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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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NORTH GROVE STREET PROPERTIES, LLC, and GASTHAUS ZUR LINDE, INC.,	)	Appeal from the Circuit Court of Kane County.
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 15-MR-341
	)	
THE CITY OF ELGIN and CAPSTONE, DEVELOPMENT GROUP, LLC,	)	
	)	
Defendants-Appellees	)	Honorable
	)	Thomas E. Mueller,
(Stickling Foundation, Defendant).	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court correctly granted the City of Elgin’s motion to dismiss the plaintiffs’ amended complaint, which sought to invalidate a conditional use permit to redevelop a formerly commercial building as a residential building, because the plaintiffs failed to sufficiently allege that Elgin’s actions violated their substantive due process, the Tax Increment Allocation Redevelopment Act (65 ILCS 5/11-74.4-1 *et seq.* (West 2014)), or article VIII, section 1(a) of the Illinois Constitution. Therefore, we affirmed.

¶ 2 The City of Elgin (Elgin), granted the Capstone Development Group, LLC (Capstone) a conditional use permit allowing Capstone to redevelop a 15-story historic building known as the

Elgin Tower Building (Tower Building) as a residential apartment building, including first floor apartment units. Elgin also entered into a redevelopment agreement (Redevelopment Agreement) with Capstone to provide \$4.7 million in tax increment financing (TIF) for the Tower Building project and to lease parking spaces for Tower Building tenants in public parking lots that Elgin owned and controlled. The Stickling Foundation owned the Tower Building but had entered into an agreement with Capstone allowing it to file the permit application as a contract purchaser. Gasthaus zur Linde, Inc. (Gasthaus zur Linde), is a restaurant that operated a tavern in Elgin beginning in 1968, and it was located adjacent to the Tower Building. North Grove Street Properties, LLC (North Grove Properties), owns the building from which Gasthaus zur Linde operated.

¶ 3 On March 13, 2015, plaintiffs, North Grove Street Properties and Gasthaus zur Linde (collectively Gasthaus), brought a 12-count complaint against defendants, Elgin, Capstone, and the Stickling Foundation, based on Elgin's actions in regards to the Tower Building. Elgin filed a motion to dismiss which the trial court granted, without prejudice.

¶ 4 On July 22, 2015, Gasthaus filed a three-count first amended complaint. Elgin moved to dismiss the amended complaint, and the trial court granted the motion, ruling that: Gasthaus's allegations were contradicted by its attached exhibits; Elgin was a home rule entity, and its actions were presumptively valid; and public parking spaces were not being taken for private use.

¶ 5 On appeal, Gasthaus challenges the trial court's dismissal of its amended complaint. We affirm.

¶ 6

## I. BACKGROUND

¶ 7

### A. First Amended Complaint

¶ 8 We begin by summarizing Gasthaus's allegations in its first amended complaint.

¶ 9 1. Count I

¶ 10 Count I sought review under section 11-13-25 of the Illinois Municipal Code (65 ILCS 5/11-13-25 (West 2014)) of the adoption and approval of the conditional use permit and variations granted in the permit. For this count, Gasthaus alleged as follows, in relevant part.

¶ 11 For at least the previous 47 years, the Tower Building had retail and services on its first floor and commercial office space on its upper floors; it never had residential apartment dwellings. During the same time period, North Grove Properties' adjacent building had contained a restaurant or tavern on the first floor, and the second floor had been vacant. Gasthaus Zur Linde had operated a restaurant "with an integrated tavern" at the site since 1968. It served food until about 2 to 2:30 a.m.; had a liquor license allowing it to stay open until 3 a.m.; had historically had the right to have an outdoor patio area during the summer months that was open until 11 p.m.; and had a stage where live music was performed. Gasthaus had spent hundreds of thousands of dollars improving its facilities in recent years.

¶ 12 In May 2013, Elgin filed a complaint against the Stickling Foundation seeking an injunction to correct ordinance violations in the Tower Building and obtain other relief. Elgin obtained a default order, and in May 2014, after a fire damaged the elevator and lobby, Elgin condemned the building.

¶ 13 Years before, in April 2002, Elgin adopted the Central Area TIF Redevelopment Plan (Redevelopment Plan). On October 28, 2014, the Elgin City Council authorized Resolution 14-153, which approved the Redevelopment Agreement between Elgin and Capstone for the Tower Building. The Redevelopment Agreement provided that Capstone would file an application to rezone the Tower Building to allow for 45 apartment dwellings, including first floor apartments;

that Elgin would provide \$4.7 million in TIF funding via the Redevelopment Plan; and that Elgin would designate 55 city parking spots for the Tower Building.

¶ 14 On December 1, 2014, Elgin held a public hearing before the planning and zoning commission to address a conditional use permit for the Tower Building development. Gasthaus appeared, cross-examined witnesses, and objected to the permit application. The commission recommended approving Capstone's application by a vote of six to one. On December 17, 2014, the city council approved the application as ordinance G2-15 by a vote of eight to zero. On January 14, 2015, the city council approved execution of the ordinance, and a conditional use permit was granted to Capstone.

¶ 15 Section 19.10.400(c) of the Elgin Municipal Code (Elgin Municipal Code § 19.10.400(C) (eff. 1992)) does not allow for first floor apartments in the Center City 1 zoning district, where the Tower Building is located. Section 19.35.530 of the Elgin Municipal Code (Elgin Municipal Code § 19.10.530 (eff. 2014)) sets forth enumerated and approved conditional uses within the Center City 1 zoning district, but first floor apartment units are not included, so they could not be authorized for the Tower Building as a conditional use. The conditional use permit also violates section 19.60.0409(H) of the Elgin Municipal Code (Elgin Municipal Code § 19.60.040(H) (eff. 1994)), which provides that “[n]o conditional use for planned development should be granted for the sole purpose of introducing a land use not otherwise permitted on the subject property.” Ground floor apartments further violated Elgin's 2000 Riverfront/Center City Master Plan (Master Plan), which provides that the Tower Building would be a multi-story office or commercial building with street-level retail and services. The grant of the permit additionally constituted illegal spot zoning, and it did not comply with the square footage requirements of the Center City 1 zoning district (Elgin Municipal Code § 19.35.535 (eff. 2001)) or with the density

requirements for a planned development (Elgin Municipal Code § 19.60.080 (eff. 2015)). The planning and zoning commission did not make its own findings of fact as required by section 19.60.190(A) (Elgin Municipal Code § 19.60.080 (eff. 2015)), and the permit failed to comply with the off-street loading requirements of section 19.47 (Elgin Municipal Code § 19.47 (eff. 1992)), the authorized variations requirement of section 19.47.110 (Elgin Municipal Code § 19.47.110 (eff. 1992)), the authorized land use variations requirements of section 19.10.500 (Elgin Municipal Code § 19.10.500 (eff. 2012)), and section 11-13-5 of the Illinois Municipal Code (65 ILCS 5/11-13-5 West 2014)). The conditional use permit was also not compatible or consistent with the neighboring properties, as it did not contemplate the location of a loading zone or of trash removal.

¶ 16 Gasthaus requested that the trial court find that the approval of the conditional use permit was invalid because it was arbitrary, capricious, and unreasonable and had no substantial relationship to the public's health, safety, morals, and welfare.

¶ 17 2. Count II

¶ 18 In count II, Gasthaus sought a declaratory judgment that the Redevelopment Agreement was invalid because allowing first floor apartments violated the Redevelopment Plan and the Tax Increment Allocation Redevelopment Act (TIF Act) (65 ILCS 5/11-74.4-1 *et seq.* (West 2014)), which required compliance with the Master Plan.

¶ 19 3. Count III

¶ 20 In count III, Gasthaus sought a declaratory judgment that the Redevelopment Agreement was invalid because it violated article VIII, section 1(a) of the Illinois Constitution, which provides: "Public funds, property or credit shall be used only for public purposes." Gasthaus alleged that, contrary to this provision, the Redevelopment Agreement took away public parking

spaces for Capstone's private use and sole benefit. It alleged that the reservation of parking spaces was also in direct conflict with the Master Plan, the Redevelopment Plan, and the public use doctrine. According to Gasthaus, this issue created an actual controversy that had a material effect upon Gasthaus's property rights, including the diminution in their property value.

¶ 21

B. Elgin's Motion to Dismiss

¶ 22 On August 12, 2015, Elgin filed a motion to dismiss Gasthaus's amended complaint under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)).

¶ 23 Regarding count I, Elgin argued that Gasthaus failed to state a claim; we summarize Elgin's arguments. Gasthaus sought a declaration that the conditional use permit was unconstitutional under substantive due process standards. For purposes of judicial review, the permit was a legislative act and would be upheld if it represented a rational means to accomplish a legitimate focus. In analyzing constitutional challenges to zoning permits, courts consider the factors articulated in *LaSalle National Bank v. County of Cook*, 12 Ill. 26, 40, 46-47 (1957), and *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 378 (1960). Elgin claimed that here, Gasthaus repeatedly alleged that the City's approval of the permit was unconstitutional because Gasthaus was an established bar and restaurant that was open late, served food and drink outdoors, and played music. However, these allegations had no bearing on whether the proposed use met substantive due process standards, as they did not show that the proposed use of the Tower Building would negatively affect surrounding properties or the general public welfare. Elgin argued that instead, the allegations merely identified negative impacts caused by Gasthaus. Elgin claimed that Gasthaus could not explain how residents who were adjacent horizontally from it would differ from residents who were vertically adjacent, and, in fact, Gasthaus had chosen to operate the business in a mixed use zoning district which allowed for apartments

immediately above restaurants and bars. The city council's decision, that first-floor apartments units in the Tower Building were appropriate, was consistent with the area's mixed use zoning and was presumptively valid, and the permit was properly approved. The Tower Building was in disrepair, so it would be a significant benefit to the public health, safety, and welfare for it to be rehabilitated. Elgin claimed that, contrary to Gasthaus's allegations, the permit provided for the collection and storage of trash, as Capstone's development application indicated that there would be a trash chute on each floor of the building with a compactor in the basement. Temporary construction-related inconveniences, lack of additional on-site parking, and lack of alley access did not diminish the value of nearby properties.

¶ 24 Elgin argued that count II should also be dismissed for failure to state a claim. It argued that the Redevelopment Agreement was consistent with the Master Plan and the Redevelopment Plan, which both emphasized the importance of mixed uses in the downtown area. Elgin argued that even if they were inconsistent, Gasthaus failed to plead facts that would support the invalidation of the Redevelopment Agreement or the Redevelopment Plan under the TIF Act.

¶ 25 Elgin argued that count III should be dismissed for failure to state a claim because it contained the same allegations and claims that were set forth in count X of the original complaint. Elgin referenced its argument in its motion to dismiss the original complaint, wherein Elgin argued that Redevelopment Agreement did not designate public parking spaces for Capstone's use but rather provided that Tower Building residents could pay Elgin \$30 per month to rent spaces, which funds directly benefited the public. Elgin further argued that even if the rental of parking spaces conferred an incidental benefit to Capstone, that benefit did not render the Redevelopment Agreement unconstitutional, because the rental of parking spots was part of a

larger effort to redevelop a blighted area and preserve a historic building, which was in the public interest.

¶ 26

### C. Trial Court's Ruling

¶ 27 On October 7, 2015, the trial court granted Elgin's motion to dismiss Gasthaus's amended complaint. At the beginning of the hearing, in response to the trial court's inquiry, Gasthaus's attorney confirmed that at the end of the previous month, Gasthaus zur Linde had ceased operations, but the business entity still existed. Moreover, the building from which it operated, owned by North Grove Properties, was also a plaintiff.

¶ 28 Regarding counts I and II, the trial court stated that the allegations were contradicted by the attached exhibits. For count II, the trial court further stated that it was a home rule situation, so the trial court had to accept Elgin's actions as valid. For count III, the trial court stated that public parking spaces were not being taken away for private use. Rather, members of the public, specifically Tower Building residents, would be able to lease and pay Elgin for the use of the parking spots, which was similar to parking meters. It was not a situation where there would be free, private use of public property. The trial court therefore granted Elgin's motion to dismiss Gasthaus's amended complaint.

¶ 29 Gasthaus timely appealed.

¶ 30

## II. ANALYSIS

¶ 31 Gasthaus appeals the trial court dismissal of its amended complaint. Elgin moved to dismiss the complaint pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)). A section 2-619.1 motion to dismiss allows combined motions under sections 2-615 (735 ILCS 5/2-615 (West 2014)), 2-619 (735 ILCS 5/2-619 (West 2014)), and 2-1005 (735 ILCS 5/2-1005 (West 2014)) of the Code. 735 ILCS 5/2-619.1 (West 2014). Section 2-1005 pertains



to summary judgment, which Elgin did not seek here, and its arguments below and on appeal maintained that Gasthaus failed to state a claim. Accordingly, we review the dismissal under section 2-615.

¶ 32 A section 2-615 motion to dismiss challenges a complaint's legal sufficiency. *State ex rel. Pusateri v. Peoples Gas Light & Coke Co.*, 2014 IL 116844, ¶ 8. In ruling on a section 2-615 motion, a court must accept as true the complaint's well-pleaded facts and all reasonable inferences. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. The main inquiry is whether the allegations, when construed in the light most favorable to the plaintiff, sufficiently state a cause of action upon which relief can be granted. *DeHart*, 2013 IL 114137, ¶ 18. If the pleading's allegations conflict with the facts disclosed in an attached exhibit, the exhibit controls. *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶ 24. Moreover, a plaintiff must set out the ultimate facts that support the cause of action, and legal conclusions unsupported by allegations of specific facts are insufficient. *La Salle National Bank v. City of Highland Park*, 344 Ill. App. 3d 259, 274-75 (2003). We review *de novo* a dismissal under section 2-615. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29.

¶ 33 A. Count I

¶ 34 In count I, Gasthaus brought a substantive due process challenge to Elgin's legislative zoning decision. Section 11-13-25(a) of the Illinois Municipal Code (65 ILCS 5/11-13-25 (West 2014)) provides that decisions allowing variances from zoning ordinances will be reviewed as legislative decisions. That section states, in relevant part:

“Any decision by the corporate authorities of any municipality, home rule or non-home rule, in regard to any petition or application for a special use, variance, rezoning, or other amendment to a zoning ordinance *shall be subject to de novo judicial review as a*

*legislative decision*, regardless of whether the process in relation thereto is considered administrative for other purposes. Any action seeking the judicial review of such a decision shall be commenced not later than 90 days after the date of the decision. (Emphasis added.) 65 ILCS 5/11-13-25(a) (West 2014).

The appellate court has held that the phrase “de novo judicial review as a legislative decision” in the statute refers to judicial review of a municipality’s zoning decision as a legislative decision, which is subject to rational basis review, as opposed to review of administrative decisions, which are subject to heightened scrutiny. *Condominium Ass’n of Commonwealth Plaza v. City of Chicago*, 399 Ill. App. 3d 32, 47 (2010); see also *Our Savior Evangelical Lutheran Church v. Saville*, 397 Ill. App. 3d 1003, 1026-27 (2009). Thus, legislative zoning decisions are not subject to traditional *de novo* review, which requires no deference to the underlying decision. That being said, here we ultimately apply *de novo* review based on the dismissal of Gasthaus’s complaint.

¶ 35 Home rule municipalities, such as Elgin, have broad power to perform any function pertaining to their governments and affairs, including enacting municipal development regulations such as zoning ordinances. *Gurba v. Community High School District No. 155*, 2015 IL 118332, ¶ 13. A zoning ordinance is presumptively valid, and courts will not interfere with the municipality’s discretion unless the plaintiff proves by clear and convincing evidence that the municipality’s action was arbitrary and capricious or unrelated to the public health, safety, and morals. *La Salle National Bank*, 12 Ill. 2d at 46. When a legislative zoning action is challenged based on substantive due process, we will examine the zoning action for arbitrariness under the six-factor test set forth in *La Salle National Bank*. *Our Savior Evangelical Lutheran Church*, 397 Ill. App. 3d at 1027. These factors are: (1) the existing uses and zoning of nearby property;

(2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of the plaintiff's property values promotes the health, safety, morals, or general welfare of the public; (4) the relative gain to the public as compared to the hardship imposed on the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned considered in the context of land development in the vicinity. *La Salle National Bank*, 12 Ill. 2d at 46-47. Our supreme court identified additional factors to consider in *Sinclair Pipe Line Co.*, 19 Ill. 2d at 378, namely: (1) the care with which the community has planned its land use and development, and (2) whether the community needs the use. No single factor is controlling. *La Salle National Bank*, 12 Ill. 2d at 47. We use these factors to determine whether the legislative zoning action was reasonably related to a legitimate government interest and was a reasonable method to achieve that purpose. See *Napleton v. Village of Hinsdale*, 364 Ill. App. 3d 1098, 1110 (2007).

¶ 36

1. Gasthaus's Arguments

¶ 37 Gasthaus argues that it has alleged facts meeting each of the above-mentioned factors. For the first factor, it argues that the conditional use permit is not compatible with the existing uses and zoning of nearby properties because the permit authorized first floor apartments which: are not compatible with a restaurant and bar that historically has had late night hours and outside service; violates section 19.60.040(H) of the Elgin Municipal Code (Elgin Municipal Code § 19.60.040(H) (eff. 1994)); and violates the Master Plan, which provides that the Tower building is to be a “ ‘multi-story office or commercial construction with integrated parking and street level retail and services.’ ” Gasthaus argues that the permit is also not compatible with nearby properties because it granted a deviation from the square footage requirements of section 19.35.535 of the Elgin Municipal Code (Elgin Municipal Code § 19.35.535 (eff. 2001)), with a

deviation in 44 out of 45 apartment units, and from section 19.60.080 of the Elgin Municipal Code (Elgin Municipal Code § 19.60.080 (eff. 2015)), which would have authorized only 2 apartments as opposed to 45 apartments. Gasthaus argues that Elgin further relied upon development requirements that were intended for horizontal developments.

¶ 38 For the second factor, Gasthaus argues that its property value will be diminished by the granting of the conditional use permit because: (1) first floor apartments are not compatible with the type of restaurant and bar it operates; (2) a conflict between the apartment dwellings and Gasthaus's present use is inevitable, and in anticipation of the building's conversion, Elgin had taken every opportunity to question Gasthaus's liquor license and had reduced Gasthaus's late-night hours; (3) Gasthaus had invested hundreds of thousands of dollars into its present use; (4) the permit did not provide for off-street loading berth requirements, contrary to sections 19.47.100 and 19.47.110 of the Elgin Municipal Code (Elgin Municipal Code §§ 19.47.100, 19.47.110 (eff. 1992)), and the only possible off-street loading berth would be the parking spaces directly in front of Gasthaus's property, which would severely impact its business; (5) an off-street berth is also needed for removal of garbage and recycling, and the floor plans provided in Capstone's application do not include any trash compactor, trash storage location, or trash chute; (6) first floor apartment dwellings are a prohibited land use that violate section 19.60.040(H) of the Elgin Municipal Code (Elgin Municipal Code § 19.60.040(H) (eff. 1994)); and (7) Elgin admitted, in its own factual findings, that the planning development requirements used were actually intended for horizontal developments.

¶ 39 In support of the third and fourth factors, Gasthaus argues that the destruction of its property value is not supported by the promotion of the public's health, safety, morals, and general welfare because: (1) the permit authorized first-floor apartment dwellings, which will

negatively impact Gasthaus; (2) the permit will disproportionately affect Gasthaus because it is immediately adjacent to the Tower Building; (3) Elgin failed to establish the need for either first floor apartments or upper floor apartments in the Tower Building at the public hearing, in the planning and zoning commission's findings, or in the permit; and (4) no public needs were ever established. Gasthaus cites *Anderman v. City of Chicago*, 379 Ill. 236, 241 (1942), where our supreme court stated that where the gain to the public is small compared to the hardship imposed upon the individual property owner by the zoning ordinance's restrictions, there is no valid basis for an exercise of police power.

¶ 40 For the fifth factor, Gasthaus argues that it has alleged that the proposed use for the Tower Building is not suitable because the permit: (1) authorized apartments in the Tower Building, contrary to the Master Plan; (2) authorized first floor apartments in particular, which is contrary to section 19.60.040(H) of the Elgin Municipal Code (Elgin Municipal Code § 19.60.040(H) (eff. 1994)), and incompatible with its restaurant; (3) granted an unreasonable deviation for Elgin's square footage requirements; (4) granted an unreasonable deviation from Elgin's density requirements; (5) relied upon development requirements intended for horizontal developments; (6) authorized illegal spot zoning that was not in harmony with surrounding properties; and (7) improperly granted a variation to eliminate off-street loading zone requirements without a notice or public hearing, contrary to Elgin's ordinances and Illinois statute.

¶ 41 For the sixth factor, Gasthaus argues that the length of time that the Tower Building has been vacant is not relevant because the building had tenants until Elgin decided to file a lawsuit to have it vacated.

¶ 42 Regarding the *Sinclair* factors, Gasthaus argues that allowing apartments in the Tower Building is contrary to the Master Plan. Gasthaus also refers to its argument for the third through fifth *La Salle* factors.

¶ 43 Gasthaus further argues that while courts generally look to the *La Salle/Sinclair* factors, they are not limited to those factors in determining whether a zoning decision was arbitrary, capricious, unreasonable, and not substantially related to the public health, safety, morals, and welfare. Gasthaus cites *City of Elgin v. County of Cook*, 169 Ill. 2d 53, 63 (1995), where the supreme court stated that the court can invalidate municipal legislation that violates the federal or state constitutions or federal or state statutes. Gasthaus argues that section 11-13-5 of the Illinois Municipal Code (65 ILCS 5/11-13-5 (West 2014)) requires public notice and a hearing before a municipality grants a variance. Gasthaus argues that Elgin violated this statute because there was no public notice or hearing on the variance request for off-street loading berths, and Elgin's community development director testified at the public hearing on the permit that no variations were being requested, yet the permit granted such a variance.

¶ 44 Gasthaus also argues that Elgin arbitrarily ignored its own procedural prerequisites, contrary to *City of Chicago Heights v. Living World Outreach Full Gospel Church & Ministries, Inc.*, 196 Ill. 2d 1 (2001). That case held that municipalities may not employ the special use application process as a means to amend zoning ordinances. *Id.* at 25. Gasthaus argues that, therefore, failure to comply with municipal ordinances can be a factor in determining whether the grant of a conditional use permit was appropriate. Gasthaus restates its arguments that Elgin violated various ordinances in granting the permit and that apartments in the Tower Building violate the Master Plan.

¶ 45 Last, Gasthaus addresses the trial court’s statement that the exhibits to its amended complaint contradicted its factual allegations. Gasthaus argues that in Elgin’s motion to dismiss, the only contradictions that Elgin alleged were whether the Tower Building was included in the Master Plan and the location of refuse disposal in the Tower Building. Gasthaus argues that it has addressed these issues, and if there was a factual question, the trial court should have viewed the allegations in the light most favorable to Gasthaus and taken them as true. Gasthaus maintains that if the trial court had done so, it would not have granted Elgin’s motion to dismiss.

¶ 46 2. Elgin’s Arguments<sup>1</sup>

¶ 47 Elgin argues that its approval of the conditional use permit complied with its ordinances. It cites chapter 19.60 of its Municipal Code, which serves to “accommodate unique development situations” for planned developments. Elgin Municipal Code § 19.60.010 (eff. 1994). The Municipal Code allows Elgin to grant a conditional use permit for planned developments involving two or fewer acres of land, such as with the Tower Building. See Elgin Municipal Code § 19.60.050 (eff. 1992). Elgin argues that several provisions of chapter 19.60 allow the city council to approve departures from generally-applicable zoning standards and regulations for planned developments, including standards for bulk, density, site design, parking, and loading. Specifically, as part of the city council’s review and approval process, it may depart “from the normal standards, regulations, requirements, and procedures of the other chapters” of the zoning code. Elgin Municipal Code § 19.60.060(A) (eff. 1994). The chapter includes some requirements for planned developments, but even then provides that the city council may depart from those “as may be deemed necessary to promote the purpose and intent of this title and chapter.” Elgin Municipal Code § 19.60.080 (eff. 2015). Another section of chapter 19.60

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<sup>1</sup> Capstone requested leave to adopt Elgin’s brief, and we granted the motion.

allows the city council to grant a departure from the normal requirements and regulations of the chapter where an “adaptive reuse of an existing building is involved.” Elgin Municipal Code § 19.60.060(B) (eff. 1994). Elgin argues that these provisions gave the city council significant discretion to depart from the standards that would otherwise be applicable to the Tower Building.

¶ 48 Elgin also argues that Gasthaus failed to allege a procedural due process claim because they have no due process interest in Elgin’s adherence to its own Municipal Code when approving a planned development permit. Elgin cites *Condominium Ass’n of Commonwealth Plaza v. City of Chicago*, 399 Ill. App. 3d 32, 43 (2010) (a home rule municipality’s failure to follow its own self-imposed regulations in enacting an ordinance is not, alone, a constitutional violation). See also *City of Elgin*, 169 Ill. 2d at 63 (courts cannot invalidate home rule municipality’s decisions based upon alleged failure to follow requirements that the municipality imposed upon itself). Elgin argues that Gasthaus cannot establish a procedural due process claim independent of the alleged ordinance conflicts.

¶ 49 Regarding Gasthaus’s allegations of lack of notice, Elgin argues that they waived those objections by attending and participating in the public hearing. See *Stroick v. West Dundee*, 319 Ill. App. 3d 468, 475 (2001) (the plaintiffs could not “raise any defects in the notice of public hearing because they had actual notice of the hearing, did not object to the notice at the hearing, and did not suffer any prejudice from the allegedly defective notice[,]” as they attended and participated in the hearing). Elgin argues that, moreover, the amended complaint and its exhibits establish that Gasthaus was afforded due process in Elgin’s consideration of and grant of the conditional use permit. Elgin maintains that written notice was given to the public by publication and to nearby property owners by mail. Elgin argues that the notice fully described the nature of the proposed use and requested zoning relief, gave the address where the



application could be inspected, and included a contact person for further information. Elgin argues that the application included proposed plans for every floor, a survey of the building and existing improvements, a list of proposed common amenities, a list of proposed exterior improvements, and an explanation of the Stickling Foundation's and Capstone's respective interests in the property. Elgin argues that, consistent with the notice, it held public hearings. Elgin contends that not only were all of the matters of which Gasthaus claims lack of notice readily apparent from the notice and application, but at the hearing, Gasthaus's counsel asked questions specifically about the proposed deviations from generally applicable residential density requirements, including the number of units and size of the apartments, and the lack of an off-street loading berth.

¶ 50 Elgin further argues that count I fails to state a substantive due process claim. Elgin argues that the issue is whether it was reasonable for Elgin to grant a conditional use permit for the redevelopment of the Tower Building, which had deteriorated to a condition below the minimum code standards for occupancy and is now functionally obsolete. Elgin notes that the building is on the National Register of Historic Places. Elgin argues that the Master Plan recognizes that the Tower Building is a key landmark in the central business district, and that Elgin has deemed its preservation to be of high importance to that business district's overall vitality. Elgin argues that in its Master Plan, it recognized that the downtown area requires a strengthened and expanded housing stock that complements the other retail, entertainment, civic, and recreational uses in the area. Elgin argues that Gasthaus objects to the redevelopment of the Tower Building as a residential apartment building, but the Municipal Code expressly permits a variety of uses in the mixed-use Center City 1 zoning district, including apartments immediately above restaurants and bars, such as Gasthaus. Elgin notes that it could further approve

departures from generally-applicable zoning standards and regulations for planned developments, such as the conditional use permit at issue here.

¶ 51 Elgin argues that Gasthaus's allegations fail to establish a constitutional violation, regardless of the *LaSalle-Sinclair* factor to which it is attributed. Elgin argues that the allegations regarding Gasthaus's former operations have no bearing on whether the redevelopment of the Tower Building for the proposed use meets the applicable substantive due process standards, as they identify how Gasthaus will be a nuisance to Tower Building residents, rather than showing that the redevelopment will cause a negative impact on surrounding properties or the general public welfare. Elgin argues that to the extent that Gasthaus asserts that the value of their property will be diminished if it became a nuisance to its new neighbors, Illinois law makes clear that nuisances do not have the right to continue. Elgin argues that Gasthaus also does not explain how residents who are vertically adjacent to it would differ from resident who are horizontally adjacent, and how they would differ from apartments that are permitted under the Municipal Code immediately above Gasthaus.

¶ 52 Elgin argues that while Gasthaus alleges that there will be inevitable pushback from Tower Building residents and that Elgin reduced the late night hours available for its liquor license, the liquor license ordinance referred to pertains to all Class U liquor licenses and cannot represent pushback from non-existent residents. Elgin argues that that ordinance is irrelevant to a zoning analysis for the Tower Building. Elgin further argues that Gasthaus zur Linde has admittedly closed its business, so any purported injuries to it are moot and cannot serve as the basis for Gasthaus's substantive due process challenge.

¶ 53 Elgin argues that Gasthaus's claim that the approval of the conditional use permit violated section 19.60.190 of the Municipal Code (Elgin Municipal Code § 19.60.190 (eff.

2012)) fails as a matter of law. That section requires that the planning and zoning commission's recommendation also contain written findings of fact stating with particularity in what respect the proposal conforms to the purpose and intent and standards for planned developments, and the extent to which it departs from otherwise applicable zoning regulations, and why such departures are in the public interest. Elgin argues that Gasthaus's exhibits show that prior to the first hearing on the application, Elgin's community development director prepared a report that described the development proposal, applied the standards for conditional uses for planned developments, and assessed the departures from general Municipal Code requirements. Gasthaus alleged that the planning and zoning commission adopted these findings of fact. Elgin argues that this represents compliance with section 19.60.190, and even if it did not, Elgin was not required to follow its own procedural rules in granting zoning relief. Elgin further argues that the wisdom or accuracy of those findings is not at issue before this court, as the conditional use permit approval is valid so long as it is a reasonable exercise of Elgin's legislative discretion.

¶ 54 Regarding Gasthaus's reliance on the Master Plan, Elgin argues that the Master Plan contains no mandates, commands, or prohibitions, but rather is, by its own terms, a "guideline to assist" Elgin with redevelopment activities. Elgin points out that the Illinois Municipal Code itself states that an official comprehensive plan "shall be advisory and in and of itself shall not be construed to regulate or control the use of private property in any way," except for parts implemented through ordinances. 65 ILCS 5/11-12-6 (West 2014); see also *Living World Outreach Full Gospel Church & Ministries, Inc.*, 196 Ill. 2d at 22-23 (unlike zoning ordinances, a comprehensive plan is not law). Elgin argues that Gasthaus also misconstrues the Master Plan by describing the Tower Building as the "Landmark Site" referenced in the document, but the "Landmark Site" is along the riverfront, unlike the Tower Building, and is described to be "a

21st century complement to the Tower Building” with a density “comparable to that of” the Tower Building. Elgin argues that even otherwise, the Master Plan does not limit development of the Landmark Site to commercial development, but instead recommends that it be part of the area’s development.

¶ 55 Elgin argues that Gasthaus’s allegation that the application does not provide for the collection and storage of trash should be disregarded because it is directly contradicted by the exhibits, which indicate that a trash chute will be present on each floor and show a mechanical/electrical room in the basement for the trash compactor. Elgin argues that constructing alleys, on-site parking, and/or loading spaces would require demolition of at least part of the building, which would be inconsistent with Elgin’s goal to preserve the historic structure.

¶ 56 Elgin further contends that contrary to Gasthaus’s position, the amount of time the Tower Building has been vacant is not irrelevant. Elgin argues that, as set forth in the amended complaint, Elgin required the building to be vacated as a result of numerous life safety and fire code violations. Elgin argues that the building was ultimately condemned because it was below code and not safe for occupancy. Elgin argues that Gasthaus’s allegations show that there would be a significant benefit to the public health, safety, and welfare from the rehabilitation of the building, the return of a historically-significant structure to a safe and usable condition, and the elimination of a vacancy in Elgin’s downtown.

¶ 57 3. Our Resolution

¶ 58 Even taking all well-plead allegations in Gasthaus’s complaint as true, we conclude that Gasthaus has not alleged sufficient facts capable of establishing that Elgin’s grant of the

conditional use permit lacked a rational basis by being arbitrary and capricious or unrelated to the public health, safety, and morals.

¶ 59 Regarding the *La Salle/Sinclair* factors used to assist in making this determination, Gasthaus repeatedly refers to the permit's deviations from various city ordinances. However, as Elgin points out, Elgin's Municipal Code itself allows Elgin to depart from the normal zoning code requirements for a planned development, such as the proposed changes to the Tower Building. See *supra* ¶ 47. Though Gasthaus points to the extent of the deviations for regulations relating to aspects like square footage and the number of units allowed, the deviations must be examined in relation to the project at issue; there is no blanket rule that significant zoning deviations show that a municipality lacked a rational basis in allowing a development project to go forward. Further, the allegation that many ordinances were developed with horizontal developments in mind, rather than a vertical development like the Tower Building, would create all the more justification for deviations. *Living World* does not assist Gasthaus in this regard, as there the municipality made a blanket decision not to allow any type of non-economic special uses in an area, without going through the procedures to make a zoning change, resulting in a *de facto* amendment of a zoning ordinance. *Living World Outreach Full Gospel Church & Ministries, Inc.*, 196 Ill. 2d at 23-25. Here, unlike *Living World*, Elgin's decision related to a single building. *Living World* also did not involve the allowance of deviations for a planned development.

¶ 60 Gasthaus relies heavily upon section 19.60.040(H) of the Municipal Code in particular. That section states: "No conditional use for a planned development should be granted for the sole purpose of introducing a land use not otherwise permitted on the subject property." Elgin Municipal Code § 19.60.040(H) (eff. 1994). Gasthaus argues that, according to notices, the sole

purpose of the conditional use permit was to allow first-floor apartments, which was a land use not otherwise permitted on the property. We discuss the notice issue below. See *infra* ¶ 65. However, it is clear from the hearing and permit, and Gasthaus's own allegations, that more than one variation was granted for the project, so the sole purpose of the permit cannot be taken as limited to allowing first-floor apartments, meaning that there could not have been a violation of section 19.60.040(H). Moreover, chapter 19.60 itself allows the city council to depart from requirements for planned developments (Elgin Municipal Code § 19.60.080 (eff. 2015)), which would include section 19.60.040(H). Even otherwise, as Elgin points out, a municipality's decision will not be invalidated solely on the basis that it failed to follow self-imposed requirements. *City of Elgin*, 169 Ill. 2d at 63.

¶ 61 At the hearing, planning and zoning commission members repeatedly questioned Capstone on the need for first floor apartments, and the hearing transcript was one of Gasthaus's exhibits. Capstone witnesses testified that: the five first floor apartments represented 10% of the income that would be generated in the building; Capstone was relying on that income to satisfy the underwriting of the project; lenders treated commercial space differently than residential space; Capstone had spoken to commercial tenants such as Starbucks, but they were not interested in the space based on factors like population and demographics; there were already many vacant commercial/retail spaces in the area, which would make it more difficult to rent such space, whereas there was a waiting list for apartments at a nearby building; and if there was commercial or retail space on the first floor, it would negatively impact the ability to rent out the upper floors because people preferred buildings that were dedicated to residential space and where the general public could not enter. The witnesses stated that Capstone could not finance and proceed with a mixed-use project. We do not accept this testimony as true for purposes of

the motion to dismiss, but the fact that there was significant discussion of the need for first floor apartments goes to the issue of whether Gasthaus alleged sufficient facts that could potentially show that Elgin decided to allow first floor apartments arbitrarily and without a rational basis.

¶ 62 As far as the Master Plan, it is unclear whether the Tower Building is within the “Landmark Site” where development is recommended to “include[] multi-story office or commercial construction with integrated parking and street level retail and services.” Regardless, we agree with Elgin that the plain language of the quoted section does not limit development to commercial development on the site. Even otherwise, the Master Plan describes itself as “a guideline to assist” in development, so Elgin was not required to follow it, and statutory and case law also provide that official comprehensive plans differ from zoning ordinances and are not laws. See *supra* ¶ 54, citing 65 ILCS 5/11-12-6 (West 2014)); *Living World Outreach Full Gospel Church & Ministries, Inc.*, 196 Ill. 2d at 22-23. Moreover, the broad Master Plan goals include “[e]stablishing downtown Elgin as an important multi-use activity center for the community and the region, including recreational, cultural, *residential*, retail, entertainment, office, high-tech business and government uses,” and “[e]stablishing the downtown as a ‘24-hour’ mixed use neighborhood by strengthening the downtown’s retail and business mix, and *expanding housing* and employment opportunities.” (Emphases added.). Thus, the Master Plan clearly contemplates having apartments within the Center City 1 zoning district.

¶ 63 One of Gasthaus’s main concerns appeared to be that future residents would complain about Gasthaus zur Linde’s loud music and late hours, even though it had operated from its location for 47 years. Of course, Gasthaus zur Linde is not currently operating, making projected complaints all-the-more speculative. Moreover, Elgin’s zoning already allows for apartments on

any floor higher than the first floor in the Center City 1 district, so Gasthaus would have to show through its allegations that the variation allowing first floor units could have an impact distinct from those on upper floors, which it has failed to do. Gasthaus attempts to circle this argument back at Elgin, saying that Elgin already decided, through its Municipal Code, that first floor apartments were improper for the area. Still, as discussed, Elgin also decided in its Municipal Code that it would not have to comply with such requirements for planned developments, such as the project here.

¶ 64 Gasthaus also points to the lack of an off-street loading berth as damaging its property value, because allegedly the only possible off-street loading berth would be the parking spaces in front of Gasthaus's property. Gasthaus argues that refuse collection and removal would also have to occur in those parking spaces. However, the exhibits and hearing testimony show that trash collection would take place within the building, through trash chutes and a compactor. Moreover, the Tower Building was in commercial use for decades, with those businesses also generating trash and requiring deliveries, without the off-street loading berth.

¶ 65 We agree with Elgin that Gasthaus cannot rely on its argument that Elgin failed to provide notice of the variation for off-street loading berths. A party cannot raise any defects in the notice of a public hearing where it had actual notice of the hearing, did not object to the notice at the hearing, and did not suffer any prejudice from the allegedly defective notice. *Stroick*, 319 Ill. App. 3d at 475. Here, Gasthaus appeared at the public hearing and cross-examined witnesses, did not object to the notice at the hearing, and discussed the issue of off-street loading berths. Gasthaus argues that it could not have waived this issue because Elgin's witness testified that no variation was being sought for loading berths at the time. However, a review of the record shows that the witness also testified that the Tower Building did not meet



the loading dock requirements for buildings for similar uses. Given that Gasthaus raised the issue of off-street loading berths at the hearing and elicited testimony showing that the Tower Building would not comply with requirements, Gasthaus cannot show prejudice from the alleged lack of notice of the issue.

¶ 66 We further agree with Elgin that the amount of time the Tower Building has been vacant is relevant in applying the *LaSalle/Sinclair* factors. Although Gasthaus faults Elgin with causing the building to be vacant, Gasthaus's exhibits show that Elgin filed suit against the Stickling Foundation in 2013 for 23 long-term fire safety violations, including the failure to install automatic sprinklers. Gasthaus also alleged that Elgin condemned the building in May 2014 after a fire damaged the elevator and lobby. Thus, in addition to the fact that it was vacant, the allegations and exhibits showed that it was in need of significant repair before it could be occupied.

¶ 67 In sum, the undisputed facts of this case show that that: Gasthaus zur Linde is not currently operating, making allegations of future complaints highly speculative; second-floor and higher apartments were already allowed in the zoning area where the Tower Building was located, and Gasthaus did not allege how first floor residents in particular would adversely affect it; where a planned development is involved, the Elgin Municipal Code gives Elgin the right to deviate from all zoning ordinances; Elgin held a hearing at which the subject of allowing first-floor apartments was extensively discussed, and Gasthaus appeared and questioned witnesses on this issue as well as others, including loading berths; though it is unclear whether the Master Plan contemplated apartments in the Tower Building, it recommended residential housing in the area, and the Master Plan was designed as guidelines that Elgin was not required to follow; the Tower Building was vacant and in need of substantial repair before it could be occupied, and Capstone

planned to repair the building and fully lease out the apartments. Thus, even when the allegations in count I are viewed in the light most favorable to Gasthaus, and considering the attached exhibits, Gasthaus still would not be able to prove a set of facts that could show that Elgin's grant of the conditional use permit was arbitrary and capricious or unrelated to the public health, safety, and morals. Accordingly, the trial court did not err in dismissing count I. *Cf. City of Highland Park*, 344 Ill. App. 3d at 278 (affirming trial court's dismissal of claim that zoning ordinance violated the plaintiff's substantive due process).

¶ 68

B. Count II

¶ 69 Gasthaus next argues that the trial court erred in dismissing count II, because Gasthaus stated a cause of action for a declaratory judgment that the Redevelopment Agreement violated the Redevelopment Plan and the TIF Act.

¶ 70 Gasthaus cites sections 11-74.4-4(b) and (j) of the TIF Act (65 ILCS 5/11-74.4-4(b), (j) (West 2014)). The former statutory subsection states, in relevant part, that a municipality may “[m]ake and enter into all contracts with property owners, developers, tenants, overlapping taxing bodies, and others *necessary or incidental to the implementation and furtherance of its redevelopment plan and project.*” (Emphasis added.) 65 ILCS 5/11-74.4-4(b) (West 2014). The latter subsection states, in relevant part, that a municipality may:

“[i]ncur project redevelopment costs and reimburse developers who incur redevelopment project costs authorized by a redevelopment agreement; provided, however, that \*\*\* *no municipality shall incur redevelopment project costs* \*\*\* that are *not consistent with the program for accomplishing the objectives of the redevelopment plan as included in that plan and approved by the municipality until the municipality has*

*amended the redevelopment plan as provided elsewhere in this Act.”* (Emphases added.)

65 ILCS 5/11-74.4-4(j) (West 2014).

¶ 71 The Redevelopment Plan shows that the Tower Building is within “Sub Area 2,” also called the “Downtown Core.” The Redevelopment Plan states, as pertinent here:

“The downtown is the anchor and heart of the Project Area. It is the historical center of Elgin and still maintains a special ambiance. This entire sub-area should be redeveloped as a mixed-use area, *incorporating ground level retail/commercial spaces with upper floors designated as residential or commercial uses. The importance of incorporating residential units into the new construction and adaptive reuse of buildings in this subarea should be emphasized, particularly on the east side of the river.* The presence of residents in the subarea will significantly strengthen the area’s sense of vitality and safety, as well as improve the demand for retail and businesses.” (Emphasis added.).

¶ 72 Gasthaus argues that, contrary to the Redevelopment Plan’s provision requiring exclusively commercial and retail spaces on ground floors with residential or commercial spaces on upper floors, the Redevelopment Agreement with Capstone calls for first floor apartments in the Tower Building. Gasthaus argues that, in turn, the Redevelopment Agreement violates sections 11-74.4-4(b) and 11-74.4-4(j) of the TIF Act, which require that such agreements comply with a municipality’s redevelopment plan.

¶ 73 We disagree that the Redevelopment Plan requires only ground level retail and commercial spaces in the area in which the Tower Building is located. Rather, the Redevelopment Plan states that the area should be “a mixed-use area, *incorporating ground level retail/commercial spaces with upper floors designated as residential or commercial uses.*”

(Emphasis added.). Courts look to dictionaries to give words their ordinary and popularly understood meaning. See *LeCompte v. Zoning Board of Appeals*, 2011 IL App (1st) 100423, ¶ 29. Merriam-Webster provides that the “Simple Definition” of “incorporate” is “to *include* (something) as part of something else.” (Emphasis added.) Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/incorporate> (last visited May 23, 2016). The term “include” does not generally connote exclusivity. *Friends for Murray Center Inc. v. Department of Human Services*, 2014 IL App (5th) 130481, ¶ 22. Thus, while the Redevelopment Plan contemplates having some ground level retail or commercial spaces with upper floors consisting of residential or commercial spaces, it does not limit the area to such configurations. The Redevelopment Plan further emphasizes the importance of including residential units in the adaptive reuse of buildings, which is the purpose of the Tower Building project. As the allowance of first-floor apartments in the Redevelopment Agreement does not violate the plain language of the Redevelopment Plan, it cannot violate the cited sections of the TIF Act.

¶ 74 Gasthaus additionally cites section 11-74.4-3(n)(2) of the TIF Act (65 ILCS 5/11-74.4-3(n)(2) (West 2014)), which states that “[n]o redevelopment plan shall be adopted unless a municipality complies” with certain requirements, including that the municipality finds that the redevelopment plan and project conform to the municipality’s comprehensive development plan. Gasthaus argues that the conditional use permit violates Elgin’s Master Plan because it allows both first floor and upper floor apartments and lacks integrated parking. Gasthaus further argues that the Redevelopment Plan also seeks to eliminate piecemeal land use, contrary to this project.

¶ 75 We have already determined that the Redevelopment Agreement is consistent with the Redevelopment Plan’s language regarding the development of the area in which the Tower Building is located, which means that it would also not qualify as piecemeal land use. Regarding

the language of section 11-74.4-3(n)(2), Elgin argues in its brief, and we agree, that the statute requires only that the municipality make certain findings, which Elgin did in this case, and it does not provide an avenue to challenge the merit of those findings. See also *City of Batavia v. Sandberg*, 286 Ill. App. 3d 991, 999 (1997) (municipality complied with the statute by making the required findings). Even otherwise, we have already determined that the Master Plan did not limit the “Landmark Site” to commercial purposes but rather specifically recommended including residential units. See *supra* ¶ 62. While Gasthaus reframes the Master Plan’s language to say that it “exclusively” requires multi-story commercial construction with integrated parking, the Master Plan actually states that the area should “include[] multi-story office or commercial construction with integrated parking and street level retail and services.” As stated, the term “include” does not generally connote exclusivity (*Friends for Murray Center Inc.*, 2014 IL App (5th) 130481, ¶ 22), so neither commercial construction nor integrated parking are “exclusively” required. Moreover, the Master Plan itself recognized that it served as a guideline that Elgin was not required to follow. See *supra* ¶ 62. Accordingly, Gasthaus’s argument is without merit, and the trial court did not err in dismissing count II.

¶ 76

### C. Count III

¶ 77 Last, Gasthaus argues that count III states a cause of action for a declaratory judgment that the Redevelopment Agreement violates article VIII, section 1(a) of the Illinois Constitution, which provides: “Public funds, property or credit shall be used only for public purposes.” Gasthaus argues that contrary to this provision, the Redevelopment Agreement takes 55 public parking spaces that benefit all downtown area businesses and specifically designates them for the private use of Capstone, a private developer, and its tenants. Gasthaus maintains that the trial court’s analogy, that the designated spaces are like parking meters, fails because metered parking

spaces may be used by any member of public, whereas the 55 designated spaces may be used only by Capstone tenants.

¶ 78 Gasthaus cites *Friends of the Parks v. Chicago Park District*, 203 Ill. 2d 312, 325 (2003), where our supreme court held that a law that allowed the Chicago Bears exclusive use of Soldier Field, which was owned by the Chicago Park District, on a limited numbers of days each year did not violate article VIII, section 1(a). Gasthaus argues that, in contrast, the parking spaces at issue here are not for a few days each year but rather result in solely private use of public property. Gasthaus argues that this situation is more similar to *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 199 Ill. 2d 225, 238-39 (2002). There, a governmental entity used its eminent domain power to take property and transfer it to a private racetrack to build additional parking, which the public could use for a fee. *Id.* at 227. Our supreme court stated that the agreement was “a private venture designed to result not in a public use, but in private profits.” *Id.*

¶ 79 Elgin argues that, contrary to Gasthaus’s argument, the Redevelopment Agreement does not designate public parking spaces for Capstone’s use but instead authorizes the rental of spaces in city-owned parking lots to Tower Building residents for \$30 per month, which will be paid to Elgin and directly benefit the public. Elgin argues that the Illinois Municipal Code authorizes the rental of public property (65 ILCS 5/11-76-1 (West 2014)), and that the predecessor provision was held constitutional (*People v. City of Centralia*, 1 Ill. App. 2d 228, 233 (1953)). Elgin asserts that just as with parking meters, the rental of parking spaces is not limited to any specific group or class of people, but rather any member of the public who chooses to rent an apartment in the Tower Building may also choose to rent a parking space in a nearby City-owned lot on a monthly basis. Elgin argues that this agreement directly addresses the same public-

resource allocation issue about which Gasthaus complains in count I, being the limited on-street parking in the downtown area and the Tower Building's existing lack of off-street parking. Elgin maintains that the rental of parking spaces also serves the public interest of historic preservation and eliminating blight, as it is part of the Redevelopment Agreement's overall approach to rehabilitate the Tower Building. Elgin argues that even if the Capstone received an incidental benefit from the rental of parking spaces, it would not render the Redevelopment Agreement unconstitutional.

¶ 80 To survive a motion to dismiss, a claim under article VIII, section 1(a) must allege facts indicating that the government has taken an action which directly benefits a private interest without a corresponding public benefit. *Empress Casino Joliet Corp. v. Giannoulis*, 231 Ill. 2d 62, 85 (2008). The legislature has broad discretion in determining what is for the public good and what are public purposes, and its judgment will be accepted absent a clear showing that the purported public purpose is an evasion and that the true purpose is private. *Id.* at 85-86. Where an enactment's principal purpose and objective is public in nature, it will not make the governmental action unconstitutional, even if there is an incidental benefit to private interests. *Id.* at 86.

¶ 81 The Redevelopment Agreement contains various recitations about the benefits of the Tower Building project, such as that: the Tower Building is an historic, iconic landmark whose preservation and reuse are of high importance to the overall vitality of the central business district; the property is functionally obsolete, deteriorated, and below minimum codes for occupancy; Capstone's proposed development would further the goals and objectives of the Redevelopment Plan; and the project would increase tax revenues, create jobs, serve to further the development of adjacent areas. Gasthaus's allegations as a whole and attached exhibits

support the Redevelopment Agreement's recitations that the primary purpose of the agreement was to redevelop the Tower Building, and that the parking lot issue was incidental to the development. In other words, it cannot be said that the true purpose of the Redevelopment Agreement was to provide Capstone with a private benefit of parking spaces.

¶ 82 Even focusing on just the parking spaces, Elgin was not providing them to Capstone but instead was going to lease them to Tower Building tenants for a monthly fee, with those funds going to Elgin. That a governmental entity is receiving money to be used in exchange for the use of public property has been a deciding factor in determining that article VIII, section 1(a), has not been violated. See *Independent Voters of Illinois Independent Precinct Organization v. Ahmad*, 2014 IL App (1st) 123629, ¶¶ 44, 52 (money paid by private entity for lease of city parking meters was a significant public benefit, and claim that the agreement violated the public purpose provision was properly dismissed). Gasthaus has not alleged sufficient facts that could show that the purpose of the Redevelopment Agreement as a whole, or the parking space provision in particular, was primarily to benefit Capstone.

¶ 83 This case is readily distinguishable from *Southwestern Illinois Development Authority*, as that case involved eminent domain to transfer land from one private owner to another private owner. Here, in contrast, Elgin is not transferring any land to Capstone or other private owner. See *Friends of the Parks*, 203 Ill. 2d at 323 (similarly distinguishing *Southwestern Illinois Development Authority*). Rather, this case is more akin to *People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62, 76 (1977), where the supreme court stated that it was apparent that the municipality intended "to undertake the redevelopment in question primarily for the purpose of revitalizing an economically stagnant downtown area[,] \*\*\* and the benefit reaped by private developers is



merely an inevitable incident thereto.” Accordingly, the trial court did not err in dismissing count III.

¶ 84

### III. CONCLUSION

¶ 85 For the reasons stated, we affirm the judgment of the Kane County circuit court.

¶ 86 Affirmed.