No. 130323

IN THE SUPREME COURT OF ILLINOIS

HABDAB, LLC, an Illinois limited liability Company,	))	Appeal from the Appellate Court of Illinois, Second District, No. 2-23-0006
Plaintiff-Appellant,	)))	
vs.	))	There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County
COUNTY OF LAKE, *et al.*,	))	
Defendants-Appellees.	))	The Hon. Jacquelyn D. Melius, Presiding Judge

---

BRIEF OF DEFENDANT – APPELLEE
COUNTY OF LAKE

Oral Argument Requested

John P. Christensen #6220276
Gunnar B. Gunnarsson #6198562
Assistant State's Attorneys
Lake County State's Attorneys Office
18 North County Street
Waukegan, IL 60085
(847) 377-3050
JChristensen2@lakecountyil.gov
GGunnarsson@lakecountyil.gov

E-FILED
5/15/2024 1:23 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

POINTS AND AUTHORITIES

NATURE OF THE CASE……………………………………………………………….1

Road Improvement Impact Fee Law, 605 ILCS 5/5-901………..………………………..1

Habdab, LLC v. County of Lake, 2023 IL App (2d) 230006…………………………...2

ISSUE PRESENTED FOR REVIEW…………………………………………….....2

Road Improvement Impact Fee Law, 605 ILCS 5/5-901………..………………………..2

Road Improvement Impact Fee Law, 605 ILCS 5/5-903…………………………………2

STATUTES INVOLVED…………………………………………………………..…3

65 ILCS 5/11-15.1-1 of the Illinois Municipal Code……………………………………...3

65 ILCS 5/11-15.1-2(d) of the Illinois Municipal Code…………………………………..3

605 ILCS 5/5-903 of the Impact Fee Law………………………………………………...3

STATEMENT OF FACTS……………………………………………………………....3

Road Improvement Impact Fee Law, 605 ILCS 5/5-901….…….…………............…9-12

Road Improvement Impact Fee Law, 605 ILCS 5/5-903…………………………....10, 12

Northern Illinois Home Builders Ass'n v. County of DuPage, 165 Ill.2d 25 (1995)...11, 13

Shore v. City of Joliet, 2011 IL App (3d) 100911-U ……………….……….....…..…11

Habdab, LLC v. County of Lake, 2023 IL App (2d) 230006……………………….....12-15

McElwain v. Office of Illinois Sec'y of State, 2015 IL 117170…………………….…….14

STANDARD OF REVIEW……………………………………………………….15

735 ILCS 5/2-1005(c)…...…………………………………………………………….15

Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago, 2018 IL 122793 …………………………………………………...…..……15

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

ARGUMENT…………………………………………………………………….....16

I. The Second District correctly found that the IGA Fees, as they relate to the Habdab Parcels 1, 2, and 3, are not subject to the Impact Fee Law where the IGA Fees do not fall within the statutory definition of "road improvement impact fee" but instead are imposed by way of an annexation agreement...…………..….………………………………………………........16

65 ILCS 5/11-15.1-1 of the Illinois Municipal Code ……...……...……...………………16

65 ILCS 5/11-15.1-2(d) of the Illinois Municipal Code …..……..……...……...……17-18

Road Improvement Impact Fee Law, 605 ILCS 5/5-903…………………………….17-19

Road Improvement Impact Fee Law, 605 ILCS 5/5-901….……..……..………....…11-15

Hampshire Tp. Road Dist. v. Cunningham, 2016 IL App (2d) 150917…………...…..…17

In re Commitment of Mitchell, 2014 IL App (2d) 131139……………………...……..17

Habdab, LLC v. County of Lake, 2023 IL App (2d) 230006………...……………....17, 19

Road Improvement Impact Fee Law, 605 ILCS 5/5-911…………………………….18-19

Road Improvement Impact Fee Law, 605 ILCS 5/5-912…………………………….18-19

Supreme Court Rule 341(h)(7)…………………………………………………..18

McGinley Partners, LLC v. Royalty Properties, LLC, 2018 IL App (1st) 172976……….18

Northern Illinois Home Builders Ass'n v. County of DuPage, 165 Ill.2d 25 (1995)...19-20

II. The IGA Fees imposed on Plaintiff for Parcels 1, 2 and 3 are not barred by the Doctrine of Unconstitutional Conditions…………...…………..................20

Road Improvement Impact Fee Law, 605 ILCS 5/5-901….……..……..………....…21

McElwain v. Office of Illinois Sec'y of State, 2015 IL 117170………………..….21-22, 24

Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309 (1994)…..……….21-22, 24, 26-28

Elm Lawn Cemetery Co. v. City of Northlake, 94 Ill.App.2d 387 (2d Dist. 1968)……....22

Habdab, LLC v. County of Lake, 2023 IL App (2d) 230006………...……………....23-25

Jackson v. City of Chicago, 2012 IL App (1st) 111044………………………...……..23

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

In re Commitment of Walker, 2014 IL App (2d) 130372………………………………..23

Northern Illinois Home Builders Ass'n v. County of DuPage, 165 Ill.2d 25 (1995)...23-24

Gaylor v. Village of Ringwood, 363 Ill.App.3d 543 (2d Dist. 2006)……….….…………26

Clark v. Marian Park, Inc., 80 Ill.App.3d 1010 (2d Dist. 1980)……………...………....26

Johannesen v. Eddins, 2011 IL App (2d) 110108……...………………………....…..26

Sheetz v. County of El Dorado, California, 144 S.Ct. 893 (2024)…..........................26-28

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141 (1987)……….26-28

CONCLUSION……………………………………………………..……..……28-29

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

NATURE OF THE CASE

Plaintiff Habdab, LLC (referred to herein as either "Plaintiff" or "Habdab") filed a two count Complaint for Declaratory Judgment ("Complaint") against the County of Lake (Count I) and the Village of Mundelein (Count II) seeking to invalidate the imposition of the fees required under the Central Lake County Area Transportation Improvement Agreement ("IGA") premised on the assertion that the IGA fees were not established in accordance with the requirements of the Road Improvement Impact Fee Law ("Impact Fee Law")(605 ILCS 5/5-901) and, thus, are unenforceable against Habdab. Thereafter, the County of Lake ("County") filed a motion for summary judgment as to Count I of the Complaint, and Plaintiff filed a cross-motion for summary judgment. In support of its cross-motion for summary judgment, Plaintiff in part argued that it was entitled to a declaratory judgment because the imposition of the fees under the IGA violated the requirements of the Impact Fee Law. The County countered in support of its motion for summary judgment that the IGA fees as they apply to Plaintiff are not subject to the Impact Fee Law because they do not fall within the statutory definition of "road improvement impact fee" since they are not levied or imposed as a condition to the issuance of a building permit or certificate of occupancy but instead flow from an annexation agreement entered into between Plaintiff and the Village of Mundelein ("Village" or "Mundelein"). The trial court agreed with the County and granted the County's Motion for Summary Judgment and denied the Plaintiff's cross-motion for summary judgment. Judgment was entered in favor of the County and against Plaintiff as to Count I of the Complaint. The trial court subsequently granted Plaintiff's request for Supreme Court Rule 304(a) language and an appeal to the Second District followed.

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

In affirming the trial court's granting of summary judgment in favor of the County and denial of Plaintiff's cross-motion for summary judgment, the Second District held that the IGA fees did not fall within the statutory definition of "road improvement impact fees" and, thus, concluded that the IGA fees were not subject to the Impact Fee Law. *Habdab, LLC v. County of Lake,* 2023 IL App (2d) 230006, ¶¶33-44. The Second District also held that the unconstitutional conditions doctrine did not apply to render the fees an unconstitutional taking since there was (1) an essential nexus between the condition burdening rights and a legitimate state interest, and (2) a rough proportionality between the burden on Plaintiff and the harm the County (via the Village) seeks to remedy through the condition. *Id.* at ¶¶54-57.

Plaintiff filed its petition for leave to appeal to this Court, which was allowed on March 27, 2024. No issues are raised on the pleadings.

<u>ISSUE PRESENTED FOR REVIEW</u>

Whether the Second District properly affirmed the trial court's granting of the County's motion for summary judgment and denial of the Plaintiff's cross-motion for summary judgment as to Count I of the Complaint for Declaratory Judgment based upon a determination that: (1) the IGA fees as they relate to Plaintiff's three parcels are not subject to the requirements of the Impact Fee Law since the IGA Fees do not fall within the statutory definition of "road improvement impact fee" where they do not involve a charge or fee levied or imposed as a condition to the issuance of a building permit or certificate of occupancy in connection with a new development, but instead flow from an annexation agreement entered into between Plaintiff and the Village; and (2) the unconstitutional conditions doctrine does not apply, and thus the IGA fees do not constitute an

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

unconstitutional taking, since (a) there is an essential nexus between the condition burdening rights and a legitimate state interest and (b) there is a rough proportionality between the burden on Plaintiff and the harm the County (via the Village) seeks to remedy through the condition.

STATUTES INVOLVED

65 ILCS 5/11-15.1-1 of the Illinois Municipal Code, which allows municipalities to enter into annexation agreements with owners of land located in unincorporated territories.

65 ILCS 5/11-15.1-2(d) of the Illinois Municipal Code, which provides that annexation agreements may provide for contribution of either land or monies, or both, to any municipality and to other units of local government.

605 ILCS 5/5-903 of the Impact Fee Law which specifically defines "Road improvement impact fee" to mean "”any charge or fee levied or imposed by unit of local government as a condition to the issuance of a building permit or a certificate of occupancy in connection with a new development, when any portion of the revenues collected is intended to be used to fund any portion of the costs of road improvements."

STATEMENT OF FACTS

The Central Lake County Area Transportation Improvement Agreement

In or about November of 2009 the County and three Central Lake County Municipalities (the Villages of Mundelein, Grayslake and Libertyville) entered into an intergovernmental agreement entitled the Central Lake County Area Transportation

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

Improvement Agreement ("IGA"). (C1680-1681; C1697-98; C1146; C1180; C1186-1214; C1270-1298) [1].

The IGA provided, inter alia, that the County would build certain mutually desired improvements to County roadways and highways serving the central Lake County area with the County fronting the initial financing, but that fifty (50%) of the cost of those improvements would be reimbursed to the County through fees ("IGA fees") to be paid by developers upon the occurrence of certain triggers. (C1191-95). Those IGA fees were to be collected, as they applied to Plaintiff's three parcels, through fees included in voluntary annexation agreements entered into between Mundelein and Plaintiff. (C1195).

The IGA provides in pertinent part:

> "Development": Any residential, commercial, industrial, or other project which is being newly constructed, reconstructed, redeveloped, structurally altered, relocated, or enlarged on any lot, parcel, or tract in the Central Lake County Area in connection with receiving Final Development Approval from the COUNTY or one of the VILLAGES, and which generates additional traffic within the Central Lake County Area. The Parties acknowledge and agree that the reconstruction, structural alteration, relocation, or enlargement of a detached single-family residence within the Central Lake County Area is not a Development for purposes of this Agreement. In addition, with respect to any property involving Development in multiple phases or plats, each such phase or final plat shall be deemed a separate Development. (pp. 4-5, Section II (4).)
>
> "Final Development Approval": For any Development, the latter of the grant of Zoning Relief, annexation approval, or final plat approval. If none of the foregoing apply, the issuance of the earlier of a grading permit, a site development permit, a building permit, or a certificate of occupancy. (p. 5, Section II (5).)
>
> The Parties acknowledge and agree that any new Development within the Central Lake County Area will generate traffic within the Highway Corridor that, without the offsetting effect of the IMPROVEMENTS, (i) "'will have adverse impacts on the surrounding properties and the facilities available to serve properties within the Central Lake County Area, (ii) will diminish the value of surrounding properties, and (iii) will threaten the public health, safety, and welfare. To finance such offsetting IMPROVEMENTS, it is necessary to collect the FEES

---

[1] Citations to the Common Law Record are referenced as "C___". Citations to the Report of Proceedings are referenced as "R___".

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

> contemplated by this Agreement. Consistent with the foregoing, the Parties agree as follows: (a) **The VILLAGES** that are Parties to this Agreement, and each of them, **agree that, as a condition of annexation** of any unincorporated territory located within the Central Lake County Area and within a Highway Improvement Area, such VILLAGE shall require the execution of an annexation agreement, which **annexation agreement shall include among its terms the payment of FEES in accordance with this Agreement**. (p. 8, Section V (1).)
>
> The Party having jurisdiction over a Development shall be responsible for collecting the FEES relating to a Development prior to granting Final Development Approval. Upon the collection of any FEES, a Party shall transfer the FEES to the COUNTY for deposit into the Fund. Alternatively, any Party having jurisdiction over a Development may cause FEES to be paid and collected by requiring that no Development shall receive Final Development Approval unless the FEES have been paid to the COUNTY and a receipt of such payment from the COUNTY is delivered to the Party having jurisdiction. Any FEES collected directly by the COUNTY pursuant to the preceding sentence shall be deposited into the Fund as hereinafter provided. (p. 9, Section V (2).)

[emphasis added]. (C1148-49; C1190-91, C1194-95).

The Annexation Agreements Between Mundelein and Plaintiff

The three contiguous parcels at issue in the Complaint (Parcels 1, 2 and 3) were annexed into Mundelein by way of successive annexation agreements. (C1149-52; C1349-73; C1377-1406; C1407-1457). Parcel 1 was annexed via an annexation agreement in 2018, Parcel 2 in 2019 through an amendment to the annexation agreement, and Parcel 3 in 2021 (approximately eight (8) months after the filing this lawsuit) through a second amendment to the annexation agreement. (C1149-52; C1349-73; C1377-1406; C1407-1457).

On September 11, 2018, Mundelein entered into an Annexation Agreement with Habdab providing, inter alia, for the annexation of Parcel 1 (consisting of 6.6 acres) into Mundelein for a "clean fill" commercial development project. (C1149; C1349-73). After the annexation of Parcel 1, and pursuant to its intention to expand the commercial clean fill operation, Habdab began negotiations with Mundelein to annex Parcel 2 (10.03 acres) into

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

the Village, which occurred pursuant to an Amendment to Annexation Agreement on July 22, 2019. (C1150; C1377-1406; C1182). Prior to annexation, Parcels 1 and 2 were located in unincorporated Lake County and zoned agricultural (AG). (C1149; C1151; C1604-08; C1151). Under the Annexation Agreement and Amendment, Parcels 1 and 2 were automatically reclassified into the category of R-1 Single Family Residential Zoning District. (C1149; C1151; C1352; C1380-81). The Annexation Agreement and Amendment recite various plans and documents that Habdab submitted to Mundelein, including engineering documents, grading and paving plans, soil erosion and sediment control plans, site work details, and landscape plans. (C1149-51; C1352; C1380-81). The berm would be constructed by Habdab in accordance with the submitted plans. (C1150; C1353; C1382). Habdab filed a plat of annexation describing the property to be annexed (Parcel 1), which was ultimately recorded by the Village along with the ordinance approving the annexation. (C1150, C1352, C1374-76). A plat of annexation describing Parcel 2 likewise was filed with the Village by Habdab. (C1151; C1380). Under the Annexation Agreement the work on the berm was originally to be completed by September 1, 2019. (C1150; C1353). However, the Amendment extended the time for completion of the berm such that the improvements on the Combined Parcels (Parcels 1 and 2) would be completed no later than December 31, 2025. (C1151; C1380-81). Both the Annexation Agreement and Amendment failed to include a provision for collection and payment of the IGA fees as required pursuant to the IGA. (C1150; C1151; C1353; C1377-1406).

In a further extensive expansion of its commercial clean fill operation, Habdab negotiated with Mundelein to annex Parcel 3 (35 acres) into the Village, which was accomplished through a Second Amendment to Annexation Agreement on April 26, 2021

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

(eight (8) months after the filing of this lawsuit). (C1151; C1407-1457; C1479). As before, the Second Amendment to Annexation Agreement recited that Habdab had submitted to Mundelein various documents, including a Concept Plan for the Combined Parcels (Parcels 1, 2, and 3), Engineering documents, and a Landscape Plan. (C1151; C1410-11). The Second Amendment provided that Parcel 3, which also had been zoned agricultural (AG) prior to annexation, was automatically reclassified into the R-1 Single Family Residential Zoning District. (C1151; C1410). Habdab also filed with the Village a plat of annexation for Parcel 3. (C1152; C1497-98). The Second Amendment extended the completion date another ten (10) years, thus allowing the continued operation of Habdab's commercial clean fill operation on the Combined Parcels (Parcels 1, 2, and 3) until December 31, 2035. (C1413).

For the first time Mundelein addressed the IGA fees in the Second Amendment, which states that Habdab will pay the IGA fees for the Combined Parcels (Parcels 1, 2 and 3) as a result of any "Final Development Approval" as defined in the IGA, and further provides (contrary to the requirements of the IGA) that Habdab does not have to pay the IGA fees (even if final development approval in fact has occurred) until this litigation is terminated by settlement or judgment or otherwise. (C1152; C1154; C1419). The Second Amendment also provided that Plaintiff agreed to indemnify and hold harmless the Village from "i) fifty percent (50%) of all attorney's fees and costs incurred by the Village, said amount to be capped at $50,000, in connection with the Litigation, including attorney's fees and costs associated with any claims by any of the parties to the IGA as well as any settlement and ii) all claims and any judgments against the Village relating to the IGA and/or the Agreement, Amended Agreement or this Second Amended Agreement and the

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

Village's actions or omissions relative to same by the County, the Owner and any other parties to the IGA." (C1419-20).

Plaintiff's Clean Fill Operation on Parcels 1, 2 and 3

Plaintiff's "clean fill operation" is proceeding on the Combined Parcels 1, 2, 3 with an average of 100 truckloads of fill being brought per day to the Combined Parcels as of March 2022. (C1152; C1481; C1499-1502). Habdab has torn down buildings and constructed a road on the Combined Parcels. (C1152; C1469; C1474-75). The depositing of that huge volume of fill, including grading of the area, has resulted in a substantial change to the landscape, such that it has been referred to as "Mount Mudville" and the imposition of substantial traffic on the roadways. (C1152-52; C1478-79; C1503-07; C1533). As noted above, the zoning for the clean fill operation was approved in the annexation agreement and its amendments, automatically classifying the parcels into R-1 Single Family residential. (C1153; C1349-73; C1377-1406; C1407-57). Again, as noted above, a plat of annexation for each of the three parcels was submitted for filing with the Village Clerk and the Village has not indicated that there was any problem with the submitted plats. (C1153; C1349-73; C1377-1406; C1407-57; C1374-76; C1497-98; C1647). There are therefore no further Village approvals needed for the clean fill operation to proceed on all three parcels and indeed the development is proceeding now on all three parcels. (C1153; C1465-66; C1472-73, 76-77, 80).

Mundelein's Evasion of its Obligation to Perform under the IGA.

John Lobaito was the Village Administrator for Mundelein at the time the IGA was being jointly drafted by the Villages and the County and he remained in that position through the time this lawsuit was commenced by Plaintiff. (C1630). Mr. Lobaito was

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

involved in the drafting of the IGA on behalf of Mundelein and, ultimately, in his position as Village Manager he recommended to the Mundelein Village Board that they approve the IGA, which occurred on November 9, 2009[2]. (C1632-1637, 1639-40). During negotiations in 2016 between Habdab and Mundelein, the IGA fees where specifically identified by Mundelein in correspondence to Habdab's counsel as one of the monetary fees that would become due as part of an annexation agreement, but the Annexation Agreement and Amendment to Annexation Agreement ultimately omitted any provision providing for payment of the IGA fees as required under the IGA. (C1153; C1551-54; C1517-1519). When the County discovered that Parcels 1 and 2 had been annexed into Mundelein and the development was ongoing in the form of Habdab's commercial clean fill operation, the County made a demand on Mundelein for the IGA fees. After the County made demand on Mundelein to pay the outstanding IGA fees for parcels 1 and 2, Mundelein and Plaintiff discussed having Plaintiff's attorney prepare a legal opinion on the IGA, which was first to go to Mundelein and then would be forwarded by Mundelein to the County. (C1154; C1555-57; C1529-30). The legal opinion letter from Plaintiff's counsel that was sent to Mundelein soon thereafter claimed that the IGA violated the Impact Fee Law and thus was illegal, even though Mundelein's counsel indicated to Plaintiff's counsel that IGA fees through voluntary annexation agreements are lawful[3]. (C1154; C1419-20;

[2] In Plaintiff's Petition for Leave to Appeal ("PLA") it states that Mr. Lobaito admitted the fees collected pursuant to the IGA are road improvement impact fees. (Plaintiff's PLA brief, p. 8). However, Lake County objected to this statement of fact because Mr. Lobaito lacks the foundation to offer a legal conclusion as to whether the IGA fees are a road improvement impact fee. (C2235). Moreover, as shown in Lake County's Motion for Summary Judgment and herein, the IGA's fees at issue are not road improvement impact fees and are not subject to the Impact Fee Law.

[3] Specifically, Mundelein's counsel stated in her March 6, 2020 letter to Plaintiff's counsel as follows, "As you know, parties to an annexation agreement can agree to any terms they want to, so the fact that the County did not follow the statute [Impact Fee Law] is irrelevant when the developer agrees to the fee via an annexation agreement." (C1562).

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

C1558-1560; C1561-1562).

Plaintiff's Complaint for Declaratory Judgment and the Parties' Cross Motions for Summary Judgment as to Count I.

On August 25, 2020 Plaintiff filed its two count Complaint against the County (Count I) and Mundelein (Count II) seeking a declaration that Plaintiff was not obligated to pay the IGA fees because they were not established in accordance the Impact Fee Law (605 ILCS 5/5-901). (C6 – C117; C1177-1269). On October 5, 2022 Mundelein filed its Answer, Affirmative Defenses and Counterclaim against Plaintiff seeking a declaratory judgment that Plaintiff is obligated to pay any IGA fees related to Parcels 1, 2 and 3. (C129-224). On that same date Mundelein also filed a third-party complaint against the County requesting a declaratory judgment that the IGA fees are not due because final development approval has not been granted by the Village. (C226-312). On May 24, 2021 the County filed a third-party counterclaim against Mundelein seeking recovery of the unpaid IGA fees. (C387-393). Thereafter, on July 6, 2021 Mundelein voluntarily dismissed its counterclaim against Plaintiff based on the agreement contained in the Second Amendment to the Annexation Agreement, which provided that the Village shall voluntarily dismiss its counterclaim against Plaintiff in the Litigation within 10 days of the parties executing the Second Amendment. (C485 – 486, 585; C1420).

Thereafter, on June 29, 2022 the County filed its motion for summary judgment as to count I of Plaintiff's Complaint based on the argument that the IGA fees, as they relate to Plaintiff and its three parcels, are not subject to the requirements of the Impact Fee Law because they do not fall within the statutory definition of a road improvement impact fee but instead flow from an annexation agreement entered between the Village and Plaintiff

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

in accordance with the Illinois Municipal Code, and thus are lawfully enforceable[4]. (C1683 – 1696). On August 23, 2022 Plaintiff filed its cross motion for summary judgment on Count I of its Complaint against Lake County and in support argued that the IGA fees were imposed in violation of the requirements of the Impact Fee Law, and thus unenforceable against Plaintiff. (C2074 – 2085). On October 25, 2022 the trial court heard argument on Lake County's motion for summary judgment and Plaintiff's cross-motion for summary judgment and continued the matter for ruling to November 1, 2022[5]. (C1700, C3111-12; R2-53).

On November 1, 2022 the trial court granted Lake County's motion for summary judgment and denied Plaintiff's cross-motion for summary judgment as to Count I of Plaintiff's Complaint. (R54-66). In so ruling, the trial court found that the main case relied upon by Plaintiff, *Northern Illinois Home Builders Ass'n v. County of DuPage,* 165 Ill.2d 25 (1995), was inapplicable because it did not involve the imposition of a fee pursuant to an annexation agreement. (R. 57). Instead, the trial court found the rationale of *Shore v. City of Joliet,* 2011 IL App (3d) 100911-U, an unpublished Rule 23 decision, which dealt with the imposition of road improvement fees by way of an annexation agreement, persuasive. The trial court noted that the property owner in *Shore* had asserted, as Habdab argues here, that the requirement to bear a portion of the road improvement costs under an annexation agreement violates the Impact Fee Law. (R58). As in *Shore,* the trial court found that the instant matter does not involve the issuance of a building

[4] Plaintiff has not been denied access by Lake County for Parcels 1, 2 and 3 to County Highways at any time and it is not an issue in this case. (C337-39; C379; C1481-82). Plaintiff did not raise nor discuss access to County Highways as a basis for its cross-motion for summary judgment, nor has Plaintiff argued it in support of its appeal. (C2074-2085; C2653-58; R1-66).

[5] During oral argument on the cross-motions for summary judgment, Plaintiff's counsel acknowledged that the clean fill operation occurring on the subject parcels is a commercial development. (R.38-39)

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

permit or certificate of occupancy, but instead involves the annexation of the subject parcels and approval of a final plat. (R59). Hence, the trial court found that the IGA fees at issue are not subject to the Impact Fee Law and can be lawfully collected through an annexation agreement and, thus, granted the County's motion for summary judgment and denied Plaintiff's cross motion for summary judgment. (R59). The trial court subsequently granted Plaintiff's request for Supreme Court Rule 304(a) language and an appeal to the Second District followed. (C3202 – 3203; C3205 – 3206; C3207-3211).

The Second District's Decision Affirming the Trial Court's Grant of Summary Judgment in Favor of the County and Denial of Plaintiff's Cross Motion for Summary Judgment.

The Second District affirmed the trial court's granting of summary judgment in favor of the County and denial of Plaintiff's cross-motion for summary judgment. *Habdab, LLC v. County of Lake,* 2023 IL App (2d) 230006. In so doing, the Second District held that the IGA fees do not constitute "road improvement impact fees" and, thus, are not subject to the Impact Fee Law. Id. at ¶¶33-44. The Second District noted that the Impact Fee Law defines "road improvement impact fees" in 605 ILCS 5/5-903 (emphasis added) as "any charge or fee levied or imposed by a unit of local government as a condition to the issuance of a ***building permit or a certificate of occupancy*** in connection with a new development, when any portion of the revenues collected is intended to be used to fund any portion of the cost of road improvements." *Id.* at ¶40. The Second District found there was no ambiguity in this statutory definition and further determined that "if the legislature intended to encompass into the Impact Fee Law every conceivable exaction for highway improvements, it would not have limited the definition of 'road improvement impact fees.' That the statute encompasses only fees levied as conditions to issuance of

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

either a building permit or a certificate of occupancy reflects that the legislature selected a point in time distinct from and later than, as relevant here, annexation." *Id.* at ¶41. The Second District found that it could not "ignore a statutory definition with very specific language" and thus concluded that the IGA fees do not constitute "road improvement impact fees" under the Impact Fee Law. *Id.* at ¶44.

The Second District also rejected Plaintiff's argument that the imposition of the IGA fees on Plaintiff constituted an unconstitutional taking under the unconstitutional conditions doctrine. The Second District noted that "plaintiff agreed at oral argument that municipal/county enactments are presumptively constitutional" and the Second District further pointed out that "courts construe enactments to uphold their validity and constitutionality, where that can reasonably be done." *Id.* at ¶47. The Second District noted that a two-part test has been adopted for evaluating unconstitutional conditions questions: (1) is there an essential nexus between the condition burdening rights and a legitimate state interest; and (2) is there a rough proportionality between the burden on the individual and the harm the government seeks to remedy through the condition. *Id.* at ¶48.

As to the first part of the test, the Second District found there is an essential nexus between the condition burdening rights and a legitimate state interest. *Id.* at ¶54. The Second District noted that "'the need to minimize or reduce traffic congestion is a legitimate State interest,'" and that a "'nexus exists between preventing further traffic congestion and providing for road improvements to ease that congestion.'" *Id.* (citing to *Northern Illinois Home Buildings,* 165 Ill.2d at 32). The Second District further noted that "[t]he IGA provides that, as property develops in the central Lake County area, residents

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

will benefit from highway improvements that ensure traffic is efficiently transported through the area, and it provides for construction funding for such improvements." *Id.*.

In applying the second part of the test, the Second District concluded that there is a rough proportionality between the burden on Plaintiff and the harm the County (via the Village) seeks to remedy through the condition. The Second District found that Plaintiff misstated the proper standard applicable to the unconstitutional conditions doctrine when it asserted that IGA fees must be specifically and uniquely attributable to its development. In holding that "rough proportionality" is the proper standard, the Second District stated, "[o]ur Supreme Court has noted that rough proportionality is the proper standard under the unconstitutional conditions doctrine (which is a federal doctrine)." *Id.* at ¶55 (citing to *McElwain v. Office of the Illinois Secretary of State,* 2015 IL 117170, ¶29, 39 N.E.3d 550). The Second District noted further that "[t]his standard requires a lesser degree of connection between the exaction and the projected impact of the new development than the specifically-and-uniquely-attributable standard" and that "[n]o precise mathematical calculation is required, but the municipality must make some sort of individualized determination that the required dedication is related in both nature and extent to the impact of the proposed development." *Id.* at ¶55.

In light of these standards, the Second District concluded,

> We believe that there is a rough proportionality between the IGA fees assessed against plaintiff's parcels and the road improvements. The IGA's purpose is to establish construction funding for future highway improvements in the central Lake county area. The improvements are intended to address existing and future traffic demands. Under the IGA, the county agreed to design and construct road improvements in exchange for a portion of the construction costs being reimbursed from fees collected from developers within the area, upon the occurrence of certain triggers. It established six "Highway Improvement Areas" within the central Lake County area, and the parties created a schedule of fees for each subarea. The fees for each subarea are divided by the number of developable areas within each

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

> subarea and are assessed against future developments, based on the number of acres contained within each development. The three parcels were zoned agricultural prior to annexation; afterward, they were reclassified into the R-1 "Single Family Residential Zoning District." Plaintiff's clean fill operation, which operates on all three parcels, involves about 100 truckloads of fill per day (as of March 2022) being transported to the parcels.

Id. at 56. Thus, the Second District held that "because both of its requirements are met, the unconstitutional conditions doctrine does not apply here to render the fees a taking without just compensation." *Id.* at ¶57.

Lastly, the Second District rejected Plaintiff's argument that it never agreed to pay the IGA fees under the Second Amendment, noting that "[a]s plaintiff acknowledges, if its challenge to the county's impact fees fails and the fees are upheld, as has occurred here, then plaintiff must pay the fee to the village." *Id.* at ¶¶59-60.

STANDARD OF REVIEW

Section 2-1005(c) of the Illinois Code of Civil Procedure provides that a motion for summary judgment "shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c); *see also*, *Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago,* 2018 IL 122793, ¶21. "By filing cross-motions for summary judgment, the parties extend an invitation to the court to decide the questions presented as a matter of law." *Carmichael,* 2018 IL 1222793, ¶21. The appellate court applies *de novo* review when deciding an appeal of a trial court's decision on a motion for summary judgment. *Id.*

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

ARGUMENT

The narrow issue presented in this case concerns the imposition of IGA fees pursuant to the terms of a voluntary annexation agreement entered between Plaintiff and the Village, and whether these IGA fees are subject to the requirements of the Impact Fee Law where they do not fall within the statutory definition of "road improvement impact fee" since they do not involve a charge or fee levied or imposed as a condition to the issuance of a building permit or certificate of occupancy in connection with a new development, and whether the imposition of the IGA Fees constitute an unconstitutional taking pursuant to the unconstitutional conditions doctrine. For the sound reasons stated by the Second District and further discussed herein, the Second District properly affirmed the trial court's granting of summary judgment in favor of the County and denial of Plaintiff's cross-motion for summary judgment based on a determination that (1) the IGA fees for Parcels 1, 2 and 3 are not subject to the Impact Fee Law and can be lawfully collected from Plaintiff by way of an annexation agreement, and (2) the applicable two-part test (essential nexus and rough proportionality) is satisfied, and, hence, the unconstitutional conditions doctrine does not apply here to render the IGA fees a taking without just compensation.

I. The Second District correctly found that the IGA Fees, as they relate to the Habdab Parcels 1, 2, and 3, are not subject to the Impact Fee Law where the IGA Fees do not fall within the statutory definition of "road improvement impact fee" but instead are imposed by way of an annexation agreement.

Before the lower courts and again in its brief to this court, Plaintiff ignores the fact that annexation agreements are governed by the Illinois Municipal Code ("Municipal Code"), which allows municipalities to enter into annexation agreements with owners of land in unincorporated territories. 65 ILCS 5/11-15.1-1. Plaintiff also ignores the fact that

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

the Municipal Code specifically provides that an annexation agreement can provide for the "contribution of either land or monies, or both, to any municipality". 65 ILCS 5/11-15.1-2(d). Thus, under the plain language of the Municipal Code, it is proper and lawful for the voluntary annexation agreement entered between Mundelein and Plaintiff to provide for the contribution of money by way of the payment of IGA fees.

Plaintiff not only asks this court to overlook the application of section 11-15.1-2 of the Municipal Code, but also asks this court to ignore the plain language of the Impact Fee Law's definition of "road improvement impact fee", which clearly and specifically limits the Impact Fee Law's application to fees levied or imposed as a condition to the issuance of a building permit or a certificate of occupancy. 605 ILCS 5/5-903. The best indicator of the legislature's intent is the plain and ordinary meaning of the statute's language, and a court may not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions. *Hampshire Tp. Road Dist. v. Cunningham,* 2016 IL App (2d) 150917, ¶20*; In re Commitment of Mitchell,* 2014 IL App (2d) 131139, ¶14. Here, the Impact Fee Law defines a "road improvement impact fee" as follows:

> "Road improvement impact fee" means any charge or fee levied or imposed by a unit of local government as a condition to the issuance of a building permit or a certificate of occupancy in connection with a new development, when any portion of the revenues collected is intended to be used to fund any portion of the cost of road improvements.

605 ILCS 5/5-903. As the Second District noted, there is no ambiguity in the statutory definition of "road improvement impact fee." *Habdab, LLC.,* 2023 IL App (2d) 230006, ¶41. Under the clear and unambiguous definition of "road improvement impact fee", for a fee to fall within the purview of the Impact Fee Law it must be levied or imposed as a condition to the issuance of a building permit or a certificate of occupancy. 605 ILCS 5/5-

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

903. Here, the IGA fee that Mundelein was required to collect from Habdab does not involve the charge of a fee in exchange for the issuance of a building permit or a certificate of occupancy; rather, it involves the voluntary annexation of the Habdab properties into Mundelein pursuant to an annexation agreement providing for the contribution of monies in the form of IGA fees as authorized by section 5/11-15.1-2 of the Illinois Municipal Code. Thus, the IGA fees as they relate to the Habdab parcels are not "road improvement impact fees" and, thus, are not subject to the Impact Fee Law.

Seeking to avoid the unambiguous definition of "road improvement impact fee", Plaintiff erroneously argued before the Second District that this definition must be read more broadly. In support, Plaintiff referred in pertinent part to sections 5-911 and 5-912 of the Impact Fee Law. However, in Plaintiff's Petition for Leave to Appeal, which it has elected to stand on as its brief before this court, Plaintiff does not dispute the Second District's findings concerning the non-applicability of sections 5-911 or 5-912 on the definition of "road improvement impact fee", nor does Plaintiff raise these statutory sections in its specious effort to expand the definition of "road improvement impact fee". As such, Plaintiff has waived these arguments and cannot raise them in its reply brief or oral argument before this Court. *See* Supreme Court Rule 341(h)(7)("Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or petition for rehearing."); *see also*, *McGinley Partners, LLC v. Royalty Properties, LLC,* 2018 IL App (1st) 172976, ¶26 ("It is well settled that a party may not raise an issue for the first time in its reply brief.").

Even *assuming arguendo* that Plaintiff has not waived these arguments, as the Second District properly determined, sections 5-911 and 5-912 do not expand the definition

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

of "road improvement impact fee". Section 5-911 addresses the timing of the fee assessment and provides that "road improvement impact fees" shall be assessed "at the time of final plat approval or when the building permit is issued when no plat approval is necessary." 605 ILCS 5/5-911. As the Second District found, "[s]ection 5-911 … does not act to broaden the definition of 'road improvement impact fees,' which, again, are limited to fees 'levied or imposed *** as a condition to the issuance of a building permit or certificate of occupancy in connection with a new development.' *Id.* §5-903. The two conditions in the definition must still be met." *Habdab, LLC.,* 2023 IL App (2d) 230006 ¶42.

Likewise, section 5-912 does not broaden the definition of "road improvement impact fees." Section 5-912 simply addresses the timing of the payment of the "road improvement impact fees" under the Impact Fee Law and sets forth methods of payment that are intended to minimize the effect of impact fees on the persons making the payments. As correctly determined by the Second District, the language of section 5-912 does not reflect that the legislature intended to broaden the definition of "road improvement impact fees." As the Second District noted, "[t]he fact that parties may agree that the statutory fees may be paid earlier than the default times under the provision does not in any way show that the definition includes fees other than those that are 'levied or imposed' *** as a condition to the issuance of a building permit or a certificate of occupancy in connection with a new development.' *Id.* §5-903."

Furthermore, Plaintiff's reliance on *Northern Illinois Home Builders Ass'n v. County of DuPage*, 165 Ill.2d 25 (1995), in support of its erroneous argument that the imposition of the IGA fees violates the Impact Fee Law, is misplaced. The *Northern*

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

Illinois Home Builders case involved a complaint for mandamus challenging the constitutionality of the prior and current versions of the Impact Fee Law and DuPage County ordinances imposing impact fees via these state statutes on developments within unincorporated DuPage County. Critically, *Northern Illinois Home Builders* did not involve a municipality's imposition of a fee by way of a voluntary annexation agreement, as authorized by the Illinois Municipal Code. As illustrated above, a fee included within an annexation agreement does not fall within the statutory definition of "road improvement impact fee" and, accordingly, is not subject to the Impact Fee Law. Consequently, the *Northern Illinois Home Builders* case is readily distinguishable from the instant matter and has no application.

In sum, the Second District properly held that the IGA fees against Plaintiff's parcels, which flow from a voluntary annexation agreement authorized under the Municipal Code, do not fall within the statutory definition of "road improvement impact fee" since they do not involve a charge or fee levied or imposed as a condition to the issuance of a building permit or certificate of occupancy, and consequently, are not subject to the Impact Fee Law.

II. The IGA Fees imposed on Plaintiff for Parcels 1, 2 and 3 are not barred by the Doctrine of Unconstitutional Conditions.

Plaintiff also erroneously argues that the Second District erred in finding that the unconstitutional conditions doctrine does not apply here to render the IGA fees an unconstitutional taking based on the determination (1) that there is an essential nexus between the condition burdening rights and a legitimate state interest and (2) that there is a rough proportionality between the IGA fees assessed against plaintiff's parcels and the road improvements. Initially, it is important to note that Plaintiff did not assert a cause of

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

action against the County based on a specific constitutional violation. Specifically, count I of the Complaint is brought against the County for declaratory judgment based on the claim that Plaintiff is not obligated to pay the IGA fees because they do not comply with the Impact Fee Law. (See ¶¶ 5-13, 21-24, 36-38 of the Complaint). While paragraph 38 of count I in general fashion alleges that "Plaintiff has a tangible legal interest in avoiding the payment of unconstitutional road improvement impact fees to the County", nowhere within Count I is a specific claim for a constitutional violation alleged. This is further illustrated by the "wherefore" clause of count I, which is devoid of any requested relief for a finding that the IGA is somehow unconstitutional and/or violates the unconstitutional conditions doctrine. As the allegations of the Complaint illustrate, the declaratory judgment action against the County in Count I is based solely on the assertion that the IGA fees, as they relate to Habdab's three parcels, are unlawful because they fail to comply with the Impact Fee Law, not based on the purported constitutional violations subsequently asserted by Plaintiff in its motion for summary judgment and appellate briefs.

Even *assuming arguendo* that Plaintiff had properly alleged a cause of action against the County for declaratory judgment based on a constitutional violation, as properly determined by the Second District, the unconstitutional conditions doctrine is not applicable under the facts of this case and, hence, the IGA fees do not constitute an unconstitutional taking. Under the unconstitutional conditions test for a discretionary benefit, the "government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship" to the right. *McElwain v. Office of Illinois Sec'y of State*, 2015 IL 117170, ¶ 29, 39 N.E.3d 550, 559 (quoting from *Dolan v. City of Tigard,* 512 U.S. 374,

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

385, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)). "The Supreme Court has adopted a two-part test for evaluating unconstitutional conditions questions: first, is there an essential nexus between the condition burdening rights and a legitimate state interest; and second, is there a 'rough proportionality' between the burden on the individual and the harm the government seeks to remedy through the condition." *McElwain*, 2015 IL 117170, ¶29 (citing to *Dolan,* 512 U.S. at 386-91).

The initial question to be answered when evaluating a claim based on the unconstitutional conditions doctrine is whether it involves a "discretionary benefit" conferred by the government. Plaintiff has pointed to no case which supports its conclusion that an annexation agreement is a "discretionary benefit" provided by a municipality, which is not surprising since an annexation agreement is not a discretionary benefit but instead a negotiated arm's length contractual arrangement between both the property owner and a municipality. *Elm Lawn Cemetery Co. v. City of Northlake,* 94 Ill.App.2d 387, 393 (2d Dist. 1968)(an annexation agreement is a contract and courts will enforce the plain terms of the agreement). Here, Plaintiff did not have a right, constitutional or otherwise, to annex its properties into Mundelein. Plaintiff was not required to annex into Mundelein, nor was Mundelein obligated to enter into an annexation agreement with Plaintiff. Plaintiff freely made the choice to annex parcels 1, 2 and 3 into the Village for the purpose of conducting its commercial clean fill development, and in so doing, agreed in the Second Amendment to pay the IGA fees for the subject parcels upon termination of the litigation in favor of the County. Thus, the voluntary annexation of Plaintiff's properties into Mundelein is not a "discretionary benefit" where the annexation agreements involved a contractual arrangement negotiated freely between Plaintiff and the Village in

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

accordance with the Municipal Code. Because this case does not involve a "discretionary benefit", the unconstitutional conditions doctrine has no application.

Even *assuming arguendo* that an annexation agreement did involve a "discretionary benefit", the Second District properly found that the two-part test applicable to the unconstitutional conditions doctrine was satisfied and, as a result, that the unconstitutional conditions doctrine was inapplicable. As the Second District correctly noted, municipal/county enactments are presumptively constitutional and courts construe enactments to uphold their validity and constitutionality, where that can reasonably be done. *Habdab, Inc.,* 2023 IL App (2d) 230006, ¶47 (citing to *Jackson v. City of Chicago,* 2012 IL App (1st) 111044, ¶20; and *In re Commitment of Walker,* 2014 IL App (2d) 130372)).

The Second District properly held that there is an essential nexus between the condition burdening rights and a legitimate state interest. *Id.* at ¶54. As the Second District noted, "'the need to minimize or reduce traffic congestion is a legitimate State interest,'" and a "'nexus exists between preventing further traffic congestion and providing for road improvements to ease that congestion.'" *Id.* (citing *Northern Illinois Home Buildings,* 165 Ill.2d at 32). Further supporting the existence of an essential nexus, as noted by the Second District, is the fact that "[t]he IGA provides that, as property develops in the central Lake County area, residents will benefit from highway improvements that ensure traffic is efficiently transported through the area, and it provides for construction funding for such improvements." *Id.*.

The Second District also properly held that there is a rough proportionality between the burden on plaintiff and the harm the County (via the Village) seeks to remedy through

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

the condition. Plaintiff, as was the case in the lower courts, misstates the proper standard, asserting that the IGA fees must be specifically and uniquely attributable to the development. Contrary to Plaintiff's erroneous assertion, however, the Supreme Court has noted that rough proportionality is the proper standard under the unconstitutional conditions doctrine. *McElwain*, 2015 IL 117170, ¶29. Moreover, as further stated by the Second District, "[t]his standard requires a lesser degree of connection between the exaction and the projected impact of the new development than the specifically-and-uniquely-attributable standard." *Habdab, Inc.*, 2024 IL Ap (2d) 23006, ¶55 (citing *Northern Illinois Home Builders Assn',* 165 Ill.2d at 33). In addition, as noted by the Second District, "[n]o precise mathematical calculation is required, but the municipality must make some sort of individualized determination that the required dedication is related in both nature and extent to the impact of the proposed development." *Habdab, Inc.*, 2024 IL Ap (2d) 23006, ¶55 (citing to *Dolan,* 512 U.S. at 391).

Here, the Second District properly determined that there is a rough proportionality between the IGA fees assessed against plaintiff's parcels and the road improvements. *Habdab, LLC.,* 2024 IL Ap (2d) 23006, ¶¶55-56. As observed by the Second District, the following support the determination that rough proportionality is satisfied here: (1) the IGA's purpose, which is to establish construction funding for future highway improvements in the central Lake County area; (2) the improvements are intended to address existing and future traffic demands; (3) under the IGA, the County agreed to design and construct road improvements in exchange for a portion of the construction costs being reimbursed from fees collected from developers within the area; (4) the IGA established six "Highway Improvement Areas" within the central Lake County area, and the parties

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

created a schedule of fees for each subarea; (5) the fees for each subarea are divided by the number of developable areas within each subarea and are assessed against future developments, based on the number of acres contained within each development; (6) Plaintiff's three parcels were zoned agricultural prior to annexation; afterward, they were reclassified into the R-1 "Single Family Residential Zoning District"; and (7) Plaintiff's clean fill operation, which operates on all three parcels, involves about 100 truckloads of fill per day (as of March 2022) being transported to the parcels. *Id.* at ¶56.

Additionally, the IGA states that in collaboration with the Villages, the County evaluated the traffic and transportation effects of future Developments along and upon the Highway Corridor for purposes of identifying Improvements that will be required to serve the additional traffic resulting from such Developments. (C1271, 1275). The IGA also provides that the six Highway Improvement Areas have associated Fees, expressed on a per-acre basis, that are intended to offset the cost of improvements necessitated by the additional traffic to be generated as a result of Developments in the particular Highway Improvement Area. (C1276). The methodology for the calculation of the Fees is described under Section IV of the IGA and the schedule of Fees is attached as Exhibit B thereto. (C1276-78). Further, the IGA states that "any new Development within the Central Lake County Area will generate traffic within the Highway Corridor that, without the offsetting effect of the Improvements, (i) will have adverse impacts on the surrounding properties and the facilities available to serve properties within the Central Lake County Area, (ii) will diminish the value of surrounding properties, and (iii) will threaten the public health, safety, and welfare. To finance such offsetting Improvements it is necessary to collect the Fees contemplated by this Agreement." (C1278). Taken together, these facts

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

establish that the essential nexus and rough proportionality factors are satisfied, and that the unconstitutional conditions doctrine has no application in the present situation.

In addition to the reasons stated above for the non-applicability of unconstitutional conditions doctrine in the instant matter, it also must be noted that parties to an annexation agreement may contract away rights, even of constitutional dimensions, as well as statutory rights. *Gaylor v. Village of Ringwood*, 363 Ill.App.3d 543, 549 (2d Dist. 2006); *Clark v. Marian Park, Inc.,* 80 Ill.App.3d 1010, 1014 (2d Dist. 1980); *see also*, *Johannesen v. Eddins*, 2011 IL App (2d) 110108, ¶23. Here, Plaintiff voluntarily entered into the Second Amendment to the Annexation Agreement by which it agreed to pay the IGA Fees for the Combined Parcels (Parcels 1, 2 and 3) resulting from any "Final Development Approval (as defined in the IGA) and upon termination of this case. As such, Plaintiff's claim concerning the application of the unconstitutional conditions doctrine must be rejected based on the additional ground that Plaintiff has contracted away its purported constitutional rights as they relate to the imposition of the IGA Fees for Parcels 1, 2 and 3.

Lastly, contrary to Plaintiff's assertion, the recent Supreme Court case of *Sheetz* does not impact the Second District's decision that the unconstitutional conditions doctrine is inapplicable based upon a finding that the essential nexus and rough proportionality tests are satisfied. *Sheetz v. County of El Dorado, California,* 144 S.Ct. 893 (2024). In *Sheetz* the California Court of Appeal rejected the argument of a property owner that the imposition of a traffic impact fee, which was a condition of the property owner receiving a building permit from El Dorado County, was an unlawful exaction of money under the Takings Clause because the traffic impact fee was imposed by legislation, and, according to the California Court of Appeal, *Nollan* and *Dolan* only apply to permit conditions

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

imposed on an ad hoc basis by administrators. *Id.* at 898. After the California Supreme Court denied further review, the United States Supreme Court granted the landowner's petition for Certiorari review. *Id.*

In addressing the ruling of the California Court of Appeal, the Supreme Court noted that its decisions in *Nollan* and *Dolan* address the potential abuses in the permitting process by setting out a two-part test modeled on the unconstitutional conditions doctrine. *Id*. at 900. First, permit conditions must have an "essential nexus to the government's land use interest. *Id.*. Second, permit conditions must have "rough proportionality" to the development's impact on land use interests. *Id.*. In addressing the limited question before it, the *Sheetz* court rejected the rationale of the California Court of Appeal and held that the *Nollan* and *Dolan* test (essential nexus and rough proportionality) applies to a fee enacted by legislative action which is imposed as a condition to a land use permit when determining whether it constitutes an unconstitutional taking under the Fifth Amendment. *Id.* 897, 900-903.

Sheetz is inapplicable in the instant matter for several reasons. First, here we are not dealing with conditions to a permit, but instead a voluntary annexation agreement freely negotiated between Plaintiff and Mundelein which is not a discretionary benefit under the unconstitutional conditions doctrine. Second, the *Sheetz* court did not apply the *Nollan* and *Dolan* two-part test to the facts of the case, but instead remanded the case to the California state court to apply the two-part test and decide whether an unconstitutional taking has occurred. *Id.* at 902. Unlike the situation in *Sheetz,* the Second District applied the two-part test applicable to the unconstitutional conditions doctrine, upon which the *Nollan* and *Dolan* test is rooted, and made the proper determination the two-part test is

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

satisfied and, as a result, that the unconstitutional conditions doctrine does not apply to render the IGA fees an unconstitutional taking. Lastly, it must be noted that Justice Kavanaugh, with whom Justice Kagan and Justice Jackson joined, wrote in his concurrence as follows:

> I join the Court's opinion, I write separately to underscore that the Court has not previously decided – and today explicitly declines to decide – whether "a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development." *Ante,* at 902. Importantly, therefore, today's decision does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property. Moreover, as is apparent from the fact that today's decision expressly leaves the question open, no prior decision of this Court has addressed or prohibited that longstanding government practice. Both *Nollan* and *Dolan* considered permit conditions tailored to specific parcels of property. See *Dolan v. City of Tigard,* 512 U.S. 374, 379-81, 393, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 828-829, 107 S.Ct. 3141, 97 L.ED.2d 677 (1987). Those decisions had no occasion to address permit conditions, such as impact fees, that are imposed on permit applicants based on reasonable formulas or schedules that assess the impact of classes of development.

Id. at 904. Thus, as Justice Kavanaugh's concurrence recognizes, the *Sheetz* decision does not address or prohibit the imposition of impact fees on new developments through reasonable formulas or schedules, contrary to Plaintiff's repeated assertions. Consequently, *Sheetz* is inapplicable and Plaintiff's reliance on same is misplaced.

CONCLUSION

As shown herein, the Second District properly affirmed the trial court's granting of the County's motion for summary judgment and denial of the Plaintiff's cross-motion for summary judgment. The IGA fees as they apply to Plaintiff's three parcels are not subject to the requirements of the Impact Fee Law because they do not involve the imposition of a fee conditioned on the issuance of a building permit or certificate of occupancy, but instead

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

flow from an annexation agreement voluntarily entered between Plaintiff and Mundelein. Moreover, the unconstitutional conditions doctrine does not apply in this matter since there is an essential nexus between the condition burdening rights and a legitimate state interest and there is a rough proportionality between the burden on Plaintiff and the harm the County (via Mundelein) seeks to remedy through the condition. Thus, the imposition of the IGA fees on Plaintiff do not constitute an unconstitutional taking.

WHEREFORE, the County of Lake prays that this Court affirms the judgment of the Second District in this matter, which affirmed the trial court's decision granting the County's Motion for Summary Judgment, denying the Plaintiff's cross-motion for summary judgment, and entering judgment in favor of the County against Plaintiff as to Count I of the Complaint with prejudice.

Respectfully submitted:
ERIC F. RINEHART
State's Attorney of Lake County

By: /s/ John P. Christensen
John P. Christensen,
Attorney for Defendant-Appellee, County of Lake

John P. Christensen #6220276
Gunnar B. Gunnarsson #6198562
Assistant State's Attorneys
18 North County Street
Waukegan, IL 60085
(847) 377-3050
jchristensen2@lakecountyil.gov
ggunnarsson@lakecountyil.gov

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

PROOF OF SERVICE

I certify that on this 15th day of May, 2024, this brief was duly served upon all counsel of record consistent with all applicable rules, including, but not limited to Supreme Court Rules 11 and 341(e).

/s/ John P. Christensen
John P. Christensen,
Attorney for Defendant-Appellee, County of Lake

RULE 341 (C) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341 (a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statements of points and authorities, the Rule 341(c) certificate of compliance, and those matters to be appended to the brief under Rule 342(a) is 29 pages long.

/s/ John P. Christensen
John P. Christensen,
Attorney for Defendant-Appellee, County of Lake

John P. Christensen (ARDC #6220276)
Gunnar B. Gunnarsson (ARDC #6198562)
Assistant State's Attorneys
18 North County Street, 5th floor
Waukegan, IL 60085
(847) 377-3050
Jchristensen2@lakecountyil.gov
ggunnarsson@lakecountyil.gov

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

No. 130323

IN THE SUPREME COURT OF ILLINOIS

HABDAB, LLC, an Illinois limited liability Company, Plaintiff-Appellant,	)	Appeal from the Appellate Court of Illinois, Second District, No. 2-23-0006
vs.	)	There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County
COUNTY OF LAKE, *et al.*, Defendants-Appellees.	)	The Hon. Jacquelyn D. Melius, Presiding Judge

NOTICE OF FILING

To:

Robert T. O'Donnell
Hayleigh K. Herchenbach
O'Donnell Callaghan LLC
28045 N. Ashley Circle, Suite 101
Libertyville, IL 60048
rodonnell@och-law.com
hherchenback@och-law.com

Michael Smoron
Zukowski, Rogers, Flood & McArdle
50 Virginia Street
Crystal Lake, IL 60014
msmorom@zrfmlaw.com

PLEASE TAKE NOTICE that on May 15, 2024, the County of Lake, as defendant-appellee, electronically filed with the Clerk of the Illinois Supreme Court, its Brief, a true and correct copy of which is attached hereto and hereby served upon you.

/s/John P. Christensen

John P. Christensen #6220276
Gunnar B. Gunnarsson #6198562
Assistant State's Attorney
Lake County State's Attorney's Office
18 N. County Street
Waukegan, Illinois 60085
(847) 377-3050
Jchristensen2@lakecountyil.gov
ggunnarsson@lakecountyil.gov

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM

CERTIFICATE OF SERVICE

On May 15, 2024, I, John P. Christensen, an attorney, on oath state that I served the foregoing by emailing to the parties listed above to the addresses shown, and by filing the stated document electronically with the Clerk of the Illinois Supreme Court, through the Court's e-filing system.

/s/ John P. Christensen
John P. Christensen, Assistant State's Attorney

SUBMITTED - 27704570 - John Christensen - 5/15/2024 1:23 PM