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

LAKE LATHROP PARTNERS, LLC,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 2024CH06462**
	)	
THE VILLAGE OF RIVER FOREST, a Municipal corporation,	)	
	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS 2-619.1 MOTION TO DISMISS

NOW COMES the defendant, the Village of River Forest ("Village"), by and through its attorneys, Klein, Thorpe, & Jenkins, Ltd. and Schain, Banks, Kenny & Schwartz, Ltd., and in support of its motion to dismiss Plaintiff's Verified Complaint for Issuance of a Writ of Mandamus, Declaratory, and Other Relief in this matter with prejudice, states as follows:

ARGUMENT

I. There is No Ambiguity Between Sections 7.06(A)(1), (A)(2), and (E) of the Redevelopment Agreement and Plaintiff Contracted Away Its Right to the Project.

First, Plaintiff asserts in its response that the Village improperly relies on facts outside of the pleadings, but that is not the case. Plaintiff's allegations establish that: (1) the parties entered into the Redevelopment Agreement ("RDA") and the subsequent amendments thereto, Comp., at ¶¶ 8-31; (2) on September 15, 2023, the Village announced that Plaintiff failed to meet certain deadlines set forth in the RDA, *Id*. at ¶ 33; and (3) on May 24, 2024, the Village sent a letter to Plaintiff indicating that it's permit application for the Project could not be considered due to the prior termination of the RDA, *Id*. at ¶ 37; *Id*. at Ex. H. The Plaintiff also attached the RDA and May 24, 2024 letter to the complaint as exhibits. These are the documents and allegations on which the Village relies – that the parties entered the RDA which was terminated by the Village for reasons

outlined in the May 24, 2024, letter – and they may be considered by the Court at this juncture, and should the exhibits contradict any allegations the exhibit will control and contradictory allegations should be disregarded. *See Biefeldt v. Wilson*, 2022 IL App (1st) 210336, ¶ 18.

Second, the Village has not sought to compel Plaintiff to reconvey the Subject Property to it and is not seeking to do so here, and so Sections 7.06(A)(1) and (A)(2) are irrelevant to these proceedings and a feeble attempt by Plaintiff to distract from the glaring issue that dooms its claim in the language of Section 7.06(E). Regardless, they create no relevant issue of fact or ambiguity. Sections 7.06(A)(1) and 7.06(A)(2) state that the Village "shall not be entitled to demand or compel Developer to reconvey [the Subject Property] to the Village." Section 7.06(E) states:

> "If the [Redevelopment Agreement] is terminated for any reason, **Developer shall have no further interest in the Project**, the Committed Funds or the Additional Village Funding, and **Developer shall execute such documents, and provide such information**, within the time required by the Village, and as directed by the Village, **to allow the Developer's rights and obligations under this Agreement in the Project, to the Committed Funds, and to the Additional Village Funding, to either be assigned to a new developer chosen by the Village, or distributed in some other manner by the Village**, as determined by the Village in the Village's sole discretion."

Compl., Ex. A at 23 (emphasis added). Reading these together, as we must under the well-established principle of contract law that contracts be read as a whole, there are clearly no inconsistencies or contradictions between them. *First Am. Bank v. Poplar Creek, LLC*, 2024 IL App (1st) 230551, ¶ 23. Sections 7.06(A)(1) and (A)(2) clearly state what remedy the Village *cannot* compel Plaintiff to do when there is an "Event of Default" by Plaintiff, and 7.06(E) identifies what the Village *can* compel Plaintiff to do if the "Agreement is ***terminated for any reason***". (emphasis added). The plain language and meaning of these sections are clear: in an "Event of Default" by the Plaintiff, the Village cannot require the Subject Property be reconveyed *to it*, but if the RDA is *terminated for any reason* the Plaintiff no longer has any interest in the Project and the Village can require the Project to be assigned to a new entity or otherwise be

distributed *other than* by being reconveyed to the Village. Accordingly, there is no ambiguity or issue of fact created by these provisions that could or should save Plaintiff's claim.

Third, Plaintiff has no right to the Project nor the permit due to the termination of the RDA. It is well established that the primary objective of contract interpretation is to ascertain the intention of the parties, and to do so courts must look to the language of the contract as a whole, taken in context. *Matschke v. Uropartners, LLC*, 2023 IL App (1st) 221112, ¶ 35; *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (Ill. 2007). Courts must first look to the plain and ordinary language of the contract alone, which is the best indicator of the parties' intent. *Gallagher*, 226 Ill. 2d at 233. It is also well-established that a party may contract away a legal right it otherwise would have, as doing so is a common form of valid consideration. *See Beyer v. Wolfe*, 228 Ill. App. 429, 435 (Ill. App. Ct. 1923) ("consideration consists of… the forbearance of some legal right which he otherwise would have been entitled to exercise"); *See In re Nitz*, 317 Ill.App.3d 119, 124 (2nd Dist. 2000) ("Parties to a contract are free to include any terms they choose"). This is true even of rights that are constitutional or statutory, and such a legal detriment may be implied. *See generally Gaylor v. Village of Ringwood*, 363 Ill.App.3d 543, 549 (2nd Dist. 2006) (annexation agreement implied that party signed away right to disconnect from annexing municipality). Here, the critical language of Section 7.06(E) which Plaintiff seeks to circumvent states: "If the [Redevelopment Agreement] is *terminated* for any reason, **Developer shall have no further interest in the Project**…" Compl., Ex. D, at 23. (emphasis added). The plain language could not be clearer. Plaintiff may still be the record owner of the Subject Property, ignoring the pending foreclosure proceeding, but in entering the RDA, Plaintiff signed away its legal rights to the Project in the event the RDA was *terminated for any reason*. Therefore, as a result of its breach and the subsequent termination of the RDA, Plaintiff no longer has any right to the Project and, necessarily,

this implies that Plaintiff does not have a right to submit or receive a new building permit for the Project. Any interpretation to the contrary would fly in the face of the parties' clear intent established by the plain language of the RDA.

In petitioning this Court for a writ of *mandamus* commanding the Village to review Plaintiff's building application related to the Project and seeking declaratory judgment declaring that it has a right to submit the building permit and have it reviewed, Plaintiff is asking this Court to subvert the clear terms of the RDA between the Parties and to restore a legal right that the Plaintiff signed away under a valid contract. To the extent that Plaintiff is asserting that because it has breached the RDA by failing to satisfy its terms related to the building permit for the Project, it somehow now has an unencumbered right to get a new building permit to complete the Project, this assertion is untenable and flies in the face of the RDA and the general principles of contract law. Such a scenario would circumvent the RDA between the Parties and unequivocally constitute illegal unjust enrichment of the Plaintiff. In asking the Court to endorse and command this scenario, the Plaintiff is essentially asking this Court to enter an order commanding it to be unjustly enriched. Such a request for relief has no basis in law and is untenable.

Accordingly, because Plaintiff's own allegations and exhibits establish that it does not have a clearly established right – nor any right at all – to the relief requested due to the termination of the Agreement, counts 1 and 2 must be dismissed with prejudice.

II. Count III Must Be Dismissed Pursuant to Sections 2-109, 2-201, 2-104, and 2-106 of the Illinois Tort Immunity Act (Section 2-619).

Finally, Count III of Plaintiff's Complaint alleging tortious interference must be dismissed pursuant to Sections 2-109, 2-201, 2-104, and 2-106 of the Illinois Tort Immunity Act.

First, Plaintiff's Response states that "[t]he Village fails to explain how Section 2-109 is applicable or helpful to its Motion." (Resp., p. 13). As noted by the Village's Motion, Section 2-

109 provides that a public entity cannot be held liable where its employee is not liable. *See* 745 ILCS 10/2-109. It is self-evident that Section 2-109 is the link between immunities provided by the Act to individual employees and the public entity. *Id.* For example, Section 2-201 is an immunity provided to public employees under Article II, Part 2 of the Act. *See* 745 ILCS 10/2-201. However, through Section 2-109, Section 2-201 also applies to the Village, because the Village can only act through its officials and employees to whom Section 2-201 applies. *See, e.g.*, *Monson v. City of Danville*, 2018 IL 122486, ¶ 16 ("[r]ead together, these sections immunize a public entity from liability for the discretionary acts or omissions of its employees").

Second, Plaintiff's Response argues that Section 2-201 does not apply because the Village Code requires the Village to accept and process Plaintiff's permit application, regardless of whether it is granted or denied, which is a ministerial act. (Resp., pp. 13-14). It is true that Section 2-201 does not apply to actions which are ministerial in nature. *See Village of Itasca v. Village of Lisle*, 352 Ill. App. 3d 847 (2d Dist. 2004) (finding that a village's decision to enter into a rebate decision was discretionary but making the statutorily required findings required to support that agreement was ministerial). However, notwithstanding the Village Code section related to permit applications, the Village's alleged conduct was still discretionary because that Village Code section did not encompass the unique situation that was presented to the Village.

As outlined in Defendant's Motion, during the underlying events, the Village took the position that Plaintiff's failure to abide by its RDA with the Village foreclosed upon its ability to develop the Subject Property. Even if this position was incorrect, although it is not, it would still be entitled to immunity under Section 2-201 because it is axiomatic that determining the Village's past obligations under contract and potential future obligations under contract involve policy determinations and discretionary acts. *See, generally*, *Strauss v. City of Chicago*, 2022 IL 127149;

and *Kevin's Towing, Inc. v. Thomas*, 351 Ill. App. 3d 540 (2d Dist. 2004) (both finding that public officials were entitled to immunity from tortious interference claims even where they arguably abused their power).

Plaintiff's Response characterizes this as an end-around to avoid the ministerial nature of the permit application process per the Village Code. However, it is not. Even where a statute, regulation, or code mandates specific conduct under specific circumstances, unique scenarios may arise where its application necessarily requires a policy determination and a discretionary act. *See, e.g.*, *Malinski v. Grayslake Comm. High Sch. Dist. 127*, 2014 IL App (2d) 130685, ¶¶ 12-13 (implementation of anti-bullying policy under statute did not render school official's conduct ministerial). Here, again, the facts set out by Plaintiff's Complaint lay out a scenario which admits that the Village and its President believed that the development was "dead" and that Plaintiff was unable to develop the Subject Property due to Plaintiff's failure to perform under the RDA. This was an alleged policy determination that was allegedly implemented through the Village's discretionary act of choosing to announce that position to the public and the Village's discretionary act of refusing to accept Plaintiff's permit application. Accordingly, Plaintiff's Complaint lays out facts which allege a unique scenario that goes well beyond the Village Code section related to permit applications, and Section 2-201 applies.

Further, Section 2-201 aside, the plain language of Section 2-104 applies to Plaintiff's allegation related to the refusal to process its permit application. As set out by the Village's Motion, Section 2-104 provides public entities with immunity from tort claims related to "the failure or refusal to issue…any permit…where the entity or its employee is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked." *See* 734 ILCS 10/2-104. Plaintiff's Response argues that Section 2-104 does not apply

because the Village has neither granted nor denied its permit application. (*See* Resp., p. 13) (discussing Section 2-104 in two cursory sentences without any citation to authority).

Plaintiff's reading of Section 2-104 is too narrow. As set out in the Village's Motion, it is plainly apparent that the Illinois legislature intended to protect municipalities from liability in tort for alleged misconduct related to the failure to grant or otherwise resolve a building permit, as other potential remedies exist. Certainly, the allegation in Plaintiff's Complaint that the Village refused to process its permit application meets the definition of a "failure or refusal to issue" within the meaning of Section 2-104. Therefore, even if Plaintiff's specific allegations related to the refusal to process its permit application are not protected by Section 2-201, the Village is nonetheless immune from any such tort claims under Section 2-104.

Lastly, Plaintiff's Response argues that Section 2-106 does not apply because Plaintiff's Complaint is alleging *written* misrepresentations which allegedly interfered with its business prospects. (*See* Resp., p. 13). The Village agrees that Section 2-106 only applies to oral misrepresentations, but posits that Plaintiff's Complaint was unclear whether these alleged "false and misleading public statements" were written or oral. To the extent that they were oral, Section 2-106 applies. To the extent that they were written, Section 2-201 applies as set out above. For all of these reasons, Count III of Plaintiff's Complaint should be dismissed with prejudice.

CONCLUSION

WHEREFORE, Defendant VILLAGE OF RIVER FOREST respectfully requests that this Honorable Court grant its motion to dismiss Plaintiff's Complaint and enter an order dismissing the complaint in its entirety with prejudice, and for any other relief this Court deems just and appropriate.

Respectfully submitted,

VILLAGE OF RIVER FOREST

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