prior description of the allegations where applicable in the instant appeal.

¶ 4 Plaintiffs filed their amended fifth amended complaint on January 20, 2012. According to the complaint, Park Ridge, Cook County, Maine Township, and the District, "among other local public entities," in coordination with private partners, developed the Prairie Creek Stormwater System, which was a manmade storm water system of drains, retention basins, and storm water sewers, and the local public entities controlled the development of the system beginning with the original 1960 plat approvals. The Prairie Creek Stormwater System received most of the storm water runoff within the Prairie Creek Watershed, a watershed of over one mile, extending upstream from plaintiffs' homes. Advocate acquired a parcel of real property adjacent to plaintiffs' neighborhood some time prior to 1976, which was also located within the watershed; as one of the parties admitted in oral argument, the property was on a flood plain. In 1976, Advocate submitted a development plan to Park Ridge that proposed modifications to Advocate's drainage system. Park Ridge approved the plans and they were subsequently implemented. In October 1976, the Illinois Department of Transportation issued a report stating that "a large portion of the subdivision set out in [Advocate's development plan]," including plaintiffs' neighborhood, "was and is subject to flood risks."

¶ 5 According to the complaint, in 1987, plaintiffs' neighborhood sustained catastrophic flooding, in response to which Park Ridge, Maine Township, and Glenview, "along with

other entities," hired Harza Engineering Services (Harza) to investigate the flooding. In 1990, Harza issued a report that identified design and maintenance defects in Advocate's drainage system, including the portions adjacent to plaintiffs' properties. The report indicated that these defects impaired the system's drainage capacity to a level "substantially below any reasonably safe standard." Plaintiffs allege that Harza's report placed Park Ridge, Maine Township, and Glenview and "possibly other [defendants]" on actual or constructive knowledge of the flood risk to plaintiffs' homes.

¶ 6 The complaint alleges that sometime after 1987 but before 2002, Advocate hired Gewalt Hamilton Associates, Inc. (Gewalt), an engineering firm, to draft and implement a development plan for the hospital property that included modifications to the drainage system and topography that altered the property's "natural drainage areas." In August 2002, a rainstorm caused storm water to accumulate within the hospital's drainage system. Plaintiffs allege that an "undersized" discharge component caused water to build up and "catastrophically overflow" the drainage system, again flooding plaintiffs' homes.

¶ 7 The complaint alleges that in 2002 or 2003, the Illinois Department of Natural Resources conducted a study in response to the 2002 flooding in conjunction with local municipal authorities, including Park Ridge, Maine Township, and Glenview. The study found "numerous bottlenecks and obstructions to flow as the causes of the invasive flooding." The study also detailed potential remedies, including specific improvements to Advocate's drainage system. After 2002 but before September 13, 2008, Advocate and Gewalt developed plans to modify the hospital property's drainage system, including components identified as problematic in the 2002 study. However, plaintiffs allege that, on information and belief, Advocate's plan did not include modifications to three undersized components of the

drainage system, despite Advocate's knowledge of the flood risk these components posed to plaintiffs. On September 13, 2008, storm water overwhelmed the hospital's drainage system and caused the flooding in plaintiffs' homes and property, leading to the instant lawsuit.[2]

¶ 8 With respect to the District, the complaint alleged that the District was the regional local public entity charged with multijurisdiction operation of storm water management and "owns and/or controls all drains, basins, structures, components and other stormwater improvements" within the Prairie Creek Stormwater System. The complaint further alleged that the District owned and operated the interceptors that received sewage from local sanitary sewers owned and controlled by Glenview and Park Ridge and transported it for treatment to one of the District's wastewater treatment plants. With respect to Park Ridge, the complaint alleged that Park Ridge had the most actual knowledge of Advocate flooding and was in the best position to make changes to Advocate's plans for its drainage system but failed to demand that Advocate make the necessary changes. The complaint further alleged that Park Ridge did not advise the District of the flooding problems and that Park Ridge deployed its police and/or department of public safety to the area during instances of flooding. With respect to Maine Township, the complaint alleged that the Maine Township Highway Department had mobilized and readied trucks for sand delivery to plaintiffs' neighborhood in anticipation of the September 13, 2008, flooding and had provided sandbags "[o]n many prior occasions" when there had been catastrophic flooding. The complaint further alleged that Maine Township was responsible for storm water management within its jurisdiction and supervised all storm water management projects and that, through its exercise of control,

[2]While the lawsuit at issue in the instant appeal is limited to the September 13, 2008, flooding, four other lawsuits were filed after subsequent flooding events; these four lawsuits were consolidated for all purposes with the instant lawsuit, and the trial court's dismissal expressly applied to all of the lawsuits.

Maine Township "owned possessed and/or controlled" the portions of the Prairie Creek Stormwater System within its jurisdiction.

¶ 9 The complaint alleged similar causes of action against all three defendants.[3] Counts XXV (against the District), XLV (against Park Ridge), and LXIV (against Maine Township) were for "negligence: dominant estate overburdening stormwater" and alleged that defendants knew or should have known of the foreseeable harm of invasive flooding into plaintiffs' neighborhood given the history of flooding, and that defendants owed nondelegable duties to properly manage the storm water so as to prevent harm to plaintiffs from excess storm water overburdening the drainage system. Counts XXXI (against the District), LII (against Park Ridge), and LXIX (against Maine Township) were for "negligent nuisance" and alleged that defendants negligently caused an accumulation of water from the drainage system to invade and interfere with plaintiffs' property. Counts XXXII (against the District), LIII (against Park Ridge), and LXX (against Maine Township) were for "negligent trespass" and alleged that, due to defendants' failure to properly manage the storm water systems, water invaded plaintiffs' property. Counts XXXVI (against the District), LVII (against Park Ridge), and LXXIV (against Maine Township) were for "statutory duty to maintain property" and alleged that section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-102(a) (West 2012)) set forth a duty for a local public entity to exercise ordinary care to maintain its property in a reasonably safe condition, which defendants did not do. Counts XXXVII (against the District), LVIII (against Park Ridge), and LXXV (against Maine Township) were for "duty to remedy dangerous plan" and alleged that section 3-103 of the Tort Immunity Act (745 ILCS 10/3-103 (West

[3]The complaint also contained a number of additional counts against defendants, but plaintiffs voluntarily dismissed several of them and, in response to defendants' motions to dismiss, indicated that they would be "proceeding only upon" the counts we discuss herein.

2012)) set forth a duty for a local public entity to correct known unsafe conditions related to the design and/or engineering of an approved plan, which defendants did not do. Counts XXXIX (against the District), LX (against Park Ridge), and LXXVI (against Maine Township) were for "taking real and personal property" and were based on article I, section 15, of the Illinois Constitution (Ill. Const. 1970, art. I, § 15), which prohibited the taking of private property for public use without the payment of just compensation.

¶ 10 On August 15, 2014, Park Ridge, the District, and Maine Township each filed motions to dismiss plaintiffs' amended fifth amended complaint.[4] Each of the motions to dismiss claimed that the complaint should be dismissed under section 2-615 of the Code because plaintiffs' claims were barred under the public duty rule and plaintiffs had failed to allege the existence of any duties owed to them. Each of the motions to dismiss further claimed that the complaint should be dismissed under section 2-619 of the Code because defendants were immune from liability pursuant to several sections of the Tort Immunity Act.

¶ 11 On April 3, 2015, the trial court granted defendants' motion to dismiss pursuant to section 2-615 based on the public duty rule. The court found that the public duty rule applied to all of defendants' alleged conduct, and that no special duty exception applied. Accordingly, the court found that plaintiffs had not alleged sufficient facts to infer the existence of an actionable duty on the part of defendants and granted the motions to dismiss.

¶ 12 On May 4, 2015, defendants filed a motion for a finding that there was no just reason to delay enforcement or appeal from the trial court's April 3, 2015, order. In response, plaintiffs

[4]The District and Maine Township each filed a combined motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)), while Park Ridge filed two separate motions to dismiss, one based on section 2-615 (735 ILCS 5/2-615 (West 2012)) and one based on section 2-619 (735 ILCS 5/2-619 (West 2012)).

claimed that the trial court's order did not encompass its counts concerning the takings clause, and the parties engaged in briefing and oral argument on the issue.

¶ 13 On January 22, 2016, the Illinois Supreme Court issued a decision in *Coleman*, 2016 IL 117952, in which it abolished the public duty rule. On February 8, 2016, plaintiffs filed a motion for reconsideration of the dismissal of the complaint based on *Coleman*. Plaintiffs claimed that, as an interlocutory order, the trial court was permitted to review, modify, or vacate such an order at any time. In response, defendants argued that the new law established in *Coleman* should not be applied retroactively.

¶ 14 On August 18, 2016, the trial court granted plaintiffs' motion for reconsideration and vacated its April 3, 2015, order. Defendants filed a motion requesting that the trial court certify the issue for interlocutory appeal. On February 1, 2017, in its order on that motion, the trial court "on its own motion, reconsider[ed] its order of August 18, 2016." The court noted that, in their briefing on the issue of certification, defendants included arguments that had not been presented in the briefing on plaintiffs' motion to reconsider and found that "[t]hose additional arguments have persuaded this Court to vacate paragraph 1 of the August 18, 2016 order and reinstate its decision of April 3, 2015 dismissing [defendants]." The court found that the new law set forth in *Coleman* should not be retroactively applied to the instant case. The court noted that defendants had been raising the public duty rule since their initial motion to dismiss in 2010 and continued to raise the issue in subsequent motions to dismiss and found that retroactive application of the law would involve substantially more litigation preparation than could have been predicted. The court found that "[t]his is a hardship on the [defendants] and their taxpayers considering the unpredictable and unexpected reversal of longstanding law, the complexity of the case, and the passage of time."

¶ 15 On February 14, 2017, defendants filed a motion for a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that there was no just reason for delaying enforcement or appeal of the February 1, 2017, order reinstating the dismissal of plaintiffs' complaint with respect to defendants; this motion was granted on March 10, 2017. Plaintiffs filed a notice of appeal on April 4, 2017, and this appeal follows.

¶ 16 ANALYSIS

¶ 17 On appeal, plaintiffs claim that the trial court erred in finding that *Coleman* should not apply retroactively to their claims. Additionally, plaintiffs claim that, in the absence of the public duty rule, there was no alternate basis for dismissing their complaint.

¶ 18 I. Standard of Review

¶ 19 The trial court's dismissal of plaintiffs' complaint was based on section 2-615 of the Code. A motion to dismiss under section 2-615 of the Code challenges the legal sufficiency of the complaint by alleging defects on its face. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004); *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003). The critical inquiry is whether the allegations in the complaint are sufficient to state a cause of action upon which relief may be granted. *Wakulich*, 203 Ill. 2d at 228. A cause of action will not be dismissed on the pleadings unless it clearly appears that the plaintiff cannot prove any set of facts that will entitle it to relief. *Board of Directors of Bloomfield Club Recreation Ass'n v. The Hoffman Group, Inc.*, 186 Ill. 2d 419, 424 (1999). In making this determination, all well-pleaded facts in the complaint and all reasonable inferences that may be drawn from those facts are taken as true. *Young*, 213 Ill. 2d at 441. In addition, we construe the allegations in the complaint in the light most favorable to the plaintiff. *Young*, 213 Ill. 2d at 441. We review *de novo* an order granting a section 2-615 motion to dismiss. *Young*, 213 Ill. 2d at 440; *Wakulich*, 203

Ill. 2d at 228. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). Additionally, even if the trial court dismissed on an improper ground, a reviewing court may affirm the dismissal if the record supports a proper ground for dismissal. See *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004) (we can affirm "on any basis present in the record"); *In re Marriage of Gary*, 384 Ill. App. 3d 979, 987 (2008) ("we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper ground").

¶ 20 Additionally, each defendant also filed a motion to dismiss the amended fifth amended complaint pursuant to section 2-619 of the Code. A motion to dismiss under section 2-619 admits the legal sufficiency of all well-pleaded facts but allows for the dismissal of claims barred by an affirmative matter defeating those claims or avoiding their legal effect. *Janda v. United States Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 83 (citing *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006)). When reviewing a motion to dismiss under section 2-619, "a court must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiffs' favor." *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). Additionally, a cause of action should not be dismissed under section 2-619 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 277-78 (2003). For a section 2-619 dismissal, our standard of review is *de novo*. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006); *Morr-Fitz, Inc.*, 231 Ill. 2d at 488. As noted, *de novo* consideration means we perform the same analysis that a trial judge would perform. *Khan*, 408 Ill. App. 3d at 578.

¶ 21 II. Public Duty Rule

¶ 22 In the case at bar, as noted, the trial court's dismissal was based on its finding that defendants owed no duties to plaintiffs due to the public duty rule. Accordingly, it is helpful to begin with an overview of the public duty rule and the impact of the supreme court's 2016 decision in *Coleman*. The common law public duty rule provides that local governmental entities do not owe any duty to individual members of the general public to provide adequate governmental services, such as police and fire protection. *Coleman*, 2016 IL 117952, ¶ 37. "The long-standing public duty rule is grounded in the principle that the duty of the governmental entity to preserve the well-being of the community is owed to the public at large rather than to specific members of the community." (Internal quotation marks omitted.) *Coleman*, 2016 IL 117952, ¶ 38. An exception to this rule is the "special duty exception," where the local governmental entity owes a special duty of care to a particular individual that is different from the duty it owes to the general public. *Coleman*, 2016 IL 117952, ¶ 41.

¶ 23 In its analysis, the *Coleman* court traced the origins of the public duty rule to either an 1855 United States Supreme Court case or to an 1880 treatise on tort law. *Coleman*, 2016 IL 117952, ¶¶ 39, 40. The court further noted that the doctrine "was widely accepted in most jurisdictions." *Coleman*, 2016 IL 117952, ¶ 41. The *Coleman* court noted that the Illinois Supreme Court first acknowledged the public duty rule and its special duty exception in 1968. *Coleman*, 2016 IL 117952, ¶ 42. The court further noted that the public duty rule "existed '[i]ndependent[ly] of statutory or common-law concepts of sovereign immunity.' " *Coleman*, 2016 IL 117952, ¶ 44 (quoting *Huey v. Town of Cicero*, 41 Ill. 2d 361, 363 (1968)). The court, thus, noted that "[w]e have consistently held that the public duty rule survived the abolition of sovereign immunity and passage of the Tort Immunity Act."

Coleman, 2016 IL 117952, ¶ 52. Nevertheless, the *Coleman* court held that "the time has come to abandon the public duty rule and its special duty exception."[5] *Coleman*, 2016 IL 117952, ¶ 52. Accordingly, the court held that "in cases where the legislature has not provided immunity for certain governmental activities, traditional tort principles apply." *Coleman*, 2016 IL 117952, ¶ 61.

¶ 24 As an initial matter, in the case at bar, plaintiffs present shifting arguments concerning the applicability of the public duty rule to the creation and operation of municipal sewer and drainage systems. We note that most of these arguments are raised for the first time in plaintiffs' reply brief and, in some cases, at oral argument. It is well settled that points not argued in the appellant's brief are forfeited. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 253 (2010); Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued [in the appellant's brief] are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Accordingly, any arguments not raised in plaintiffs' initial brief are not properly before this court. Nevertheless, we will briefly address some of those arguments below.

¶ 25 In their briefs, plaintiffs argue that the public duty rule is inapplicable because it is preempted by the Tort Immunity Act. However, our supreme court has repeatedly maintained that the public duty rule and the Tort Immunity Act may properly coexist. See, *e.g.*, *Coleman*, 2016 IL 117952, ¶ 52; *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 45 (1998); *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 346 (1998); *Huey*, 41 Ill.

[5]While we refer to the "*Coleman* court," the decision in *Coleman* was a split one, with no majority opinion. Four justices concurred in the judgment, agreeing to abolish the public duty rule. However, the lead opinion was joined by the author and another justice, with two other justices joining in a special concurrence. Three justices dissented, believing that the public duty rule should not be abolished. For purposes of this appeal, however, the only relevant fact is that the public duty rule has been abolished.

2d at 363. Additionally, in their reply brief, plaintiffs argue that the public duty rule has "never been applied to [a local public entity] which actually owned the sewer or drain." (Emphases omitted.)[6] Even assuming *arguendo* that plaintiffs are correct, plaintiffs fail to explain the relevance of defendants' ownership of the pipes. We note that our supreme court has found that the distinction between a governmental unit's governmental and proprietary functions was abandoned upon the abolishment of sovereign immunity. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 192 (1997). Accordingly, we cannot find that the ownership of the pipes would have any impact on the applicability of the public duty rule.[7] Plaintiffs then argue that operation of storm water sewer systems is not considered " 'flood prevention' or 'flood relief' services." Again, even assuming *arguendo* that plaintiffs are correct, it is irrelevant to the question of whether the public duty rule applies, as the rule is not limited to flood prevention or flood relief services. See, *e.g.*, *Harinek*, 181 Ill. 2d at 345 ("the public duty rule *** prevents [governmental] units from being held liable for their failure to provide adequate governmental services").

¶ 26 In their reply brief, plaintiffs next claim that the 1897 supreme court case of *City of Chicago v. Seben*, 165 Ill. 371 (1897), provides that "a [local public entity] acts ministerial without immunity when constructing, maintaining and operating sewers in executing its plan." However, whether a governmental entity's action is discretionary or ministerial is an issue with respect to application of the Tort Immunity Act, as plaintiffs themselves implicitly

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[6] In their opening brief, plaintiffs also argue that the supreme court has never applied the public duty rule to "trespassory water invasion" as part of their argument for retroactive application of *Coleman*. We discuss that argument later in our analysis on the retroactivity issue.

[7] We note that our supreme court has suggested that an exception to the public duty rule may apply where the government is acting in a private, as opposed to a governmental, capacity. *Burdine v. Village of Glendale Heights*, 139 Ill. 2d 501, 508 (1990), *overruled in part on other grounds*, *McCuen v. Peoria Park District*, 163 Ill. 2d 125 (1994). However, plaintiffs do not claim that defendants in the case at bar were acting in a private capacity.

recognize through their reference to "immunity." Our supreme court has made clear that "[t]he existence of a duty and the existence of an immunity *** are separate issues." *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 490 (2001); see also *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 370 (2003); *Harinek*, 181 Ill. 2d at 346; *Zimmerman*, 183 Ill. 2d at 46. The court first determines whether a duty exists, then addresses whether the governmental entity is immune from liability for a breach of that duty. *Village of Bloomingdale*, 196 Ill. 2d at 490; *Harinek*, 181 Ill. 2d at 346 ("the question of whether the City owed plaintiff a duty under the special duty doctrine has no bearing on the separate question of whether the [Tort Immunity] Act immunizes the City from liability for plaintiff's injuries"); *Zimmerman*, 183 Ill. 2d at 46 ("The distinction between an immunity and a duty is crucial, because only if a duty is found is the issue of whether an immunity or defense is available to the governmental entity considered ***."). Thus, whether an action is discretionary or ministerial has no impact on whether a duty exists in the first instance.

¶ 27 Moreover, plaintiffs' reliance on *Seben* shifted during oral argument. There, plaintiffs' counsel stated that "the public duty rule has been rejected by the supreme court explicitly in *Seben* in 1898 [*sic*] when they rejected the Michigan rule." As noted, points not argued in the appellant's brief are forfeited. *Lebron*, 237 Ill. 2d at 253; Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued [in the appellant's brief] are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Consequently, the argument plaintiffs raised for the first time at oral argument is not properly before this court. Furthermore, plaintiffs' counsel vastly overstated the *Seben* court's findings. In that case, the supreme court affirmed the trial court's refusal to give jury instructions providing that the City of Chicago could not be held liable for an injury caused by the plaintiff's stepping into a

sewer inlet where the sewer was constructed as part of a plan that was devised through no error in judgment. *Seben*, 165 Ill. at 383. The court found that the proposed jury instructions focused on only the initial construction of the sewer, and not on whether it was properly maintained. *Seben*, 165 Ill. at 383. In its discussion, the supreme court rejected the city's reliance on the "Michigan doctrine," which provided that where an injury was caused by the implementation of a plan that would render the work dangerous when completed, the fault lay with the legislature and that a "suit grounded upon it is grounded upon a wrong attributable to the legislative body itself." *Seben*, 165 Ill. at 380. The court further noted that Michigan had adopted the public duty rule—although it did not use that term—and did not draw a distinction between the liability of cities and the liability of towns and counties. *Seben*, 165 Ill. at 380.

¶ 28 The *Seben* court's discussion of these latter two points highlights the flaws with plaintiffs' characterization of the case at oral argument. As noted, *Seben* was decided in 1897, and the law in Illinois at that time was significantly different than it is today. As the *Coleman* court explained, the public duty rule originated in either 1855 or 1880, and our supreme court first expressly recognized the rule in 1968. *Coleman*, 2016 IL 117952, ¶¶ 39-40, 42. Thus, at the time that the *Seben* court issued its decision, the public duty rule itself was comparatively recent law, and the supreme court had never discussed it, much less "rejected" it "explicitly," as plaintiffs' counsel suggested at oral argument. Additionally, at that time, Illinois still retained local governmental tort immunity, which remained the state of the law until it was abolished in 1959. See *Coleman*, 2016 IL 117952, ¶¶ 30-33 (discussing the history of local governmental tort immunity). Thus, the liability of a local governmental entity established by the State differed from the liability of a municipality. *Coleman*, 2016 IL

117952, ¶¶ 33.[8] In its analysis, the *Seben* court appropriately made note of these differences from Michigan law, which recognized the public duty rule and did not maintain local governmental tort immunity, in determining that the appellant's arguments advocating for the "Michigan doctrine" were not persuasive. *Seben*, 165 Ill. at 380. This in no way suggests, however, that the *Seben* court was considering the issue of the public duty rule—or local governmental tort immunity, for that matter—and "reject[ing]" it. Furthermore, even if the case could be interpreted in that way, any "reject[ion]" of the public duty rule would have only lasted until 1968, when the supreme court expressly recognized the rule in *Huey v. Town of Cicero*, 41 Ill. 2d 361, 363 (1968).

¶ 29 Finally, plaintiffs' counsel at oral argument also claimed that the public duty rule has never been applied to a "public improvement." Again, as this argument was first raised at oral argument, it is not properly before this court. Moreover, as we noted with respect to plaintiffs' earlier arguments, plaintiffs' focus on whether a particular category of governmental service has or has not been considered with respect to the application of the public duty rule is not dispositive of the issue. Our supreme court has made clear that "[t]he public duty rule is a long-standing precept which establishes that a governmental entity and its employees owe no duty of care to individual members of the general public to provide governmental services, such as police and fire protection." *Zimmerman*, 183 Ill. 2d at 32. Courts have applied this rule to a variety of "governmental services." See *DeSmet v. County of Rock Island*, 219 Ill. 2d 497, 508 (2006) (noting that the rule has been applied "in various contexts" (citing *Sims-Hearn v. Office of the Medical Examiner*, 359 Ill. App. 3d 439, 443-46

[8] The *Coleman* court suggested that the existence of local governmental tort immunity explained the lack of earlier cases discussing the public duty rule—while the immunity existed, the public duty rule "remained in abeyance," since the immunity stood as an absolute bar to the enforcement of any civil liability arising from a breach of any duty. *Coleman*, 2016 IL 117952, ¶ 42.

(2005), and *Alexander v. Consumers Illinois Water Co.*, 358 Ill. App. 3d 774 (2005))). For instance, the public duty rule has been applied to bar liability for "a general duty to the public to prevent *** sewer back-ups" (*Alexander*, 358 Ill. App. 3d at 779), for performance of autopsies (*Sims-Hearn*, 359 Ill. App. 3d at 445), for administration of a 911 emergency telephone system (*Donovan v. Village of Ohio*, 397 Ill. App. 3d 844, 850 (2010)), for failure to administer a vaccine (*Taylor v. Bi-County Health Department*, 2011 IL App (5th) 090475, ¶ 36), and for failure to properly inspect a porch that subsequently collapsed (*Ware v. City of Chicago*, 375 Ill. App. 3d 574, 581 (2007)). Thus, it is apparent that the public duty rule has been found applicable to a wide variety of governmental services.

¶ 30 Nevertheless, based on our research, plaintiffs' counsel appears to be correct in the claim that the public duty rule has not been considered in the context of a public improvement. The closest analogue would be in *Alexander*, where the court applied the public duty rule in the context of the village's duty to prevent sewer back-ups. *Alexander*, 358 Ill. App. 3d at 779. We also note that the Seventh Circuit, applying Illinois law, has observed in *dicta* that there is no duty to provide uninterrupted water service for firefighting purposes. *Remet Corp. v. City of Chicago*, 509 F.3d 816, 820 (7th Cir. 2007). Thus, there are arguments to be made concerning whether the public duty rule is appropriate in considering the governmental entity's duty with respect to such improvements, given the lack of case law on the issue, and the issue could have been further developed by both parties had plaintiffs properly raised it on appeal. However, we have no need to reach an answer to the question of the applicability of the public duty rule because our conclusion on the issue of retroactivity is dispositive. We turn, then, to consideration of that question.

¶ 31 We note that this appears to be a case of first impression, as we have discovered no case law expressly considering the retroactive applicability of *Coleman*. There is one case, involving storm water runoff and flooding, in which the public duty rule has been raised post-*Coleman*. See *Salvi v. Village of Lake Zurich*, 2016 IL App (2d) 150249. However, after noting that the defendant village had invoked the public duty rule, the court in that case simply noted that "our supreme court has recently abolished the public duty rule" and proceeded to consider the defendant's arguments under the Tort Immunity Act without any discussion of whether the new law should apply retroactively. *Salvi*, 2016 IL App (2d) 150249, ¶ 37. Thus, from our research, we are the first court to consider whether *Coleman* should apply retroactively.

¶ 32 Generally, when a court issues an opinion, its decision is presumed to apply both retroactively and prospectively. *Tosado v. Miller*, 188 Ill. 2d 186, 196 (1999). However, our supreme court has set forth two ways for that presumption to be overcome. *Aleckson v. Village of Round Lake Park*, 176 Ill. 2d 82, 86 (1997). First, the presumption is overcome when a court expressly states that its decision will be applied prospectively only. *Tosado*, 188 Ill. 2d at 196-97. Second, "a later court may, under certain circumstances, override the presumption by declining to give the previous opinion retroactive effect, at least with respect to the parties appearing before the later court." *Aleckson*, 176 Ill. 2d at 86. This authority is not limited to the supreme court; an appellate court has the authority to determine whether a previous decision should be applied prospectively with respect to a case before it. *Aleckson*, 176 Ill. 2d at 91; see also *Aleckson*, 176 Ill. 2d at 89 (noting that the supreme court had previously implicitly recognized this authority when it cited an appellate court's prospective application of Illinois Supreme Court and United States Supreme Court case law).

¶ 33 Our supreme court has identified three factors in determining the question of prospective application:

> "(1) whether the decision to be applied nonretroactively established a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether, given the purpose and history of the new rule, its operation will be retarded or promoted by prospective application; and (3) whether substantial inequitable results would be produced if the former decision is applied retroactively." *Tosado*, 188 Ill. 2d at 197 (citing *Aleckson*, 176 Ill. 2d at 92-94).

¶ 34 In the case at bar, the *Coleman* court did not expressly address whether its decision would be prospective only. Plaintiffs claim that, because the *Coleman* dissent made reference to a case in which the court considered the retroactive application of a statutory amendment, the fact that the *Coleman* court did not specifically address the prospective application of the new law "buttresses the conclusion that the *Coleman* Court intentionally chose not to give prospective only effect." We find this argument unpersuasive. First, the case was one of nine cases cited in a string cite to support the dissenting justice's argument that the supreme court routinely engaged in an " 'even if' approach to decisionmaking" by deciding dispositive issues first in the interests of judicial expediency. *Coleman*, 2016 IL 117952, ¶ 85 (Thomas, J., dissenting, joined by Garman, C.J., and Karmeier, J.). Additionally, the case cited by the dissent concerned the retroactive effect of a statute, not a court decision, which is subject to an entirely different analysis. See, *e.g.*, *People v. Hunter*, 2017 IL 121306 (discussing standards to be applied in determining retroactive effect of statutory amendment). Thus, we cannot find that the mere use of the words "prospectively" and "retroactively" in a

parenthetical in this string cite in any way indicates that "certainly bells went off in the minds of the seven justices as to whether prospective only application of *Coleman* should be given." The court was silent on the issue. All that this silence indicates is that the presumption of retroactivity has not been overcome by an express statement by the court.

¶ 35 Thus, we must consider whether the factors set forth in *Aleckson* lead us to give the law announced in *Coleman* retroactive effect. As noted, the first factor is whether the decision established a new principle of law, either by overruling clear past precedent on which litigants have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. *Aleckson*, 176 Ill. 2d at 92. We agree with defendants that *Coleman* clearly established a new principle of law. The court was explicit in the fact that it was doing so and was overruling past precedent; the lead opinion contains a discussion of *stare decisis* and the dissent also focuses its analysis on that issue. See *Coleman*, 2016 IL 117952, ¶¶ 53-54 (lead opinion); *Coleman*, 2016 IL 117952, ¶¶ 84-96 (Thomas, J., dissenting, joined by Garman, C.J., and Karmeier, J.). Most clearly, all three opinions in that case refer to the outcome as "abandon[ing]" or "abolish[ing]" the public duty rule. See *Coleman*, 2016 IL 117952, ¶ 52 (lead opinion) ("the time has come to abandon the public duty rule and its special duty exception"); *Coleman*, 2016 IL 117952, ¶ 54 ("We believe that departing from *stare decisis* and abandoning the public duty rule and its special duty exception is justified for three reasons ***."); *Coleman*, 2016 IL 117952, ¶ 61 ("we hereby abolish the public duty rule and its special duty exception"); *Coleman*, 2016 IL 117952, ¶ 64 ("We abolish the public duty rule and its special duty exception."); *Coleman*, 2016 IL 117952, ¶ 67 (Freeman, J., specially concurring, joined by Theis, J.) ("the time has come for this court to abandon the public duty rule and its special duty exception"); *Coleman*, 2016 IL 117952, ¶ 77 ("I agree

that the public duty rule and its special duty exception must be abolished"); *Coleman*, 2016 IL 117952, ¶ 80 (Thomas, J., dissenting, joined by Garman, C.J., and Karmeier, J.) ("Today the court abandons these well-settled principles and abolishes the public duty rule."); *Coleman*, 2016 IL 117952, ¶ 96 ("I find no compelling legal rationale to overrule this precedent and abolish the public duty rule.") There is no way to read *Coleman* without concluding that the supreme court was making new law by overturning longstanding precedent.

¶ 36 Plaintiffs argue that *Coleman* did not announce a new rule because the supreme court had never previously applied the public duty rule to water-damage litigation and because the supreme court in *Coleman* described the jurisprudence concerning the rule to be "muddled and inconsistent," meaning that the past precedent was not "clear." We do not find these arguments persuasive. First, the question we must answer is not whether *Coleman* established a new principle of law in the specific context of water-damage litigation; the question is whether *Coleman* established a new principle of law, period. As noted, the *Coleman* court clearly and expressly overruled what it termed "a long-standing common-law rule" (*Coleman*, 2016 IL 117952, ¶ 42 (lead opinion)). Additionally, the fact that the supreme court has not spoken on a particular issue does not mean that litigants are acting in a vacuum; appellate court and trial court decisions can provide guidance as to the current state of the law even in the absence of a supreme court ruling on a particular factual scenario. For instance, in the case at bar, several appellate court cases, both reported and unreported,[9] supported defendants' claim that the public duty rule would apply to water-damage litigation.

[9]While, of course, unreported decisions cannot be cited by the parties and have no precedential value, even unreported cases are publicly available and their existence can guide attorneys seeking to draft the best arguments to advance their clients' positions and permits them to view analysis found persuasive by other courts.

See, *e.g.*, *Town of Cicero v. Metropolitan Water Reclamation District of Greater Chicago*, 2012 IL App (1st) 112164, ¶ 41 n.4 (suggesting without deciding that the public duty rule would appear to bar claims concerning adequacy of storm management against the District); *Alexander*, 358 Ill. App. 3d at 779 (finding that the public duty rule would bar village's liability for sewage system back-ups); *Remet Corp.*, 509 F.3d at 820 (in *dicta*, observing that the public duty rule meant that the city had no duty to provide uninterrupted water service for firefighting purposes). Additionally, in support of its motion to dismiss, the District attached six trial court decisions in storm management and sewer-backup cases in which it had been a defendant, all of which dismissed the plaintiffs' claims against the District due to the public duty rule. Thus, it was eminently reasonable for defendants to rely on the public duty rule in challenging plaintiffs' claims against them, and there is no basis for claiming that *Coleman* did not represent a change in law by "overruling clear past precedent on which litigants have relied." *Aleckson*, 176 Ill. 2d at 92.

¶ 37 We are also unpersuaded by plaintiffs' argument that past precedent was not "clear" because the primary opinion in *Coleman* referred to the jurisprudence concerning the public duty rule as "muddled and inconsistent." First, we note that the opinion in which this language appears was joined by only one justice in addition to the author, meaning that it does not carry the weight of a majority—or even a plurality—opinion. Additionally, the reason the opinion characterized the jurisprudence in that way was based on the interaction between the public duty rule and statutory immunities. See *Coleman*, 2016 IL 117952, ¶¶ 55-57. The opinion did not indicate that the *existence* of the public duty rule itself was not

"clear." Accordingly, we find that, under the first factor, the *Coleman* court established a new principle of law by overruling clear past precedent on which litigants have relied.[10]

¶ 38 The second factor we must consider is "whether, given the purpose and history of the new rule, its operation will be retarded or promoted by prospective application." *Tosado*, 188 Ill. 2d at 197. As noted, the ultimate holding of *Coleman*—the abolition of the public duty rule—was the result of two opinions, each of which was joined by two justices. Thus, it is difficult to glean any overarching "purpose and history of the new rule" (*Tosado*, 188 Ill. 2d at 197). The primary opinion provided three reasons for abolishing the public duty rule:

> "(1) the jurisprudence has been muddled and inconsistent in the recognition and application of the public duty rule and its special duty exception; (2) application of the public duty rule is incompatible with the legislature's grant of limited immunity in cases of willful and wanton misconduct; and (3) determination of public policy is primarily a legislative function and the legislature's enactment of statutory immunities has rendered the public duty rule obsolete." *Coleman*, 2016 IL 117952, ¶ 54.

By contrast, the specially concurring opinion reasoned that the public duty rule should be abolished because it was predicated on the same basis as the concepts underlying local governmental immunity and, when the constitution was amended to abolish all forms of

[10]Plaintiffs also argue that *Coleman* did not establish new law because the Tort Immunity Act "foreshadowed the abolition" of the public duty rule. Leaving aside the fact that *Coleman* court expressly recognized that "[w]e have consistently held that the public duty rule survived the abolition of sovereign immunity and passage of the Tort Immunity Act" (*Coleman*, 2016 IL 117952, ¶ 52), we have no need to address this argument. The first factor asks whether the new decision established a new principle of law "*either* by overruling clear past precedent on which litigants have relied *or* by deciding an issue of first impression whose resolution was not clearly foreshadowed." (Emphases added.) *Aleckson*, 176 Ill. 2d at 92. As noted, we have determined that the first applies—the court overruled clear past precedent on which litigants had relied—and so we have no need to discuss the second, other than to observe that it would appear almost impossible for something to be "an issue of first impression" when it is expressly overruling long-standing law.

nonstatutory governmental immunity, "the judiciary's power to apply the public duty doctrine ceased to exist as a means of assessing municipal tort liability." *Coleman*, 2016 IL 117952, ¶ 68 (Freeman, J., specially concurring, joined by Theis, J.).

¶ 39 In the case at bar, defendants argue that, under the facts of the instant case, a prospective application of the new law set forth in *Coleman* would not frustrate the concerns set forth by the *Coleman* court. First, they note that the litigation history of this case renders it unique—the flooding occurred in 2008, and defendants first asserted the application of the public duty rule in 2010 and continued asserting it through the filing of a number of amended complaints, culminating in the amended fifth amended complaint. They finally obtained a dismissal on that basis on April 3, 2015, five years after they first asserted the applicability of the public duty rule. Had they obtained a dismissal when they first sought it in 2010, the judgment would have been final and appealable well prior to the supreme court's January 22, 2016, decision in *Coleman* and we would not be considering the applicability of the public duty rule today.[11]

¶ 40 Our supreme court in *Aleckson* found that where the court below "noted that it was applying [the new law] prospectively to the parties because the facts of the instant case and its timing *vis a vis* [the case establishing the new law] are so unique" that "the nonretroactive application was expressly limited to the facts of the case and could not have 'retarded' the future operation of" the new case. (Internal quotation marks omitted.) *Aleckson*, 176 Ill. 2d at 93. Similarly, in the case at bar, the facts of the instant case and its timing *vis-à-vis Coleman* is unique; it is only through an accident of timing that *Coleman* was decided while this case

[11]However, we note that a decision normally has retroactive application to any causes pending at the time the decision is announced, including cases on appeal in the appellate court. *Heastie v. Roberts*, 226 Ill. 2d 515, 535 (2007). Thus, if the case had been pending on appeal, plaintiffs could have conceivably raised the retroactivity issue at that point.

was still active before the trial court. This would weigh in favor of a nonretroactive application of *Coleman*.

¶ 41 Defendants further argue that a nonretroactive application of *Coleman* in the instant case would also have limited impact due to the statute of limitations. Under the Tort Immunity Act, any civil action against a local governmental entity must be commenced within one year from the date that the cause of action accrued.[12] 745 ILCS 10/8-101(a) (West 2016). Thus, any claim against a local governmental entity that is filed subsequent to our opinion must have accrued no earlier than May 2018. By May 2018, *Coleman* and its abolition of the public duty rule was settled law. A finding that the new law does not apply to the instant action would have no impact on such a lawsuit, which would be filed well after the date the law had changed. Thus, the only impact a nonretroactive finding could have would be upon cases that are currently pending before the trial or appellate courts, which would be a small subset of cases at most, if any.

¶ 42 However, we must also note the existence of *Salvi*, in which the Second District applied the new law set forth in *Coleman* retroactively. *Salvi*, 2016 IL App (2d) 150249, ¶ 37. There, the flooding at issue occurred in 2013 (*Salvi*, 2016 IL App (2d) 150249, ¶ 13), the plaintiff's amended complaint was filed in 2014 (*Salvi*, 2016 IL App (2d) 150249, ¶ 3), and the defendant village raised the issue of the public duty rule in a motion to dismiss (*Salvi*, 2016 IL App (2d) 150249, ¶ 20). Thus, as in the case at bar, the flooding, the lawsuit, and the motion to dismiss based on the public duty rule all predated *Coleman*.[13] Despite these facts,

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[12]The exception is for actions for damages based on injury or death arising out of patient care, which have a two-year statute of limitations. 745 ILCS 10/8-101(b) (West 2016).

[13]Although the opinion does not indicate the date of the defendant village's motion to dismiss, we know that the motion was also filed prior to the 2016 *Coleman* decision because the appeal in *Salvi* was filed in 2015, as evidenced by the appeal number. Thus, *Coleman* would have been decided while the *Salvi* appeal was pending.

the *Salvi* court applied the new law retroactively. *Salvi*, 2016 IL App (2d) 150249, ¶ 37. As noted, the *Salvi* court did not engage in a discussion of whether the law should be applied retroactively or prospectively; thus, we have no way of knowing what arguments were raised before it by the defendant village. Nevertheless, the fact remains that the *Salvi* court did expressly apply *Coleman* to the case before it. *Salvi*, 2016 IL App (2d) 150249, ¶ 37 ("[O]ur supreme court has recently abolished the public duty rule. [Citation.] Thus, we will proceed to the Tort Immunity Act.").

¶ 43 The existence of *Salvi* is relevant to the instant discussion because a prospective application of *Coleman* to the instant case would mean that two cases with similar facts would be applying two different versions of the law. We are not obligated to follow the *Salvi* court's decision if we disagree with it. See *Deutsche Bank National Trust Co. v. Iordanov*, 2016 IL App (1st) 152656, ¶ 44. However, in considering the second factor of the retroactivity analysis, reaching a decision that would lead to conflicting case law would appear to feed into the "muddled and inconsistent" jurisprudence surrounding the public duty rule that was of concern to several justices in deciding *Coleman*. See *Coleman*, 2016 IL 117952, ¶ 54. Thus, while it would not hinder the operation of the new law, a prospective application of *Coleman* in the instant case would certainly not promote the operation of the new law and could even lead to an increase in the uncertainty surrounding the application of the rule.

¶ 44 The final factor to be considered is "whether substantial inequitable results would be produced if the former decision is applied retroactively." *Aleckson*, 176 Ill. 2d at 93. In the case at bar, the trial court found that "[t]he retroactive application of the *Coleman* decision dramatically changes the considerations concerning the possible course of litigation of the

instant case in the future." On appeal, defendants focus on similar considerations in arguing that the equities favor a prospective application of the new law. Defendants claim that they have "endured nine years of litigation and risk exposure, waiting patiently for their time to be heard on the Public Duty Rule, and now must contend with the Supreme Court's abolishment of the Public Duty Rule altogether," which they argue is "not fair." Defendants further claim that if *Coleman* applies retroactively, they will be forced to reevaluate defense and indemnity exposure and will endure significant litigation costs and time commitments that they otherwise would not have needed to endure. Certainly, if *Coleman* is applied to their case, defendants will undergo significant hardship. Any additional litigation necessarily involves additional time and expense. This additional expense is especially fraught when dealing with a governmental entity, as it is taxpayers, not a private party, who are responsible for the expenses. As the trial court noted:

> "The consequence to the [defendants] of the abolition of the Public Duty Rule as a defense is financial. Every public entity has a responsibility to its taxpayers to estimate budgets and to tax its citizens reasonably. Predicting legal expenses is difficult because the entity does not know whether litigation will be filed. Once filed, the entity then must budget for the potential expenses of the litigation based on a prediction of the legal and factual issues which might be involved. Legal issues, to be determined based on facts alleged in pleadings taken as true, such as the application of the Public Duty Rule, involve different legal expenses than the expenses necessary to prepare for class certification, prove the availability of immunities under the Tort Immunity Act, and defend against assertions of wrongdoing."

¶ 45 In the case at bar, at the time of the flooding, at the time of the filing of the complaint, and at the time of dismissal of the amended fifth amended complaint, defendants were operating in a legal universe that included the availability of the public duty rule and governed their actions accordingly. Then, the supreme court overruled long-standing precedent—which it had expressly reaffirmed as recently as 1998—and abolished that rule, shifting the legal ground on which defendants stood. "Local government officials, like other people, are entitled to rely on [existing law] when 'making decisions and in shaping their conduct.' " *Board of Commissioners of the Wood Dale Public Library District v. County of Du Page*, 103 Ill. 2d 422, 429 (1984) (quoting *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973)). By applying the new law retroactively, defendants and their taxpayers would be forced to incur additional unexpected expenses in litigating this case, which could prove substantial, as it has been pending for 10 years to date and has yet to proceed beyond the pleading stage.

¶ 46 However, we note that these additional expenses and time commitments are not necessarily predicated solely on *Coleman*. Defendants' argument presupposes that their actions were, in fact, covered by the public duty rule. Under defendants' argument, in the absence of *Coleman*, the public duty rule would apply, marking the end of litigation. However, that overlooks the fact that it is not beyond dispute that the public duty rule would, in fact, apply. Plaintiffs likely would have appealed the trial court's April 3, 2015, dismissal even in the absence of *Coleman*, and we would have been asked to determine whether the public duty rule applies to the circumstances present in the case at bar. As discussed earlier in our analysis, this is not a question that has been considered by our supreme court, nor is it an area that has a clear answer at the appellate level. If plaintiffs had prevailed in that appeal,

defendants would find themselves in exactly the same position as they are now—forced to litigate the remainder of the case. Thus, while we recognize defendants' understandable frustration at the unexpected change in the legal universe, the additional expenses that would be incurred by continuing to litigate the instant case should not have been entirely unexpected, as defendants should have been prepared for the contingency of a loss on appeal.

¶ 47 Plaintiffs, by contrast, argue that a prospective application of *Coleman* would be inequitable to them because they would lose the ability to have their day in court. We note that, unlike in the case relied on by plaintiffs, *Oak Grove Jubilee Center, Inc. v. City of Genoa*, 347 Ill. App. 3d 973 (2004), this is not a case in which the plaintiff had a viable cause of action that would be lost by retroactive application of the new law. Here, plaintiffs had a cause of action that had already been dismissed, which would be revived by the retroactive application of the new law. In either case, though, the question is the same: applying the new law one way results in an active lawsuit, while applying it the other way results in the termination of that lawsuit. Thus, our decision has very real consequences to plaintiffs, as well as to defendants. We also note that, in some respects, plaintiffs are a victim of timing in much the same way as defendants are—if the supreme court had abolished the public duty rule earlier, defendants would not have been able to raise the rule in response to plaintiffs' complaint and the complaint would not have been dismissed on that basis. Thus, there are equitable arguments to be made on both sides of the equation.

¶ 48 In considering the three factors, there is no clear-cut answer on either side. The only clear answer is with respect to the first factor: *Coleman* made new law by abolishing the public duty rule. With respect to the second factor, prospective application of the new rule would have minimal impact on the rule's future applicability, as the unique facts of the instant case

and the Tort Immunity Act's statute of limitations necessarily limit the scope of our holding. However, prospective application would result in a direct conflict with the Second District, given its retroactive application of *Coleman* in *Salvi*, which would further muddy the jurisprudence concerning the applicability of the public duty rule. Finally, with respect to the third factor, retroactive application of the new law would cause hardship to defendants and their taxpayers, as defendants relied on the long-standing law concerning the existence of the public duty rule and their taxpayers would be forced to absorb the additional litigation costs. On the other hand, such additional litigation costs should not be entirely unexpected, as defendants should have been prepared for the contingency of a loss on appeal even if the public duty rule remained in effect. By contrast, prospective application of the new law would result in plaintiffs being prevented from pursuing their claims against defendants. Thus, there are equitable considerations in favor of both parties.

¶ 49 As noted, when a court issues an opinion, its decision is presumed to apply both retroactively and prospectively, unless that presumption is overcome by either an express statement by the court or through the consideration of the factors set forth in *Aleckson. Tosado*, 188 Ill. 2d at 196-97. Here, there is no express statement by the supreme court and the *Aleckson* factors do not tilt in any one direction. Consequently, we cannot find that the presumption of retroactivity has been overcome, and therefore, the new law set forth in *Coleman* should have been applied retroactively to the instant case. Accordingly, the trial court erred in limiting the new law set forth in *Coleman* to apply only prospectively to the instant case, and we must reverse the trial court's dismissal of plaintiffs' complaint based on the public duty rule.

¶ 50 III. Alternate Bases

¶ 51 Our decision concerning the public duty rule does not end our analysis, however, because we may affirm the trial court's dismissal on any basis supported by the record, even if the trial court did not base its decision on that ground. See *Raintree Homes*, 209 Ill. 2d at 261 (we can affirm "on any basis present in the record"); *In re Marriage of Gary*, 384 Ill. App. 3d at 987 ("we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper ground"). In the case at bar, plaintiffs alleged causes of action based on the Tort Immunity Act, based on the common law, and based on the Illinois Constitution. We consider each of these counts in turn, discussing whether they should have been dismissed under section 2-615 of the Code. If any of these counts should have survived dismissal based on section 2-615, we then consider whether they should have been dismissed under section 2-619.

¶ 52 As an initial matter, defendants make an overarching argument concerning all of plaintiffs' counts that are based on negligence—they claim that plaintiffs failed to plead that defendants' conduct proximately caused plaintiffs' damages. Since this argument applies to many of plaintiffs' causes of action, we address it first. "To recover damages based upon a defendant's alleged negligence, a plaintiff must allege and prove that the defendant owed a duty to the plaintiff, that defendant breached that duty, and that the breach was the proximate cause of the plaintiff's injuries." *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 256 (1999) (citing *Thompson v. County of Cook*, 154 Ill. 2d 374, 382 (1993)). Our supreme court has explained the proximate cause element as follows:

> "The proximate cause element is a factual question for the jury to decide and has two components: cause in fact and legal cause. [Citations.] 'Cause in fact' is

established where there is reasonable certainty that the injury would not have occurred 'but for' the defendant's conduct or where a defendant's conduct was a 'substantial factor' in bringing about the harm. [Citation.] Legal cause, however, is essentially a question of policy, *i.e.*, 'How far should a defendant's legal responsibility extend for conduct that did, in fact, cause the harm?' (Internal quotation marks omitted.) [Citation.] Legal cause, therefore, is established only when it can be said that the injury was reasonably foreseeable. [Citations.]" *Stanphill v. Ortberg*, 2018 IL 122974, ¶ 34.

¶ 53 In the case at bar, defendants claim that plaintiffs failed to allege the "cause in fact" component of proximate cause. In support, they point to the trial court's dismissal of a negligence count against Gewalt, the engineering firm that worked with Advocate to develop a drainage plan in 2002; in that dismissal, the court found that plaintiffs had not alleged that Gewalt's conduct after 2002 was a cause in fact in bringing about the September 2008 flooding. However, Gewalt's position in the litigation differs quite significantly from defendants' position. Indeed, in its dismissal, the trial court specifically pointed to the fact that "plaintiffs alleged a host of other components of the [Prairie Creek Stormwater System] that contributed to the 2008 flooding, all of which existed prior to Gewalt's post-2002 designs on the Dempster Basin." Plaintiffs' allegations against defendants go far beyond the 2002 allegations against Gewalt. They allege that plaintiffs were involved in approving the drainage and sewer systems as far back as the 1960s and were aware of the undersized drainage capacity of certain portions of the systems. They further allege that defendants approved of Advocate's flawed plans for its drainage system and that defendants nevertheless approved them. Finally, they allege that defendants were aware of the serious design and

maintenance defects with the Prairie Creek Stormwater System based on the persistent flooding and failed to remedy those defects or to take measures to prevent the flooding. Thus, we cannot agree with defendants that plaintiffs have failed to allege sufficient facts that defendants' conduct was a "cause in fact" of plaintiffs' damages. Instead, at least at this stage of the proceedings, plaintiffs' allegations are sufficient to withstand a motion to dismiss. We turn, then, to consideration of each of plaintiffs' causes of action individually.

¶ 54 A. Tort Immunity Act Counts

¶ 55 With respect to the Tort Immunity Act, plaintiffs set forth causes of action for statutory duties pursuant to sections 3-102(a) and 3-103 of the Tort Immunity Act. Plaintiffs alleged that defendants breached a duty to maintain their property in a reasonably safe condition pursuant to section 3-102(a) and that defendants breached their duty to correct known unsafe conditions relating to the design of the Prairie Creek Stormwater System pursuant to section 3-103 by not compelling Advocate to redesign its drainage plans.

¶ 56 1. Section 3-102(a)

¶ 57 Section 3-102(a) of the Tort Immunity Act provides:

> "Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." 745 ILCS 10/3-102(a) (West 2012).

In counts XXXVI (against the District), LVII (against Park Ridge), and LXXIV (against Maine Township), plaintiffs alleged that defendants breached a "statutory duty to maintain property" pursuant to this section. Defendants argue that these counts were properly dismissed because there is no such "statutory duty to maintain property."

¶ 58 Defendants are correct that the Tort Immunity Act does not create any new duties. Our supreme court has made clear that "[t]he Tort Immunity Act grants only immunities and defenses; it does not create duties." *Village of Bloomingdale*, 196 Ill. 2d at 490; see also *Barnett v. Zion Park District*, 171 Ill. 2d 378, 386 (1996) ("It is settled that the Tort Immunity Act does not impose on a municipality any new duties."). Instead, "the [Tort Immunity] Act merely codifies those duties existing at common law, to which the subsequently delineated immunities apply." *Barnett*, 171 Ill. 2d at 386; *Monson v. City of Danville*, 2018 IL 122486, ¶ 24 ("the courts of this state have uniformly held that section 3-102(a) merely codifies the common-law duty of a local public entity to maintain its property in a reasonably safe condition"). Thus, a court must look to the common law and other statutes to determine whether the defendant owes the plaintiff a duty. *Barnett*, 171 Ill. 2d at 386. Once the court determines that a duty exists, then it examines whether the Tort Immunity Act provides immunity for a breach of that duty. *Village of Bloomingdale*, 196 Ill. 2d at 490. "In other words, because the Act implicitly recognizes duties which already exist at common law, we may refer to the common law to determine the duties a local public entity holds. But to determine whether that entity is liable for the breach of a duty, we look to the Tort Immunity Act, not the common law." *Village of Bloomingdale*, 196 Ill. 2d at 490.

¶ 59 In the case at bar, plaintiffs have styled these counts as arising under a "statutory duty to maintain property," which suggests that the basis of the duty is the statute, not the common

law. It is on this basis that defendants argue that the counts should be dismissed. However, our supreme court "has emphasized that 'the character of the pleading should be determined from its content, not its label.' " *In re Parentage of Scarlett Z.-D.*, 2015 IL 117904, ¶ 64 (quoting *In re Haley D.*, 2011 IL 110886, ¶ 67). Thus, the title of the count does not control over the substance of its claim. *Papadakis v. Fitness 19 IL 116, LLC*, 2018 IL App (1st) 170388, ¶ 32. Here, the substance of these counts of the complaint can be interpreted as alleging negligence based on a breach of defendants' common-law duty to maintain their property in a reasonably safe condition.

¶ 60 However, plaintiffs have foreclosed this interpretation by making it clear in their reply brief that they are asserting a "separate, independent, stand-alone cause-of-action imposing [a] duty owing to individual citizens for [a local public entity] to maintain its property." Plaintiffs further claim that "[c]odified duty is still enforceable, individual duty separate from common law." Thus, plaintiffs have expressly stated that they believe that there are two separate, independent, duties: a common-law duty and a statutory duty. This is simply not the case. Even *Wagner v. City of Chicago*, 166 Ill. 2d 144, 150 (1995), a case relied on by plaintiffs, makes this clear: " 'Th[e] limitation on the scope of the duty in section 3-102(a) is in keeping with the scope of that duty as it existed at common law. The Tort Immunity Act creates no new duties but merely codifies those existing at common law. [Citations.] At common law, a municipality had a duty to maintain its property in a safe condition ***.' " (quoting *West v. Kirkham*, 147 Ill. 2d 1, 14 (1992)). The statutory duty *is* the common-law duty, simply published in statutory form. Plaintiffs' insistence otherwise requires us to affirm the trial court's dismissal of these counts.

¶ 61 2. Section 3-103

¶ 62 Similarly, counts XXXVII (against the District), LVIII (against Park Ridge), and LXXV (against Maine Township) were for "duty to remedy [a] dangerous plan" and allege that section 3-103 of the Tort Immunity Act set forth a duty for a local public entity to correct known unsafe conditions related to the design and/or engineering of an approved plan, which defendants did not do. Section 3-103(a) provides:

> "A local public entity is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property where the plan or design has been approved in advance of the construction or improvement by the legislative body of such entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved. The local public entity is liable, however, if after the execution of such plan or design it appears from its use that it has created a condition that it is not reasonably safe." 745 ILCS 10/3-103(a) (West 2012).

¶ 63 Again, as with section 3-102(a), section 3-103(a) "codifies [the] common-law duty of care in the making of public improvements." *Salvi*, 2016 IL App (2d) 150249, ¶ 43; see also *O'Brien v. City of Chicago*, 285 Ill. App. 3d 864, 871 (1996) ("Sections 3-102(a) and 3-103(a) codify [common law] duties but do not impose any new obligations on local governments."); *Horrell v. City of Chicago*, 145 Ill. App. 3d 428, 435 (1986) ("[T]he 'duties' *** that are found in section 3-103(a) regarding the execution of a plan[ ] are derived from the basic common law duty articulated in section 3-102."). At common law, a municipality had a duty to maintain its property in a safe condition, but this duty did not extend to creating

or erecting public improvements. *West v. Kirkham*, 147 Ill. 2d 1, 14 (1992). Once a public improvement was actually constructed, however, the municipality has a duty to maintain it in a reasonably safe condition. *West*, 147 Ill. 2d at 14.

¶ 64 In the case at bar, again, while the substance of these counts could be interpreted as alleging negligence based on a breach of defendants' common-law duty in the making of public improvements, plaintiffs have foreclosed this interpretation in their reply brief by making clear that they are alleging that section 3-103(a) "declare[s] [a] separate and independent dut[y]" and that this "statutory dut[y] [is a] separate and independent, individual dut[y] from the common law." Accordingly, we must affirm the trial court's dismissal of these counts.

¶ 65 B. Common Law Counts

¶ 66 Next, plaintiffs alleged several counts based on common law negligence.

¶ 67 1. Dominant Estate Overburdening

¶ 68 Counts XXV (against the District), XLV (against Park Ridge), and LXIV (against Maine Township) were for "negligence: dominant estate overburdening stormwater" and alleged that defendants knew or should have known of the foreseeable harm of invasive flooding into plaintiffs' neighborhood given the history of flooding and that defendants owed nondelegable duties to properly manage the storm water so as to prevent harm to plaintiffs from excess storm water overburdening the drainage system. On appeal, plaintiffs "abandon their Dominant Estate Overburdening claim" but argue that the facts alleged in these counts give rise to an "adjacent property owner" claim.

¶ 69 Generally, a landowner owes no duty to adjoining landowners for dangerous natural conditions present on the land, but may owe a duty if the condition is artificial or where a

natural condition is aggravated by the owner's use of the area. See *Dealers Service & Supply Co. v. St. Louis National Stockyards Co.*, 155 Ill. App. 3d 1075, 1079 (1987); *Choi v. Commonwealth Edison Co.*, 217 Ill. App. 3d 952, 957 (1991). Additionally, a local public entity bears a common law duty not to increase the natural flow of surface water onto the property of an adjacent landowner. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 369 (2003). Defendants claim that, because they were not "adjacent landowners," these counts should be dismissed. We agree.

¶ 70 In the case at bar, plaintiffs have not alleged that defendants are landowners, much less landowners adjacent to plaintiffs' property. Plaintiffs have alleged that defendants own the sewers and the drains, but have not alleged that defendants own the real property under which those sewers and drains run. Instead, they allege that defendants were the holders of easements for the purpose of drainage and sewers, which ran through plaintiffs' neighborhood, and that it was these systems that overflowed and damaged plaintiffs' property. The only adjacent landowner plaintiffs identify in their complaint is Advocate.

¶ 71 Given the status of defendants as easement holders, not landowners, the appropriate cause of action would be for the overburdening of their easement. However, plaintiffs have expressly abandoned that claim on appeal. In the absence of that legal framework, we find no basis for applying "adjacent property owner" liability to defendants; plaintiffs have cited no authority applying such a duty without first establishing that the defendant was actually a landowner. Accordingly, we must affirm the dismissal of these counts.

¶ 72 2. Negligent Nuisance

¶ 73 Counts XXXI (against the District), LII (against Park Ridge), and LXIX (against Maine Township) were for "negligent nuisance" and alleged that defendants negligently caused an

accumulation of water from the drainage system to invade and interfere with plaintiffs' property. "A private nuisance is a substantial invasion of another's interest in the use and enjoyment of his or her land. The invasion must be: substantial, either intentional or negligent, and unreasonable." *In re Chicago Flood Litigation*, 176 Ill. 2d at 204. The standard for determining if particular conduct constitutes a nuisance is its effect on a reasonable person. *In re Chicago Flood Litigation*, 176 Ill. 2d at 204. Our supreme court has explained the difference between the type of invasion that nuisance protects as compared to the type of invasion that trespass protects:

> " 'A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. *** A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession.' " *In re Chicago Flood Litigation*, 176 Ill. 2d at 204 (quoting Restatement (Second) of Torts § 821D cmt. d, at 101 (1979)).

¶ 74 In the case at bar, the complaint alleges that defendants negligently permitted an accumulation of storm water runoff in their drainage and sewage systems due to their management of the systems, which caused flood water to invade and interfere with plaintiffs' property on September 13, 2008. The complaint further alleges that such interference was substantial and unreasonable. These allegations are sufficient to state a cause of action for negligent nuisance so as to withstand dismissal pursuant to section 2-615.

¶ 75 3. Negligent Trespass

¶ 76 Counts XXXII (against the District), LIII (against Park Ridge), and LXX (against Maine Township) were for "negligent trespass" and alleged that, due to defendants' failure to properly manage the storm water systems, water invaded plaintiffs' property. A trespass is an

invasion in the exclusive possession and physical condition of real property. *Millers Mutual Insurance Ass'n of Illinois v. Graham Oil Co.*, 282 Ill. App. 3d 129, 139 (1996). "[O]ne can be liable under present-day trespass for causing a thing or a third person to enter the land of another either through a negligent act or an intentional act." *Dial v. City of O'Fallon*, 81 Ill. 2d 548, 556-57 (1980).

¶ 77 In our prior decision concerning Advocate, we found that the complaint adequately alleged that Advocate could be liable for intentional trespass based on its conduct with respect to its drainage system. See *Tzakis*, 2015 IL App (1st) 142285-U, ¶ 74. We found:

> "Taken as a whole, [plaintiffs'] allegations are far from mere conclusory allegations. Plaintiffs identify numerous examples that suggest [Advocate] was aware of the flooding problem, and knowingly took inadequate measures to correct it. Plaintiffs' allegations identify specific components of [Advocate's] drainage system as deficient, and demonstrate multiple instances where [Advocate] had occasion to address the problems and failed to do so adequately. As with the examples of piling sand adjacent to another's property, or erecting a dam to alter the flow of a stream, plaintiffs' allegations regarding [Advocate's] conduct are sufficient to show that [Advocate] acted with a high degree of certainty that its modifications to the drainage system would cause or fail to prevent flooding to plaintiffs' homes." *Tzakis*, 2015 IL App (1st) 142285-U, ¶ 74.

¶ 78 In the case at bar, plaintiffs are not alleging intentional trespass as they did against Advocate.[14] Thus, they are not required to allege the high degree of certainty required by an intentional trespass claim. However, the allegations against Advocate, which we found

[14]We note that plaintiffs did, in fact, originally include counts for intentional trespass, but those counts were voluntarily dismissed and are not at issue on appeal.

satisfied such a high bar, also apply in large part to defendants, as they are alleged to have approved all of Advocate's plans. Thus, our prior decision is certainly instructive to the analysis in the instant appeal. In the case at bar, plaintiffs have alleged that there was an invasion in their properties due to the excess storm water runoff. Plaintiffs have further alleged that this invasion was caused by defendants' negligent design and operation of their drainage and sewer systems. These allegations adequately set forth causes of action for negligent trespass against defendants so as to withstand a section 2-615 motion to dismiss.[15]

¶ 79 C. Takings Clause

¶ 80 Finally, plaintiffs claimed that the flooding of their property was an unconstitutional taking that violated the Illinois Constitution. The takings clause of the Illinois Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law." Ill. Const. 1970, art. I, § 15. Our supreme court has defined a "taking" as "a physical invasion of private property or the radical interference with a private property owner's use and enjoyment of the property." *Hampton v. Metropolitan Water Reclamation District*, 2016 IL 119861, ¶ 24. The supreme court has further indicated that "a taking occurs when real estate is physically invaded 'by superinduced additions of water *** so as to effectually destroy or impair its usefulness.' " *Hampton*, 2016 IL 119861, ¶ 24 (quoting *Horn v. City of Chicago*, 403 Ill. 549, 554 (1949)). Our supreme court has recently made explicit that a temporary flooding may constitute a taking. *Hampton*, 2016 IL 119861, ¶ 22; see also

[15]At the end of their brief, plaintiffs include a brief paragraph concerning "equitable relief." It is not apparent what argument they are attempting to make, and plaintiffs do not tie this request into any particular cause of action. As it has not been properly developed, we do not consider this argument. See *Lebron*, 237 Ill. 2d at 253; Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued [in the appellant's brief] are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

Pineschi v. Rock River Water Reclamation District, 346 Ill. App. 3d 719, 727 (2004) (temporary flooding caused by backup of sewer system may constitute a taking).

¶ 81 Our supreme court has also found instructive additional factors set forth by the United States Supreme Court in determining whether a temporary flooding constitutes a taking; "[t]hese factors include the time and duration of the flooding, whether the invasion of the property was intentional or whether it was a foreseeable result of an authorized government action, and the character of the land and the owner's reasonable investment-backed expectations regarding the land's use." *Hampton*, 2016 IL 119861, ¶ 25 (citing *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 38-39 (2012)).

¶ 82 In the case at bar, defendants claim that plaintiffs' takings clause claims must fail because the water overflow was the result of Advocate's conduct, not theirs. "To constitute a government taking or compensable government action, the water overflow must be the result of a structure or action imposed by the governmental entity ***." *Sorrells v. City of Macomb*, 2015 IL App (3d) 140763, ¶ 33. In *Sorrells*, the plaintiff homeowners filed suit against a developer who was developing adjacent property in a way that the plaintiffs alleged altered the natural drainage of surface waters and caused an increase of water drainage onto their property. *Sorrells*, 2015 IL App (3d) 140763, ¶ 4. The plaintiffs also included an inverse condemnation claim against the defendant city, which the plaintiffs alleged had approved the construction and design of the developer's plans, and to whom the streets and drainage system had been dedicated. *Sorrells*, 2015 IL App (3d) 140763, ¶¶ 17-18. The plaintiffs alleged that the city's actions constituted a taking under the takings clause of the Illinois Constitution. *Sorrells*, 2015 IL App (3d) 140763, ¶ 18.

¶ 83 On appeal, the *Sorrells* court affirmed the trial court's dismissal of the counts aimed at the city. The court first noted that the plaintiffs alleged that the private development as a whole caused the allegedly unreasonable surface water drainage, not the streets that belonged to the city. *Sorrells*, 2015 IL App (3d) 140763, ¶ 30. The court found that the complaint "makes clear that the water allegedly invading the plaintiffs' property was drainage from two [private] storm water detention basins or other drainage basins." *Sorrells*, 2015 IL App (3d) 140763, ¶ 31. The court further found that the plaintiffs failed to allege that this unreasonable water draining from the development onto their land "was the intended or foreseeable result, in whole or in part, of the City's actions rather than that of the development." *Sorrells*, 2015 IL App (3d) 140763, ¶ 32.

¶ 84 The *Sorrells* court also noted that condemnation cases "traditionally arise from government action alone; not from multiple causes that would include actions of private actors, as in this case where the water was from the whole development flowing into detention basins." *Sorrells*, 2015 IL App (3d) 140763, ¶ 33. In the case before it, the court found that "the alleged flooding of the plaintiffs' land was from the overflow of drainage and detention basins, not from the City's actions." *Sorrells*, 2015 IL App (3d) 140763, ¶ 33. Consequently, the court affirmed the dismissal of the inverse condemnation claim.

¶ 85 In the case at bar, contrary to defendants' claim, we cannot agree that the situation is analogous to that present in *Sorrells*. The instant case is not one in which Advocate developed its property, then later dedicated the streets and drainage system to defendants. Instead, plaintiffs allege much more hands-on involvement and ongoing responsibility from defendants. Additionally, plaintiffs allege a history of flooding prior to the 2008 flooding at issue, indicating that defendants knew of the increased risk of flooding. Finally, plaintiffs

point to numerous areas in which defendants were allegedly negligent, including through the use of undersized drains. We note that we are not asked to determine whether plaintiffs will be successful in ultimately proving their takings claim—at this stage of the proceedings, a cause of action will not be dismissed on the pleadings unless it clearly appears that the plaintiff cannot prove any set of facts that will entitle it to relief. *Board of Directors of Bloomfield Club Recreation Ass'n*, 186 Ill. 2d at 424. Under the facts as alleged by plaintiffs, their claims under the takings clause are sufficient to satisfy this hurdle.

¶ 86 D. Section 2-619 Motions to Dismiss

¶ 87 As explained above, we have determined that the counts concerning negligent nuisance, negligent trespass, and the takings clause (1) should not have been barred by the public duty rule and (2) are sufficient to withstand dismissal under section 2-615 of the Code. However, these counts were also subject to motions to dismiss pursuant to section 2-619 of the Code. Thus, we must consider whether they should have been dismissed under that section in order to determine whether there remains an alternate basis for affirming the trial court's judgment.

¶ 88 On appeal, defendants claim that plaintiffs' causes of action against them should have been dismissed pursuant to several sections of the Tort Immunity Act. The Tort Immunity Act was enacted in 1965 in response to the supreme court's abolition of sovereign immunity. *Monson*, 2018 IL 122486, ¶ 15. It protects local public entities and their employees from liability arising from government operations. *Monson*, 2018 IL 122486, ¶ 15; 745 ILCS 10/1-101.1(a) (West 2006). The purpose of the Tort Immunity Act "is to prevent the dissipation of public funds on damage awards in tort cases." *Monson*, 2018 IL 122486, ¶ 15. "Since the [Tort Immunity] Act was enacted in derogation of the common law, it must be strictly construed." *Van Meter*, 207 Ill. 2d at 368; *Monson*, 2018 IL 122486, ¶ 15. "Unless an

immunity provision applies, municipalities are liable in tort to the same extent as private parties." *Van Meter*, 207 Ill. 2d at 368-69; *Monson*, 2018 IL 122486, ¶ 15. "Because the immunities afforded to governmental entities operate as an affirmative defense, those entities bear the burden of properly raising and proving their immunity under the [Tort Immunity] Act. It is only when the governmental entities have met this burden that a plaintiff's right to recovery is barred." *Van Meter*, 207 Ill. 2d at 370.

¶ 89 1. Sections 2-109 and 2-201

¶ 90 Defendants first rely on sections 2-109 and 2-201 of the Tort Immunity Act. Section 2-109 provides:

> "A local public entity is not liable for any injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109 (West 2006).

Section 2-201 provides:

> "Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2006).

Our supreme court has observed that "[s]ection 2-201 extends the most significant protection afforded to public employees under the [Tort Immunity] Act." *Van Meter*, 207 Ill. 2d at 370. Read together, sections 2-109 and 2-201 immunize a public entity from liability for the discretionary acts or omissions of its employees. *Monson*, 2018 IL 122486, ¶ 16.

¶ 91 In order for immunity to attach, a court must conduct a dual-prong inquiry. See *Van Meter*, 207 Ill. 2d at 373. First, a defendant claiming immunity under section 2-201 must establish that its employee held either a position involving the determination of policy or a

position involving the exercise of discretion. *Monson*, 2018 IL 122486, ¶ 29. Additionally, "immunity will not attach unless the plaintiff's injury results from an act performed or omitted by the employee in determining policy *and* in exercising discretion." (Emphasis in original.) *Harinek*, 181 Ill. 2d at 341 (1998). Thus, while under the statute, the employee's position may be one which involves either determining policy or exercising discretion, in order for immunity to apply, the act or omission itself must be both a determination of policy and an exercise of discretion. *Harinek*, 181 Ill. 2d at 341.

¶ 92 Our supreme court has defined " 'policy decisions made by a municipality' " as " 'those decisions which require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests.' " *Harinek*, 181 Ill. 2d at 342 (quoting *West*, 147 Ill. 2d at 11). With respect to discretionary decisions, "the distinction between discretionary and ministerial functions resists precise formulation, and *** the determination whether acts are discretionary or ministerial must be made on a case-by-case basis." *Snyder v. Curran Township*, 167 Ill. 2d 466, 474 (1995). Our supreme court has defined the terms as follows:

> "[D]iscretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." *Snyder*, 167 Ill. 2d at 474.

Additionally, discretionary decisions " 'involve the exercise of personal deliberation and judgment in deciding whether to perform a particular act, or how and in what manner that act

should be performed.' " *Monson*, 2018 IL 122486, ¶ 30 (quoting *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 395 (2000)).

¶ 93 In the case at bar, plaintiffs have alleged a number of actions and omissions that they claim subject defendants to liability. While defendants are undoubtedly correct that at least some of these actions would fall under the purview of section 2-201 immunity, we cannot agree with their position that they are wholly immune from liability such that dismissal is warranted.

¶ 94 For instance, one of the allegations against defendants is that the drainage and sewer systems represented a dangerous condition and that defendants failed to correct that condition by, *inter alia*, not pumping down the retention basins prior to the September 2008 storm. Our supreme court has recognized that decisions involving repairs to public property can be a discretionary matter subject to immunity under section 2-201. *Monson*, 2018 IL 122486, ¶ 33. However, "a public entity claiming immunity for an alleged failure to repair a defective condition must present sufficient evidence that it made a conscious decision not to perform the repair. The failure to do so is fatal to the claim." *Monson*, 2018 IL 122486, ¶ 33. Here, there has been no showing that it was a conscious decision not to pump down the basins prior to the storm. Accordingly, that decision would not be subject to section 2-201 immunity.

¶ 95 As noted, "[s]ection 2-201 extends the most significant protection afforded to public employees under the [Tort Immunity] Act." *Van Meter*, 207 Ill. 2d at 370. Thus, we must be especially careful when speaking broadly about sweeping all of defendants' alleged conduct with the same brush. In the case at bar, plaintiffs have alleged acts and omissions by defendants that would not be subject to section 2-201 immunity. Accordingly, it is inappropriate to wholly dismiss the counts aimed at defendants on the basis of that immunity

and we cannot find that section 2-201 immunity serves as an alternate basis for dismissal of plaintiffs' complaint at this time.

¶ 96 2. Section 2-105

¶ 97 Defendants next claim that they are immune under section 2-105 of the Tort Immunity Act, which provides:

> "A local public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its own, to determine whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety." 745 ILCS 10/2-105 (West 2006).

¶ 98 In the case at bar, plaintiffs allege that all three defendants own and operate various portions of the drainage and sewer systems at issue. We agree with defendants that, under section 2-105, each defendant is immune from liability for a failure to inspect any property that is not determined to belong to that defendant. However, at this point in the litigation, we must take the allegations of the complaint as true (*Morr-Fitz, Inc.*, 231 Ill. 2d at 488), and therefore must accept plaintiffs' allegations that defendants own the property at issue. Accordingly, section 2-105 does not provide an alternate basis for dismissal of the complaint.

¶ 99 3. Section 2-104

¶ 100 Next, defendants Park Ridge and the District claim that they are immune under section 2-104 of the Tort Immunity Act.[16] Section 2-104 provides:

[16]While the three defendants filed a joint brief on appeal and do not specify which defendants are making this argument, the motion to dismiss filed by Maine Township before the trial court does not list section 2-104 as a basis for dismissal. Accordingly, we consider this section with respect to Park Ridge and the District alone.

> "A local public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization where the entity or its employee is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked." 745 ILCS 10/2-104 (West 2006).

¶ 101 In the case at bar, plaintiffs allege that these defendants should be held liable for plaintiffs' flooding damage in part because they approved Advocate's plans for its drainage system. We agree with defendants that, to the extent that plaintiffs claim that their injury was caused by defendants' approval of Advocate's plans, the plain language of section 2-104 immunizes defendants from liability for such claims. However, such immunity is limited to injuries caused by the approval itself—where defendants' actual actions or omissions are at issue, section 2-104 immunity would not apply. See *Salvi*, 2016 IL App (2d) 150249, ¶ 46 (denying section 2-104 immunity where the village's actions in reconstructing a pond and developing a parcel were at issue, as opposed to its issuance of permits or approvals). Therefore, dismissal at this time is not warranted.

¶ 102 4. Section 3-110

¶ 103 Finally, defendants Maine Township and Park Ridge claim that they are immune from liability under section 3-110 of the Tort Immunity Act.[17] Section 3-110 provides:

> "Neither a local public entity nor a public employee is liable for any injury occurring on, in, or adjacent to any waterway, lake, pond, river or stream not owned,

[17]The District's motion to dismiss did not raise section 3-110 as a basis for dismissal, and accordingly, we consider the section with respect to Maine Township and Park Ridge alone.

supervised, maintained, operated, managed or controlled by the local public entity." 745 ILCS 10/3-110 (West 2006).

¶ 104 In the case at bar, these defendants argue that all injury resulted from flooding that came from a waterway—the Prairie Creek Stormwater System—and that plaintiffs did not allege facts supporting their claim that Maine Township or Park Ridge owned, supervised, maintained, operated, managed, or controlled any component of that system. We do not find this argument persuasive. First, the Prairie Creek Stormwater System as a whole would not be considered a "waterway" for purposes of section 3-110. As defined in the complaint, the Prairie Creek Stormwater System is a system of public improvements consisting of (1) open drains, (2) enclosed pipes, (3) retention basins, and (4) tributary storm water sewers that run under the streets. While the retention basins would arguably fall under section 3-110's definition of a "pond," the remainder of the system would certainly not be considered a "waterway." See Black's Law Dictionary 1623 (8th ed. 1999) (defining "waterway" in the same way as "watercourse": "A body of water, [usually] of natural origin, flowing in a reasonably definite channel with bed and banks. The term includes not just rivers and creeks, but also springs, lakes, and marshes in which such flowing streams originate or through which they flow."); American Heritage Dictionary 1367 (2d College ed. 1985) (defining "waterway" as "[a] navigable body of water, such as a river, channel, or canal"); Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/waterway (last visited May 10, 2019) [https://perma.cc/NU2H-LWKW] (defining "waterway" as "[a] river, canal, or other route for travel by water"). Thus, section 3-110 immunity would not apply.

¶ 105 Furthermore, plaintiffs' complaint alleges that both defendants bore responsibility for the portions of the system falling within their jurisdictions. While defendants point to a comment

by plaintiffs' counsel that they claim constitutes an admission that Maine Township did not "own" the system, even if that comment is read in the way defendants wish, section 3-110 limits immunity not only for owners but also for those who "supervise[ ], maintain[ ], operate[ ], manage[ ] or control[ ]" such waterways. 745 ILCS 10/3-110 (West 2006). As noted, the complaint alleges that defendants bore such responsibility over the system. In the case at bar, then, section 3-110 does not serve as an alternate basis for dismissal of plaintiffs' complaint.

¶ 106 CONCLUSION

¶ 107 For the reasons set forth above, the trial court erred in applying *Coleman* prospectively and, accordingly, erroneously granted defendants' section 2-615 motion to dismiss on the basis of the public duty rule. However, the counts based on violations of the Tort Immunity Act and for adjacent property owner liability were nevertheless properly dismissed under section 2-615 because plaintiffs failed to state causes of action with respect to each of those counts. The counts based on negligent nuisance, negligent trespass, and the takings clause were sufficient to withstand dismissal under section 2-615, and most of defendants' claims of immunity under the Tort Immunity Act do not provide an alternate basis for dismissal of those counts under section 2-619. Accordingly, we reverse the trial court's dismissal of plaintiffs' complaint with respect to defendants Park Ridge, Maine Township, and the District on those counts.

¶ 108 Affirmed in part and reversed in part.

APPENDIX

Document 9

EA
B 09-60

SUPREME COURT OF ILLINOIS

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September 25, 2019

In re: Dennis Tzakis et al., etc., Appellees, v. Berger Excavating Contractors, Inc., et al., etc. (Maine Township et al., Appellants).
Appeal, Appellate Court, First District.
125017

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

APPENDIX

Document 10

TABLE OF CONTENTS FOR RECORD ON APPEAL

Date Filed	Title/Description	Page No.
12/11/2014	NOTICE OF FILING	C 1819- C 1829
12/12/2014	ORDER	C 1830- C 1831
01/16/2015	STIPULATION	C 1832- C 1833
01/16/2015	ORDER	C 1834- C 1846
01/26/2015	ORDER	C 1847- C 1848
02/02/2015	ORDER	C 1849
02/02/2015	ORDER2	C 1850
02/17/2015	REPONSE	C 1851- C 1883
04/03/2015	ORDER_Part1	C 1884
04/03/2015	ORDER_Part2	C 1885- C 1892
04/03/2015	ORDER_Part3	C 1893- C 1894
04/03/2015	ORDER_Part4	C 1895- C 1909
05/04/2015	MOTION	C 1910- C 1921
05/15/2015	ORDER	C 1922- C 1923
06/05/2015	ORDER	C 1924- C 1925
06/26/2015	NOTICE OF FILING	C 1926- C 2129
06/29/2015	MOTION	C 2130- C 2131
06/29/2015	MEMORANDUM	C 2132- C 2134
06/29/2015	EXHIBITS	C 2135- C 2162
06/29/2015	NOTICE OF FILING	C 2163- C 2166
06/29/2015	NOTICE OF FILING2	C 2167- C 2170
07/09/2015	ORDER	C 2171
07/31/2015	REPSPONSE	C 2172- C 2187
08/12/2015	NOTICE OF FILING	C 2188- C 2204
08/14/2015	REPLY	C 2205- C 2207
08/25/2015	MOTION	C 2208- C 2215
08/25/2015	ORDER	C 2216
08/26/2015	ORDER	C 2217
09/03/2015	MOTION	C 2218- C 2222
09/03/2015	EXHIBIT	C 2223- C 2224
10/06/2015	ORDER	C 2225
10/29/2015	MOTION	C 2226- C 2232
10/29/2015	EXHIBITS	C 2233- C 2241
10/30/2015	MOTION	C 2242- C 2248
10/30/2015	ORDER	C 2249
11/20/2015	ORDER	C 2250
11/25/2015	RESPONSE	C 2251- C 2295
12/17/2015	ANSWER	C 2296- C 2304
01/11/2016	ORDER	C 2305

CONTENTS OF VOLUME 2 OF COMMON LAW RECORD

CONTENTS OF VOLUME 3 OF COMMON LAW RECORD

CONTENTS OF SUPPLEMENT TO COMMON LAW RECORD

TABLE OF REPORTS OF PROCEEDING