Nos. 130036, 130058

IN THE SUPREME COURT OF ILLINOIS

WAUKEGAN POTAWATOMI CASINO LLC, an Illinois limited liability company, Plaintiff-Appellee, vs. THE ILLINOIS GAMING BOARD, an Illinois administrative agency, and in their official capacities, CHARLES SCHMADEKE, Board Chairman, DIONNE R. HAYDEN, Board Member, ANTHONY GARCIA, Board Member, MARC E. BELL, Board Member, and MARCUS FRUCHTER, Board Administrator, and the CITY OF WAUKEGAN, an Illinois municipal corporation, Defendants-Appellants.	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-22-0883 There heard on Appeal from the Circuit Court of Cook County, Illinois Chancery Division, No. 21 CH 05784 Presiding Judge: Cecilia A. Horan

REPLY BRIEF OF THE CITY OF WAUKEGAN

ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

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INTRODUCTION

The long journey of bringing a casino to Waukegan began on June 28, 2019, when Governor Pritzker signed amendments to the Gambling Act into law. A026; A002 at ¶3; 230 ILCS §10/7(e-5).

On July 3, 2019, Waukegan issued its RFQ/P[1] for casino proposals. C15 at ¶17. Five applicants submitted proposals by the August 5, 2019 deadline; among them, Potawatomi Casino and Full House. C15 at ¶19; C1067. On September 18, 2019, the applicants gave presentations to the public at the Genesee Theatre in Waukegan. A029; C29; C1067. In the weeks that followed, Waukegan received and considered more than 1,200 comments from residents and the public. A029; C29; C1067. During this same period, Waukegan officials met with each of the five applicants to review and discuss the specific terms and features of their proposals. *See* C29; C298; C721; *see also* Brief of Amici Curiae at 13 (noting several sit-down meetings between Full House and City officials). Finally, on October 17, 2019, the City Council met in a Special Session to vote on the various casino proposals. A032; A500 at ¶19; C15 at ¶19. The City Council voted to certify North Point, Full House, and Rivers, but declined to certify Potawatomi Casino, sparking litigation (though not yet this litigation). A003 at ¶4; A501 at ¶24.

The extensive work of bringing a casino to Waukegan continued. On December 8, 2021, the Gaming Board found Full House preliminarily suitable for the casino license. A004 at ¶6; A082; A113. In January 2023, Waukegan and Full House signed the Ground Lease and DHCA, which, together, represented more than *two hundred page*s of documentation and negotiation of various development terms. A117-218 (Ground Lease);

[1] The Reply Brief uses the same abbreviations and defined terms as the Opening Brief.

A220-351 (DHCA). Outside counsel assisted Waukegan in negotiating these documents. *See* A220.

The extensive work of bringing a casino to Waukegan continued. Amidst the negotiations, Full House began constructing a temporary casino and held hiring events to staff both the temporary and permanent facility. Steve Sadin, Temporary Casino Starting to Take Shape in Lake County; Fall Opening Now Expected, 2022 WLNR 20464108, *Arlington Heights Post* (June 30, 2022). On February 17, 2023, Full House opened its temporary casino, The Temporary By American Place. City of Waukegan Opening Brief at 9. On June 15, 2023, the Gaming Board issued Full House a Casino Owners License to operate a casino in Waukegan. *Id.* A few months later, the City Council approved the site plan and variance request for the permanent casino. *Id.* Construction of the permanent casino is now on hold because of this lawsuit. Brief of Amici Curiae at 17-18.

The extensive work of bringing a casino to Waukegan has come at significant costs, both in terms of time and effort, and also monetarily. Full House has spent nearly *$175 million* to obtain the necessary licenses, construct its temporary casino, and prepare for the construction of its permanent casino. Brief of Amici Curiae at 1, 9, 16. Potawatomi Casino asks this Court to undo years of presentations, negotiations, certifications, agency approvals, hiring fairs, and construction, to say nothing of $175 million in expenditures. Potawatomi Casino seeks to have this Court undo all of this work, *through equitable relief*, based solely on its allegation that Waukegan failed to memorialize certain details before sending three certifications (and not the Potawatomi Casino proposal) to the Gaming Board. WPC Brief at 3. This Court should decline Potawatomi Casino's request to undo all of this work and should reinstate the Circuit Court's dismissal.

LEGAL ARGUMENT

Potawatomi Casino cannot use the Gambling Act to halt construction on the Waukegan casino and restart the certification process anew. Both legal and equitable doctrines support dismissal of Potawatomi Casino's lawsuit, and nothing in Potawatomi Casino's response brief compels a contrary conclusion.

A. Potawatomi Casino Is Not Entitled to the Extraordinary, Equitable Relief It Seeks

Potawatomi Casino argues it is entitled to an order voiding or retracting Full House's casino license and an order "requiring the process contemplated by section 7(e-5) to begin anew." WPC Brief at 4-5. Potawatomi Casino argues the First District adequately considered the actual economic costs of voiding the license and restarting the certification process, and that Waukegan's public policy arguments are meritless. WPC Brief at 54-56. These arguments are unpersuasive and the equitable relief Potawatomi Casino seeks is unjustified and inappropriate.

Potawatomi Casino's complaint seeks equitable relief. In bold, capital letters, the complaint declares "Recent Developments Necessitat[e] Equitable Relief Against the Gaming Board." A505. In its claim for "Declaratory and Injunctive Relief," Potawatomi Casino alleges it will suffer irreparable injury for which it has no adequate remedy at law, absent the relief requested. A507 at ¶53. Potawatomi Casino further alleges the balance of harms "favors an award of equitable relief against the Gaming Board and in favor of plaintiff." A507 at ¶54. Finally, Potawatomi Casino asks a court to declare Waukegan failed to satisfy the requirements for the Gaming Board to consider issuing a license and to declare the Gaming Board lacked the authority to issue a casino license for Waukegan. A507-508. The relief being sought is equitable. The case law agrees. A request for

declaratory and injunctive relief that seeks to have a Court declare casino "development agreements void and to order a new [casino] selection process" is an "exercise of [the Court's] equitable powers." *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 2002 WL 1592596, at *4 (W.D. Mich. July 9, 2002).

Potawatomi Casino is not entitled to this equitable relief. "Equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *In re Marriage of Rogers*, 283 Ill. App. 3d 719, 723 (3d Dist. 1996). This means a court should consider the relative benefits and hardships to the parties when crafting an appropriate remedy. *Westcon/Dillingham Microtunneling v. Walsh Const. Co. of Illinois*, 319 Ill. App. 3d 870, 878 (2d Dist. 2001). A court should also consider the prejudice that may inure to a party, *id.*, as well as the prejudice that may inure to those non-parties who are innocent of any wrongdoing, *Lac Vieux Desert*, 2002 WL 1592596, at *10; *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("Courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

These considerations mean equity will not "require the doing of an act which will result in little benefit to one but greater hardship to another." *Glenn v. City of Chicago*, 256 Ill. App. 3d 825, 841 (1st Dist. 1993). The equities of this case do not dictate that Waukegan restart the casino selection process anew, that the Gaming Board retract the casino license that it issued, or that Full House lose the benefit of its $175 million investment. To the contrary, the equitable considerations favor dismissal of Potawatomi Casino's complaint and Full House constructing and operating the permanent Waukegan casino.

1. The Equities Favor Full House Continuing as the Developer

The current casino developer, Full House, is an innocent party,[2] who submitted a proposal to develop a casino in Waukegan that would provide new employment opportunities and serve as a catalyst for economic development in the city. *See* 230 ILCS 10/2; *see also* Brief of Amici Curiae at 16-17 (noting the jobs and tax revenue that would come with the casino). Full House has incurred costs exceeding $175 million in pursuing the casino opportunity, from the initial RFQ/P phase, through negotiation of development agreements, construction, licensing before Gaming Board, and the opening and operation of the temporary casino. Brief of Amici Curiae at 9. There is no question Full House would be adversely affected if the Court were to grant the requested relief. Even if Full House was "ultimately reselected under a new process," it would suffer from duplicative costs, delays, loss of revenue, and the loss of goodwill that would accompany any interruption of its lawful casino operations. *See Lac Vieux Desert Band*, 2002 WL 1592596, at *13.

2. The Equities Favor The People of Waukegan Having the Casino Developed Without Further Delay or Litigation

The citizens of Waukegan (and, more generally, the state of Illinois) are another innocent party impacted by this litigation. These citizens have "an interest in the jobs, taxes, and revenue currently being generated by" Full House's temporary casino. *Lac Vieux Desert*, 2002 WL 1592596, at *14. They also have "an interest in the timely construction of the permanent casino" and an equally strong interest in the "constructive use of public funds" and not seeing those funds "wasted in an academic reselection process." *Id.* Potawatomi Casino argues there is an equally strong interest in preventing agencies from

[2] Potawatomi Casino has never suggested Full House bears any responsibility for the so-called "sham" certification process.

exceeding their authorized powers and that unchecked regulation would impede economic development. WPC Brief at 55. But Potawatomi Casino provides no support for this statement and there is no indication a recertification process is the proper remedy for policing the allegedly unauthorized agency action here. *See Lac Vieux Desert*, 2002 WL 1592596, at *14.

3. The Equities Favor Waukegan Having the Casino Developed Without Further Delay or Litigation

Waukegan would be adversely impacted by Potawatomi Casino's requested relief because any recertification process "would significantly delay the construction of the permanent facility." *Lac Vieux Desert*, 2002 WL 1592596, at *13. Restarting the certification process anew would invite new lawsuits, certainly from Full House, but also from those—like Potawatomi Casino or Waukegan Gaming—who would participate but not be selected. *See id; see also Waukegan Gaming, LLC v. City of Waukegan*, 2023 IL App (2d) 220426 (rejecting Waukegan Gaming's arguments that it had an exclusive right to build the casino in Waukegan).

Prior experience also teaches that a reselection process could take months, followed by months of negotiating the terms of the new development agreements, followed by more months of state investigations and hearings in the licensing phase. *Lac Vieux Desert*, 2002 WL 1592596, at *13. The delay in bringing the permanent casino online and the uncertainties that would be generated by a new certification process would affect the viability of the current casino, while undermining the Gambling Act's core purpose of sparking economic development in Waukegan. *Id;* 230 ILCS 10/2.

4. The Equities Do Not Favor Potawatomi Casino

Potawatomi Casino is the only party the equities do not favor. Potawatomi Casino argues there is "more than a substantial probability" Waukegan would have certified its proposal to the Gaming Board "had the City complied with section 7(e-5)." WPC Brief at 25. This is pure, unsupported conjecture.

The City Council twice rejected Potawatomi Casino's efforts to be certified. In December 2021, the Circuit Court rejected Potawatomi Casino's request for a temporary restraining order and the First District declined to review that decision. A004 at ¶6; A466-467. The federal court, on a full record, found at least *six, rational reasons* for Waukegan's decision not to certify Potawatomi Casino. A046-049; *Waukegan Potawatomi Casino, LLC v. City of Waukegan*, 2024 WL 1363733, at *9-10 (N.D. Ill. Mar. 29, 2024). Nothing has changed since the federal court's opinion two months ago. Potawatomi Casino cannot show there is "any likelihood that it would be selected as a casino developer in the event that the selection process were begun anew." *Lac Vieux Desert Band*, 2002 WL 1592596, at *14. The equities do not favor Potawatomi Casino.

5. Potawatomi Casino Is Not Entitled to the Extraordinary Equitable Relief It Seeks

The scales of equity do not tip towards Potawatomi Casino. The City Council's certification vote took place nearly four and a half years ago. A500-501. Since that vote, Potawatomi Casino never sought injunctive relief from the federal court. In late 2021, Potawatomi Casino unsuccessfully sought a temporary restraining order from the Circuit Court. A004 at ¶6; A466-467. Potawatomi Casino did not seek any further injunctive relief. Starting the certification process anew, after four and a half years of progress on the Waukegan casino, would irreparably harm the citizens of Waukegan and Full House, even

as they bear no responsibility for the allegedly unlawful certifications. *See Lac Vieux Desert*, 2002 WL 1592596, at *14. And because "there is no guarantee, or even any likelihood, that Plaintiff would be successful in a rebidding process,[3] the harm to [Full House and the citizens of Waukegan] would be manifestly worse than any benefit Plaintiff would achieve by the reselection process." *Id.*

Restarting the certification process, with all the uncertainties and litigation it would produce would be manifestly unfair. *Id.* "[T]he egg cannot be unscrambled at this late date." *Id.* Potawatomi Casino is not entitled to the extraordinary equitable relief it seeks, particularly after weighing the competing concerns of the citizens of Waukegan, the City of Waukegan, Full House, and Potawatomi Casino. This Court should permit Full House to proceed with construction of the permanent casino. *See id.* (refusing to order a casino reselection process, even when the selection was pursuant to an unconstitutional selection ordinance).

B. Potawatomi Casino is Collaterally Estopped from Arguing It Would Have Been Certified Absent Waukegan's So-Called Sham Process

Potawatomi Casino argues Waukegan's certification process was a "sham," designed to achieve a predetermined outcome, quoting testimony from Alderman Turner. WPC Brief at 3, 9. Potawatomi Casino goes on to argue that if it had "been afforded a fair and lawful casino review process," it would have been among the candidates ultimately submitted to the Board. WPC Brief at 25-26. Potawatomi Casino's efforts at prophecy are both speculative and foreclosed by the federal court's recent summary judgment order under the doctrine of collateral estoppel.

[3] See Section (B)(2) below.

1. Collateral Estoppel is Intended to Prevent Efforts to Relitigate Issues That Have Already Been Decided

Collateral estoppel (or issue preclusion) is an equitable doctrine, designed to promote fairness and judicial economy by preventing the relitigation of issues that have already been resolved in earlier actions. *Du Page Forklift Serv., Inc. v. Material Handling Servs., Inc.*, 195 Ill. 2d 71, 77 (2001). Collateral estoppel applies with equal force to both issues of fact and law, and may be invoked by a party that was not involved in the prior proceeding. *Id.* at 77-78.

Collateral estoppel is properly invoked when: (1) the issue decided in the prior action is identical with the one presented in the current action; (2) there was a final judgment on the merits in the prior action; and (3) the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior action. *Id.* at 81. Waukegan has satisfied these three criteria.

2. The Federal Court's Findings Estop Potawatomi's Attempts to Create an Alternate Future Reality

The issue of whether Waukegan engaged in a sham process and whether Potawatomi Casino would have been certified had the process been lawful was presented to, and rejected by, the federal court. Potawatomi Casino cannot relitigate these same issues now.

In its summary judgment briefing before the federal court, Potawatomi Casino argued Waukegan favored Full House as a relatively weak competitor and certified Rivers because Rivers had unearthed damaging information in the Waukegan Gaming litigation. C1137. In its summary judgment briefing before the federal court (and now this Court), Potawatomi Casino argued North Point's true proposal was hidden from the City Council

and Full House's supplemental information was considered (but Potawatomi Casino's supplemental information was not). Compare C1133 and 1135, *with* WPC Brief at 25 and 25 n.9 (discussing the problems with the North Point and Full House proposals). The First District highlighted these allegations in its opinion. A08-09 at ¶¶15 (discussing the problems with the North Point and Full House proposals). Alderman Turner's testimony that the mayor directed the vote also figured prominently in Potawatomi Casino's briefing before the federal court, the First District's opinion, and now briefing before this Court. *Compare* C1133, *with* A09 at ¶15 and WPC Brief at 3, 9. Potawatomi Casino has now asserted Waukegan's RFQ/P process was "rigged," and "a sham," "designed to achieve a predetermined outcome," in each of its lawsuits. *Compare* C1107, C1137, *with* A497 at ¶2, WPC Brief at 3. Finally, Potawatomi Casino's summary judgment brief boasted that discovery had produced "abundant and compelling evidence" of this rigged process and that it was not just trading in "mere allegations." SA52; C1107.

Potawatomi Casino's current complaint and Supreme Court brief do not distance themselves from the federal court arguments. To the contrary, both the current complaint and brief specifically reference evidence from the federal court case as proof Waukegan's certification process was a sham and proof Waukegan purposefully disregarded the Gambling Act's requirements in order "to reach a predetermined outcome." A497 at ¶3; WPC Brief at 9. The current complaint specifically references the parties' summary judgment briefing when it alleges the "City manipulated its entire casino certification process. . ." A502 at ¶¶28-29.

The federal court was not persuaded by these arguments. The federal court discussed Potawatomi Casino's arguments about a "rigged" process, and specifically noted

the testimony of Alderman Turner and the argument that Michael Bond had dictated the results of the certification process. A033 n.2, A048; *Waukegan Potawatomi Casino*, 2024 WL 1363733, at *4 n.2, at *10. And yet, the federal court found ***six, independent reasons*** supported Waukegan's 7-2 vote against certifying Potawatomi Casino's proposal. A032, A046-A048. Among the reasons:

1) Potawatomi Casino's proposal was simply too large for the Waukegan market;[4]

2) Potawatomi Casino's proposal did not include a temporary casino or entertainment complex;

3) Potawatomi Casino's proposal was the only proposal that did not provide a specific price for the purchase or lease of the casino site by the deadline;

4) The Potawatomi Tribe had no experience running casinos in multiple states;

5) the City could have reasonably believed Potawatomi Casino was not committed to operating a casino in Waukegan given the proximity of its Milwaukee casino; and

6) the City could have reasonably found Potawatomi Casino's presentation lackluster.

A046-048. These six, separate reasons foreclose any argument that Potawatomi Casino would be certified if Waukegan were forced to begin the process anew.

Potawatomi Casino argues the standard governing their class-of-one equal protection claim differs from the standards at issue here. WPC Brief at 26. This argument is legally irrelevant. *Schandelmeier-Bartels v. Chicago Park Dist.*, 2015 IL App (1st)

[4] Waukegan is not the first defendant to express concerns that an applicant's casino proposal was simply too big and not properly sized to the market. *Bd. of Cnty. Commissioners of Cnty. of Cherokee v. Kansas Racing & Gaming Comm'n*, 393 P.3d 601, 621 (Kan. 2017) ("[T]he Board could reasonably conclude that Castle Rock—though bigger—posed an unacceptable risk [and] that a smaller but more sustainable casino could better serve the interests of Kansans.").

133356, ¶45. Indeed, Potawatomi Casino has not cited any authority that would show a difference in standards "has any bearing on determining whether issues are identical for purposes of collateral estoppel." *Id.* Likewise, the presence of additional allegations in the current complaint is not "sufficient to destroy the identity of issue between the two actions required by the doctrine of collateral estoppel." *Du Page Forklift Serv.*, 195 Ill. 2d at 82-83. The City has satisfied the first factor for collateral estoppel.

The final two factors are also easily satisfied. The District Court's summary judgment order is a final judgment on the merits for purposes of collateral estoppel. *Du Page Forklift*, 195 Ill. 2d at 84. To be sure, Potawatomi Casino has appealed the order to the Seventh Circuit. But that appeal does not alter the finality of the summary judgment order for purposes of collateral estoppel. The preclusive effect of a federal-court judgment is determined by federal common law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). And under well-settled Seventh Circuit precedent, "a final judgment of a court of first instance can be given collateral estoppel effect even while an appeal is pending." *Prymer v. Ogden*, 29 F.3d 1208, 1213 n.2 (7th Cir. 1994); *Bohn v. Boiron, Inc.*, 2013 WL 3975126, at *8 (N.D. Ill. Aug. 1, 2013).

Potawatomi Casino was obviously a party to the federal court action, and enjoyed "a full and fair opportunity to litigate [its] claims" in that proceeding. *Du Page Forklift*, 195 Ill. 2d at 87. Potawatomi Casino is barred from relitigating what a future certification process might look like. *See id.*

C. Potawatomi Casino Does Not Have Standing to Enforce the Alleged Violations of Section 7(e-5)

Potawatomi Casino argues it has satisfied the three-part test for standing, arguing it has adequately alleged (1) a distinct and palpable injury, (2) which is fairly traceable to the

defendant's conduct, and (3) substantially likely to be redressed by the grant of such relief. WPC Brief at 14-28. This is not the case.

1. Potawatomi Casino Did Not Suffer a Legally Cognizable Injury and its Competitive Bidding Cases are Inapposite

Potawatomi Casino argues its injury stems from not being able to participate in a "fair and lawful RFQ process," because that process did not comply with the Gambling Act. WPC Brief at 16. Potawatomi Casino argues Illinois courts have long recognized standing based on an alleged lost opportunity to participate in a lawful public procurement process. *Id.* at 17. In reaching this conclusion, Potawatomi Casino cites several cases decided under competitive bidding provisions, which require contracts to be awarded to the "'lowest responsible bidder.'" *See, e.g.*, *Ct. St. Steak House, Inc. v. Cnty. of Tazewell,* 163 Ill. 2d 159, 168 (1994); *L.E. Zannini & Co. v. Bd. of Educ., Hawthorn Sch. Dist*. 73, 138 Ill. App. 3d 467, 469 (2d Dist. 1985) (cited by WPC Brief at 17).

These cases are not on point. The City of Waukegan engaged in an RFQ/P process that is legally distinct from a competitive bidding process. *See Am. Health Care Providers, Inc. v. Cty. of Cook,* 265 Ill. App. 3d 919, 921 (1st Dist. 1994). Competitive bidding seeks standardization so that cost is the sole determining factor in the award of a contract. *Starburst Realty Corp. v. City of New York,* 498 N.Y.S.2d 673, 680 (N.Y. Sup. Ct. 1985). The RFQ/P process does not have this standardization, which gives a municipality greater flexibility when choosing between different proposals. *Id.* Potawatomi Casino's competitive bidding cases are not persuasive. The specific terms of the RFQ/P process did not offer or assure use of competitive bidding procedures, and there was no statutory requirement for their use.

2. Potawatomi Casino's Alleged Injury Is Not Traceable to the Defendants' Conduct and Not Redressable Through this Action

Potawatomi Casino argues its injury—the inability to compete in a fair RFQ process—is traceable to the City's conduct and that "more than a substantial probability exists" it "would have been among the candidates ultimately submitted to the Board," if the City had complied with section 7(e-5). WPC Brief at 20-28. Neither of these statements is compelling.

Waukegan conducted a fair RFQ/P process. Each of the applicants received the same opportunity to give presentations to the public and to meet with Waukegan officials. A029; C29; C1067; C298; C721. Each of the applicants received the same consideration in the vote before the City Council on October 17, 2019; the City Council simply voted against the Potawatomi Casino's proposal. A003 at ¶4; A032-33. And for all its discussions about the exact timing of the certifications, Potawatomi Casino still cannot explain how an allegedly defective certifying resolution (at the end of the City's process) impacted the City's treatment of Potawatomi Casino or the manner in which the City Council viewed the Potawatomi Casino's proposal.

No amount of additional negotiations between the City of Waukegan and *the other applicants* would change the fact that Potawatomi Casino's proposal was too big for the market, lacked desired entertainment options, failed to specify an actual price for the casino site, or failed to show sufficient commitment to the region (among other factors). *See* A046-048. No amount of additional negotiations between the City of Waukegan and *the other applicants* would change the fact that the City Council fairly considered (and twice rejected) Potawatomi Casino's proposal. Potawatomi Casino's alleged injury is not traceable to any unlawful conduct by the City. *See Barden Detroit Casino, L.L.C. v. City*

of Detroit, 230 F.3d 848, 854 (6th Cir. 2000) ("Mirage—the only developer adversely affected by the provision—might be able to allege an injury-in-fact; on the evidence before us, Barden cannot.").

Potawatomi Casino's alleged injury is also not redressable through this action because there is not a "substantial probability" that Waukegan would have certified Potawatomi Casino to the Board. A substantiality probability means "much more likely than not." *In re Detention of Hayes,* 321 Ill. App. 3d 178, 188 (2d Dist. 2001). Potawatomi Casino cannot meet this high standard.

As noted above, Potawatomi Casino is collaterally estopped from arguing it would have been certified to the Board. The District Court's opinion rejecting the arguments of a rigged process—in which certain proposals were favored over others—expressly forecloses any argument the City's 7-2 vote against Potawatomi Casino would change if the certification process were started anew. Estoppel aside, Potawatomi Casino still fails "to offer any persuasive reason to justify how an injunction can be granted awarding a near-completed contract to another vendor based on speculation about what would have occurred under a different process and with potentially different vendors vying for the contracts." *RJB Properties, Inc. v. Bd. of Educ. of City of Chicago,* 2006 WL 224101, at *13 (N.D. Ill. Jan. 24, 2006), *aff'd,* 468 F.3d 1005 (7th Cir. 2006).

Potawatomi Casino cannot predict which applicants would re-apply for the license, which new applicants would apply for the license, the terms of any of these proposals, or even the future composition of the City Council and the aldermen's respective positions on gaming.[5] Potawatomi Casino cannot show there is "any likelihood that it would be selected

[5] Three aldermen were opposed to gaming and voted against all of the proposals. A032.

as a casino developer in the event that the selection process were begun anew." *Lac Vieux Desert*, 2002 WL 1592596, at *14. Finally, Potawatomi Casino cannot show there is any legal mechanism for starting the certification process anew. Nothing in the Gambling Act speaks to retracting a license or restarting the certification process. Potawatomi Casino cites section 7(e-10), WPC Brief at 27, but this provision addresses a circumstance where there are no pending applications for a license, and not a situation where a license was issued but later retracted, 230 ILCS 10/7(e-10). Potawatomi Casino cannot satisfy the requirements for standing.

D. This Case Should Be Dismissed as Moot Because Potawatomi Casino Cannot Obtain the Relief Requested in Its Pleadings

Potawatomi Casino argues this case is not moot because the court may still grant effectual relief. WPC Brief at 28-32. Potawatomi Casino cites *Pierce Downer's Heritage* in support of this argument, but the case aids Waukegan and not Potawatomi Casino. WPC Brief at 32 (citing *Pierce Downer's Heritage All. v. Vill. of Downers Grove*, 302 Ill. App. 3d 286, 293 (2d Dist. 1998)).

Examining Potawatomi Casino's complaint confirms the case is moot. *Pierce Downer's Heritage* states a court "must examine the pleadings" to determine whether a case is moot. 302 Ill. App. 3d at 293. Potawatomi Casino's complaint seeks to enjoin the Gaming Board from "taking formal steps to issue a Waukegan casino license, including by issuing a determination of preliminary suitability. . ." A508, C23. This is the only relief Potawatomi Casino seeks from its complaint, and this requested relief happened in December 2021. A004 at ¶6; A082, A113. Since that point, progress on the Waukegan casino has continued to move forward, and Full House is now operating a temporary casino

after having obtained a license from the Gaming Board—additional actions that have rendered Potawatomi Casino's case moot. *See* Opening Brief at 9, 40-41.

Potawatomi Casino's complaint does not seek to halt construction of a temporary or permanent casino, or require Waukegan to restart the certification process anew. The conduct Potawatomi Casino actually sought to enjoin in its complaint has happened. Review of Potawatomi Casino's complaint reveals the case is moot, to say nothing of the Gaming Board's additional actions. *Compare Pierce Downer's Heritage,* 302 Ill. App. 3d at 294 (noting the plaintiff had "not secured the relief sought in its complaint").

E. Mandamus Does Not Apply Here Because the Official Decisions At Issue Were Discretionary

Potawatomi Casino argues mandamus is proper and can be used to compel the undoing of an act. WPC Brief at 38-39. While mandamus can be used to undo an official act, the "extraordinary remedy" of mandamus only applies to enforce the performance of official duties where those duties do not involve the exercise of discretion. *Noyola v. Bd. of Educ. of the City of Chicago*, 179 Ill. 2d 121, 133 (1997). That is not the case here. Each City Council member exercised individual judgment in deciding which applicants to certify and which applicants not to certify. *See* A032. Each member of the Gaming Board (named as defendants here) exercised individual judgment in deciding which certified applicant to select as preliminarily suitable and in deciding whether Full House should be awarded a casino license. The extraordinary remedy of mandamus is not available to Potawatomi Casino because the actions at issue concerned discretionary acts of individual judgment.

Potawatomi Casino argues it will not have an adequate remedy in the absence of mandamus and cites the federal court's recent decision. WPC Brief at 41-42. This is an interesting assessment of the federal court's opinion, since the federal court's decision is

proof that Potawatomi Casino does not have a viable case *writ large,* and not just that Potawatomi Casino lacks a viable damages remedy under §1983. Potawatomi Casino has not demonstrated a clear right to mandamus relief.

F. Injunction and Declaratory Judgment Actions Require an Underlying Private Right of Action and Potawatomi Casino's Efforts To Distinguish This Caselaw are Unpersuasive

Illinois courts have repeatedly found that a private right of action is necessary to pursue a declaratory judgment or injunction action. Opening Brief at 14-16 (citing *Carmichael v. Pro. Transportation, Inc.*, 2021 IL App (1st) 201386, ¶35; *Davis v. Kewanee Hosp*., 2014 IL App (2d) 130304, ¶1, ¶54; *Jackson v. Randle*, 2011 IL App (4th) 100790, ¶14; *Am. Fed'n of State, Cnty. & Mun. Emps., Council 31 v. Ryan*, 332 Ill. App. 3d 866, 871 (4th Dist. 2002); *Gilmore v. City of Mattoon*, 2019 IL App (4th) 180777, ¶15; *Smith v. Sears, Roebuck & Co.*, 95 Ill. App. 3d 174, 179 (4th Dist. 1981)). Potawatomi Casino's efforts to distinguish these cases are unpersuasive.

Potawatomi Casino argues the defendants in *Carmichael, Davis* and *Smith* were not public officials, but does not otherwise explain why a private right of action would be available in one instance (against public officials) but not others (against private parties). WPC Brief at 43. Nor could it, because nothing in the language of these cases announced anything other than rules of general applicability. Indeed, in *Carmichael*, the First District explicitly stated that a statute either provides for a private right of action or does not, and that the inquiry is not "fact-specific" or "dependent on the particular circumstances of any given case." 2021 IL App (1st) 201386, ¶33. In *Gilmore,* the Fourth District found the requested injunctive relief was unavailable against the defendant municipality. 2019 IL

App (4th) 180777, ¶15. Potawatomi Casino cannot carve out a private right of action exception for cases involving public officials.

Potawatomi Casino argues *Jackson* is bad law. WPC Brief at 44 (citing *Cerbertowicz v. Baldwin*, 2017 IL App (4th) 160535, ¶17). This is not the case. In *Bocock*, the Third District found plaintiff lacked standing to bring his mandamus petition and specifically cited *Jackson* and its conclusion that the doctrine of standing precludes a plaintiff "'from bringing a private cause of action based on a statute unless the statute expressly confers standing on an individual or class to do so.'" *Bocock v. O'Leary*, 2015 IL App (3d) 150096, ¶9 (quoting *Jackson v. Randle*, 2011 IL App (4th) 100790, ¶14).

Potawatomi Casino argues Waukegan has offered a lone citation in asserting declaratory judgments are designed to settle and fix rights before there has been an irrevocable change in the parties' positions. WPC Brief at 45. This lone citation is no outlier. This Court has also held the declaratory judgment procedure was "designed to settle and fix rights before there has been an irrevocable change in the position of the parties. . ." *Beahringer v. Page*, 204 Ill. 2d 363, 373 (2003). The *Beahringer* court also noted how the declaratory judgment procedure was intended to *precede* a claim for damages—law Potawatomi Casino did not observe when filing this declaratory judgment action two years after its §1983 action. *See id.* at 372. Potawatomi Casino's efforts to distinguish Waukegan's private right of action cases are unpersuasive.

G. Agency Decisions Reflect Informed Judgments Based on Experience and Expertise

Potawatomi Casino argues the Gaming Board did not have exclusive jurisdiction over this controversy and argues the Gaming Board cannot grant itself powers which the Legislature did not confer. WPC Brief at 48-50. This argument ignores the actual authority

the Legislature did confer on the Gaming Board, which includes the authority to determine the eligibility of applicants for licenses, select among competing applicants, and investigate alleged violations of the Gambling Act. 230 ILCS 10/5(c)(1),(5). This argument also ignores the authority of the Gaming Board to interpret the Gambling Act in fulfilling its designated functions. Agency decisions reflect informed judgments that stem from the weight of their experience and expertise in a given field. *See Provena Covenant Med. Ctr. v. Dep't of Revenue*, 236 Ill. 2d 368, 387 n.9 (2010). For this reason, an agency's construction of a statute is entitled "to substantial weight and deference," even when review is de novo. *Id.* Potawatomi Casino would have this Court ignore the Gaming Board's expertise and experience in awarding casino licenses.

H. Waukegan Substantially Complied with the Gambling Act

Potawatomi Casino argues the doctrine of substantial compliance is inapplicable and argues the Gambling Act's requirements cannot be considered mere technicalities. WPC Brief at 50-54. This is not the case because even "mandatory provisions can sometimes be satisfied through substantial, rather than strict, compliance." *Kennedy v. City of Chicago*, 2022 IL App (1st) 210492, ¶39. Determining substantial compliance is a two-step process and asks whether: (1) the purpose of the statute in question may be achieved without strict compliance and (2) the defendant has suffered prejudice from the plaintiff's failure to strictly comply. *Id.*

Waukegan has satisfied this two-part test. *See* Opening Brief at 33-38. The purpose of the Gambling Act is to assist economic development, promote Illinois tourism, and increase public revenues. 230 ILCS 10/2. This purpose is satisfied by awarding the casino license to Full House, particularly with the knowledge Waukegan has negotiated an

extensive Ground Lease and DHCA with Full House, Opening Brief at 36-37, the Gaming Board has vetted and approved granting the license to Full House, A082, A113, A012 at ¶21, and the federal court has considered and rejected Potawatomi Casino's "compelling evidence" of a rigged process, SA52; C1107. There is no prejudice to Potawatomi Casino because it cannot show it would be certified by Waukegan if the certification process started anew. *See* Section (B)(2) above.

Finally, Potawatomi Casino argues it is entitled to its well-pleaded facts. WPC Brief at 52. First, substantial compliance may be successfully asserted at the motion to dismiss stage. *Kennedy*, 2022 IL App (1st) 210492, ¶46. Second, and perhaps more critically, the federal court has rejected Potawatomi Casino's allegations of a rigged process, which estops Potawatomi Casino from relitigating these issues before this Court. Waukegan's substantial compliance argument remains compelling.

CONCLUSION

This Court should reverse the First District's opinion and reinstate the Circuit Court's decision dismissing Potawatomi Casino's complaint with prejudice.

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CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief conforms to the requirements of Supreme Court Rule 315(h), Rule 341(a) and (b). The length of this Reply Brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief, is 5,978 words.

By: */s/ Glenn E. Davis*

Nos. 130036, 130058

IN THE SUPREME COURT OF ILLINOIS

WAUKEGAN POTAWATOMI CASINO LLC, an Illinois limited liability company, Plaintiff-Appellee, vs. THE ILLINOIS GAMING BOARD, an Illinois administrative agency, and in their official capacities, CHARLES SCHMADEKE, Board Chairman, DIONNE R. HAYDEN, Board Member, ANTHONY GARCIA, Board Member, MARC E. BELL, Board Member, and MARCUS FRUCHTER, Board Administrator, and the CITY OF WAUKEGAN, an Illinois municipal corporation, Defendants-Appellants.	)	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-22-0883 There heard on Appeal from the Circuit Court of Cook County, Illinois Chancery Division, No. 21 CH 05784 Presiding Judge: Cecilia A. Horan

CITY OF WAUKEGAN'S NOTICE OF FILING

Defendant-Appellant City of Waukegan hereby gives notice that the following filing was electronically submitted to the Supreme Court Clerk's office on this 4th day of June 2024:

1. Reply Brief of the City of Waukegan

The foregoing document was electronically served via email on the following counsel of record on this 4th day of June 2024:

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The undersigned certifies that a complete copy of this instrument was electronically served via email to:

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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.

By: */s/ Glenn E. Davis*

Nos. 130036, 130058

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CERTIFICATE OF SERVICE

Glenn Davis, the attorney representing Defendant-Appellant City of Waukegan hereby gives notice that on this 4th day of June 2024, he caused to be electronically filed the following documents with the Clerk of the Illinois Supreme Court, 202 E. Capital Ave., Springfield, IL 62701.

- Reply Brief of the City of Waukegan
- Notice of Filing

And that he electronically served via email on this 4th day of June 2024, the Reply Brief and all other documents listed above to:

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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

Dated this 4th day of June 2024.

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