2013 IL App (1st) 121701-U

FOURTH DIVISION
September 26, 2013

No. 1-12-1701

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALBERT C. HANNA and CAROL C. MROWKA, Plaintiffs-Appellants, v. THE CITY OF CHICAGO; THE COMMISSION ON CHICAGO LANDMARKS; DAVID MOSENA, Chairman, Commission on Chicago Landmarks; JOHN W. BAIRD, Commissioner; LORI T. HEALEY, Commissioner, Department of Planning and Development and Commission on Chicago Landmarks; LISA T. WILLIS, Commissioner; PHYLLIS ELLIN, Commissioner; THE CITY OF CHICAGO DEPARTMENT OF PLANNING AND DEVELOPMENT; and BRIAN GOEKEN, Deputy Commissioner, Landmarks Division, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 06 CH 19422 The Honorable Sophia H. Hall, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

HELD: Trial court's decision to grant summary judgment in favor of defendants with respect to counts I through III of plaintiffs' third amended complaint was proper where landmarking legislation at issue is not vague and does not improperly delegate authority to an administrative body; however, trial court's decision to grant defendants' motion to dismiss counts VI through XXI of plaintiffs' third amended complaint was not correct where plaintiffs' complaint sufficiently stated a cause of action regarding equal protection and substantive due process with respect to landmark districting that affects their specific properties.

¶ 1 The instant cause involves the Chicago Landmark Ordinance (Ordinance) (Chicago Municipal Code §§ 2-120-580 to 2-120-920) as challenged by plaintiffs-appellants Albert C. Hanna (Hanna) and Carol C. Mrowka (Mrowka) (collectively, plaintiffs) against defendants-appellees the City of Chicago (City), the Commission on Chicago Landmarks (Commission) and several city officials (collectively, defendants or as named). The instant cause is also one with which our Court is already familiar. Following our reversal and remand of the trial court's dismissal of plaintiffs' first amended complaint, the matter returned to the circuit court whereupon plaintiffs filed a third amended complaint identical, in all substantive effect, to their first amended complaint. Just as before, defendants filed a section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2006)) certain counts, and the trial court granted this. The parties then filed cross motions for summary judgment with respect to other counts, whereupon the trial court granted defendants' motion, denied plaintiffs' motion and entered judgment in favor of defendants on these counts.

¶ 2 Plaintiffs appeal both the trial court's order dismissing certain counts of their third amended complaint and its order granting defendants' motion for summary judgment with respect to other counts and denying their motion for summary judgment. They assert that the

trial court erred in rendering these decisions for myriad reasons, principle among them that our Court has conclusively found that the Ordinance is unconstitutional. Accordingly, they ask that we reverse these judgments, enter judgment in their favor or alternatively remand with instructions to the trial court to enter judgment in their favor, remand the cause for further proceedings including a trial on the merits, and grant any other relief we deem appropriate and just. For the following reasons, we affirm in part and reverse in part.[1]

¶ 3 BACKGROUND

¶ 4 In our decision reversing and remanding the trial court's dismissal of plaintiffs' complaint, issued via opinion on March 6, 2009, we provided a thorough discussion of the relevant facts involved in this cause. See *Hanna v. City of Chicago, et al.*, 388 Ill. App. 3d 909 (2009). Therefore, we will discuss herein only those pertinent to the instant appeal.

¶ 5 Briefly, Hanna owns property in the Arlington Deming neighborhood of Lincoln Park in Chicago, and Mrowka owns property in the East Village neighborhood of Chicago. Pursuant to recommendations issued by the Commission, and in accordance with the Ordinance, the Chicago City Council designated both these neighborhoods as landmark districts, thereby affecting plaintiffs' ability to construct, demolish or perform any other work on their properties.

¶ 6 Plaintiffs thus filed a suit against defendants challenging the Ordinance. Their first amended complaint contained 20 counts: count I asserted that the Ordinance is facially vague due

[1]We note for the record that the law firm of Winston & Strawn, LLP filed a motion on March 5, 2013 for leave to file an *amicus curiae* brief in support of defendants. On March 28, 2013, our Court took this motion with the case. Upon review of that motion, we now grant it and therefore accept its *amicus curiae* brief.

to the use of several words and phrases that are ambiguous; count II challenged provisions of the Ordinance that allegedly delegate authority by the City Council to the Commission in an improper manner; count III claimed that section 2-120-705 of the Ordinance is facially invalid because it allows the Commission to exercise legislative power; and counts V through XX claimed that the Ordinance is unconstitutional facially and as applied to their properties. In response, defendants filed a section 2-615 motion to dismiss. The trial court held in favor of defendants. It concluded that, contrary to count I, the language of the Ordinance is sufficient and not unconstitutionally vague; contrary to count II, the Commission's recommendations are merely advisory, not declaratory, and the Ordinance provides intelligible standards for the Commission to apply; and contrary to count III, the procedures for granting the Commission's recommendations do not result in an improper delegation of legislative authority to the Commission. In addition, with respect to counts V through XX of plaintiffs' complaint dealing with their particular properties, the trial court described that Illinois law utilizes the rational basis test, and not a "rational relationship test tailored to zoning," as plaintiffs asserted. Accordingly, the trial court granted defendants' motion and dismissed plaintiffs' complaint for failure to state a cause of action.

¶ 7 Plaintiffs appealed and the cause was presented before our Court. The primary question before us was whether the allegations of plaintiffs' complaint, when construed in the light most favorable to them and taking all well pled facts and all reasonable inferences to be drawn therefrom as true, was sufficient to establish a cause of action against defendants here. See *Hanna*, 388 Ill. App. 3d at 914. Upon our review, we disagreed with the trial court's

determinations and held that it did. See *Hanna*, 388 Ill. App. 3d at 921. First, with respect to count I, we examined the Ordinance's seven criteria that guide landmark designations and found, based on these as well as the qualifications of the Commission members, that "the allegations in plaintiffs' complaint regarding the vagueness of the Ordinance [were] sufficient to establish a cause of action and should not have been dismissed on the pleadings by the trial court." *Hanna*, 388 Ill. App. 3d at 917. Next, with respect to count II, we examined the Commission's functions and found that plaintiffs "adequately stated a cause of action *** when they alleged that the Ordinance permitted an improper delegation of authority." *Hanna*, 388 Ill. App. 3d at 920. And, with respect to count III, we noted that its claims were directly related to count II and found, therefore, that "plaintiffs stated a cause of action sufficient to withstand" dismissal of this count as well. *Hanna*, 388 Ill. App. 3d at 920.

¶ 8 Having concluded that the trial court should not have dismissed counts I through III, this left us with counts V through XX of plaintiffs' complaint asserting violations of their substantive due process and equal protection rights via the Arlington Deming and East Village landmark designations which were based on the Ordinance. We declined to address these counts at that time, "before the trial court makes a finding on whether the Ordinance is unconstitutionally vague." *Hanna*, 388 Ill. App. 3d at 920. We reasoned that, if, upon our reversal and remand, the trial court were to find the Ordinance to be vague and, thus, invalid, then the designations of the landmark districts affecting plaintiffs would also be invalid and the issue would be moot. See *Hanna*, 388 Ill. App. 3d at 920. Accordingly, we reversed the trial court's dismissal of plaintiffs' complaint and remanded the case to the trial court "for further proceedings." *Hanna*, 388 Ill.

App. 3d at 921.

¶ 9 Following our decision, the cause returned to the trial court where plaintiffs eventually filed a third amended complaint.[2] The third amended complaint was substantively identical to plaintiffs' first amended complaint. Counts I through III were the same. Counts IV and V comprised two new counts specifically challenging the constitutionality of the Arlington Deming and the East Village districts, asserting that, because they utilized the same vague and ambiguous language as the Ordinance, these landmark designations were also unconstitutional and, thus, invalid. Finally, counts VI to XXI of plaintiffs' third amended complaint were the same as counts V through XX of their first amended complaint, asserting that the Arlington Deming and East Village districts violated their substantive due process and equal protection rights both facially and as applied.

¶ 10 In response, defendants filed a section 2-615 motion to dismiss counts VI through XXI of the third amended complaint. They alleged that plaintiffs failed to state a cause of action that the Arlington Deming and East Village districts violated equal protection or substantive due process rights on their face or as applied. Using the rational basis test, the trial court granted defendants' motion. The trial court found that plaintiffs did not negate any conceivable basis for finding a rational relationship between the formation of these districts and the legitimate state interest of historic preservation, and that plaintiffs failed to show that the action of the legislature here was arbitrary or capricious. Thus, the trial court dismissed counts VI through XXI of plaintiffs' third

[2]The record reflects that defendants filed a petition for leave to appeal with the Illinois Supreme Court (no. 108172) on March 13, 2009, and that this was denied on May 28, 2009.

amended complaint.

¶ 11 Then, the parties filed cross motions for summary judgment with respect to the remaining counts. The trial court granted defendants' motion and denied plaintiffs' motion. Declaring that our prior decision did not constitute law of the case, the trial court held that the Ordinance is not unconstitutionally vague (count I), that there is no improper delegation of authority (count II), and that plaintiffs do not have standing to challenge section 2-120-705 of the Ordinance and the Commission does not exercise any legislative authority (count III). The trial court further held that the Arlington Deming and East Village districts are clearly defined and constitutional (counts IV and V).

¶ 12 Without any viable counts of their third amended complaint remaining, plaintiffs appealed, bringing this cause back to our Court once again.

¶ 13 ANALYSIS

¶ 14 As noted, plaintiffs appeal from both the trial court's order granting defendants' motion for summary judgment and denying their motion for summary judgment as to counts I through V, and the trial court's order granting defendants' section 2-615 motion to dismiss counts VI through XXI of their third amended complaint. We address each separately.

¶ 15 I. Summary Judgment

¶ 16 In attacking the grant of summary judgment in favor of defendants, plaintiffs here make several allegations of trial court error. Their first argument, which is an overarching one, asserts that the trial court erred in granting summary judgment because it violated the doctrine of law of the case. They claim that in our prior decision, our Court affirmatively held, explicitly and

implicitly, that the Ordinance was unconstitutional and, thus, the trial court was bound to follow that decision with respect to counts I through III and employ it to the newly added counts IV and V since they derive from count I. Should this fail, plaintiffs' alternative arguments take us back to a review of their third amended complaint, as they claim that the Ordinance is unconstitutionally vague and impermissibly delegates authority to the Commission (counts I through III), and that the Arlington Deming and East Village districts are similarly unconstitutional since they use the same criteria and language as the Ordinance (counts IV and V). Upon our review, we disagree with plaintiffs and find that the trial court properly granted summary judgment in favor of defendants.

¶ 17 We begin by addressing plaintiffs' overarching argument regarding law of the case. This doctrine states that, "where an issue has been litigated and decided, a court's unreversed decision on that question of law or fact settles that question 'for all subsequent stages of the suit.' " *Alwin v. Village of Wheeling*, 371 Ill. App. 3d 898, 909 (2007) (quoting *Pekin Ins. Co. v. Pulte Home Corp.*, 344 Ill. App. 3d 64, 69 (2003), and *Norton v. City of Chicago*, 293 Ill. App. 3d 620, 624 (1997)); accord *Radwill v. Manor Care of Westmont, IL, LLC*, 2013 IL App (2d) 120957, ¶ 8 (questions of law decided in previous appeal are binding on trial court upon remand as well as upon appellate court in subsequent appeals). As plaintiffs note, this includes a reviewing court's "explicit decisions, as well as those issues decided by necessary implication." *Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc.*, 284 Ill. App. 3d 627, 632-33 (1996) (quoting *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987)). When a reviewing court issues specific directions in its mandate, the trial court must follow the mandate to ensure

that its subsequent order is in line with the higher court's prior decision on the cause. See *In re Marriage of Blinderman*, 283 Ill. App. 3d 26, 35 (1996). When a reviewing court remands a case with only general instructions, the trial court is required to examine the reviewing court's opinion in addition to its mandate and exercise its discretion in determining what further proceedings would be consistent with these. See *Blinderman*, 283 Ill. App. 3d at 35. Ultimately, the trial court is to proceed in a manner that conforms to the views expressed in the mandate and opinion. See *Suburban Auto Rebuilders, Inc. v. Associated Title Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81, 95 (2009) (reviewing court is not required to provide specific directions in order reversing judgment and remanding cause; regardless, and no matter what, trial court is to examine prior decision and proceed in manner conforming to it).

¶ 18 When we remanded the instant cause to the trial court, we did not issue any specific instructions; rather, our mandate simply stated "reversed and remanded" and included only the phrase "for further proceedings." Accordingly, it was for the trial court, then, to determine, in its own discretion, what further proceedings would be proper and consistent with our opinion. Holding a hearing and granting summary judgment for defendants was, we believe, proper and consistent. Plaintiffs insist that our prior decision conclusively declared that the Ordinance was unconstitutional and, thus, the trial court could never have held in defendants' favor upon our remand. Their argument, however, misconstrues our prior decision and ignores the procedural context of the cause at the time we issued our opinion.

¶ 19 The cause came to us originally upon a motion to dismiss. As noted earlier, plaintiffs brought a 20-count complaint against defendants with respect to the Ordinance and the districting

that affected their properties. Defendants filed a section 2-615 motion to dismiss, and the trial court granted it. Plaintiffs appealed. The issue before us was, quite clearly, whether the allegations in plaintiffs' complaint, when construed in the light most favorable to them, and taking all well pled facts and all reasonable inferences drawn therefrom as true, were sufficient to establish a cause of action upon which relief may be granted. This is the general standard with which reviewing courts are to examine appeals from section 2-615 dismissals, and this was the standard we were to apply, as that was precisely the context of the cause before us at that time. See *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008); *Hanna*, 388 Ill. App. 3d at 914. We repeated this throughout our decision–at the outset when we laid out the standard of review, in the middle when we "reiterate[d] that our inquiry is merely whether the allegation in plaintiffs' complaint *** are sufficient to establish a cause of action," and in our conclusion. *Hanna*, 388 Ill. App. 3d at 914, 917, 921. After reviewing counts I through III, we held that plaintiffs had properly stated a cause of action sufficient to overcome defendants' section 2-615 motion to dismiss. See *Hanna*, 388 Ill. App. 3d at 921. Therefore, we reversed the trial court's decision and "remand[ed] the case to the trial court for further proceedings." *Hanna*, 388 Ill. App. 3d at 921.

¶ 20 Citing several phrases from our opinion, plaintiffs claim that we went beyond our holding to declare that the Ordinance was unconstitutional. However, we did not then, nor upon our review do we now, make this declaration. Admittedly, we did allude in our discussion that the portions of the Ordinance challenged by plaintiffs in counts I through III could be seen as vague or as an improper delegation of authority to the Commission. See, *e.g.*, *Hanna*, 388 Ill. App. 3d

at 916-20 (discussing vague phrases in the Ordinance and vague qualifications for Commission members, as well as delegation of authority). Yet, we did so only in the ultimate context of an appeal from the grant of a section 2-615 dismissal to show that plaintiffs had some sort of legal and factual basis for their claims that, contrary to the trial court's decision, survived dismissal under section 2-615. In contrast to plaintiffs' overbroad mischaracterization of our decision, we stated clearly at the end of each section dealing with counts I, II and III that we were merely, and only, holding that plaintiffs, with these counts, met the standards required to keep their case alive and move it beyond the section 2-615 dismissal stage. See *Hanna*, 388 Ill. App. 3d at 917, 920 (stating "[w]e find that the allegation in plaintiffs' complaint regarding the vagueness of the Ordinance [count I] are sufficient to establish a cause of action and should not have been dismissed"; "we find that the plaintiffs adequately stated a cause of action in count II"; "we find that plaintiffs state a cause of action sufficient to withstand the *** motion to dismiss" with respect to count III). In other words, we explored plaintiffs' contentions to find that they did, indeed, state a cause of action–but not that they also prevailed in that cause of action. That additional step was not proper for us to determine at that procedural stage but, rather, was for the trial court to determine on remand as part of the "further proceedings" to be had following our reversal.

¶ 21 The bottom line is this: while plaintiffs are correct that, at the time the cause was before us, we made some remarks suggesting our feelings that the Ordinance could be seen as unconstitutional for vagueness and improper delegation, they are wholly incorrect that these remarks amounted to strict holdings or instructions to the trial court to so find or be bound upon

remand. Not only did we specifically not include such directions in our mandate or opinion, but we also made it clear, with our refusal to address counts V through XX about the Arlington Deming and East Village districting, that the ultimate decision of constitutionality rested with the trial court upon our remand and not, at that time, with us. See *Hanna*, 388 Ill. App. 3d at 920 ("[w]e decline to address this issue [counts V through XX] *before the trial court makes a finding on whether the Ordinance is unconstitutionally vague*" (emphasis added)). Were our intentions otherwise, we would have reversed and remanded with directions to enter judgment for plaintiffs, since a finding of unconstitutionality would have ended the case in their favor. We did not do so, as we made no official finding regarding the Ordinance's constitutionality on any ground nor could such a finding be implied from our procedural decision. Again, constitutionality was for the trial court to determine, which it went on to do when the cause progressed from the section 2-615 motion to dismiss stage to the summary judgment stage.

¶ 22 From all this, then, it is clear that the law of the case doctrine simply does not apply here. The only binding decision we entered was that, contrary to the trial court's finding, plaintiffs sufficiently stated a cause of action to defeat defendants' motion to dismiss with respect to counts I through III. Upon remand, "further proceedings" required only that the cause move beyond that stage, nothing more and nothing less. The trial court complied; plaintiffs filed their third amended complaint and defendants moved for summary judgment. At that point, the trial court was required to hear that motion and adjudge the constitutionality of the Ordinance as challenged in those counts, which we left open for it to determine. Essentially, we issued no substantive "law" on this case that the trial court was to impose, other than our procedural finding that further

hearing was necessary. Therefore, plaintiffs' overarching argument cannot stand.[3]

¶ 23 In this same vein, plaintiffs further argue that, if law of the case does not apply here, then our prior decision contained judicial *dicta* that the trial court should have followed on remand. However, there are two forms of dicta in the law: *obiter dictum* is a remark or opinion uttered by the way, *i.e.*, as a second thought or an aside, while judicial *dictum* is an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 236 (2010). The former is certainly not binding as legal authority or precedent. See *Lebron*, 237 Ill. 2d at 236 (it is not essential to the outcome of the case and is not integral to the opinion issued). However, the latter is entitled to much weight and should be followed unless it is found to be erroneous. See *Lebron*, 237 Ill. 2d at 236.

¶ 24 Any *dictum* found in our opinion regarding our feelings that there may be an issue of constitutionality regarding the Ordinance comprised only *obiter dictum* and not judicial *dictum*. They amounted to an aside as we, bound by the procedural constraint of our review pursuant to the grant of defendants' section 2-615 motion to dismiss, held only that plaintiffs' complaint was sufficient. Again, that was the issue at hand, not the constitutionality of the Ordinance upon which we deliberately did not pass and which we clearly stated was for the trial court to determine.

¶ 25 Having explained that neither the doctrine of law of the case nor judicial *dictum* apply

---

[3]Because we conclude that the law of the case doctrine does not apply here with respect to counts I through III, it also cannot apply to counts IV and V which, as plaintiffs concede, were never even before our Court at the time of the appeal but were only added after our decision with the filing of the third amended complaint. See, *e.g.*, *Alwin*, 371 Ill. App. 3d at 909 (for this doctrine to apply, issue must first have been litigated and decided).

here, we now turn to plaintiffs' alternative arguments with respect to summary judgment.

¶ 26 Plaintiffs contend that the trial court erred in granting summary judgment in favor of defendants with respect to each of the first five counts of their third amended complaint. They argue that summary judgment should have instead been granted in their favor upon their cross motion because certain words in the Ordinance are vague (count I) and there is an improper delegation of authority (counts II and III). We disagree.

¶ 27 Summary judgment is appropriate when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). When, as here, the parties file cross motions for summary judgment, they " 'invite the court to determine the issues as a matter of law and enter judgment in favor of one of the parties.' " *Mount Hawley Insurance Co. v. Robinette Demolition, Inc.*, 2013 IL App (1st) 112847, ¶ 14 (quoting *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993)). While summary judgment has been called a "drastic measure," it is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris*, 197 Ill. 2d at 35 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). Appellate review of a trial court's grant of summary judgment is *de novo*. See *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 28 We further note that a municipal enactment, such as the Ordinance in the instant cause, enjoys a presumption of validity. See *Chavda v. Wolak*, 188 Ill. 2d 394, 398 (1999); *Greyhound*

Lines, Inc. v. City of Chicago, 24 Ill. App. 3d 718, 723 (1974); see also *People ex rel. Lumpkin v. Cassidy*, 184 Ill. 2d 117, 123 (1998) (constitutionality is to be presumed). To overcome this presumption, the party challenging the ordinance, namely, plaintiffs here, must show by clear and affirmative evidence that the Ordinance is "arbitrary, capricious, or unreasonable; that there is no permissible interpretation of the enactment that justifies its adoption; or that the enactment will not promote the safety and general welfare of the public." *Chavda*, 188 Ill. 2d at 398-99; see *City of Des Plaines v. Gacs*, 65 Ill. App. 3d 44, 48 (1978) (challenger must establish that ordinance is "palpably arbitrary, capricious, and unreasonable and bears no rational relationship to the health and safety of the community"). This is a heavy burden. See *Greyhound Lines, Inc.*, 24 Ill. App. 3d at 723. Accordingly, if there is any room for a legitimate difference of opinion concerning the reasonableness of the Ordinance, the legislative judgment of the body that enacted it must prevail. See *City of Des Plaines*, 65 Ill. App. 3d at 48; accord *Lumpkin*, 184 Ill. 2d at 123 (court should uphold validity if reasonably possible).

¶ 29 A. Vagueness (Count I)

¶ 30 A vague ordinance is one that authorizes or encourages discriminatory enforcement. See *General Motors Corp. v. State Motor Vehicle Review Board*, 224 Ill. 2d 1, 24 (2007) (its meaning rests on whims of enforcers rather than on objective criteria). However, an ordinance is not vague if it provides people of ordinary intelligence with the opportunity to understand what conduct is prohibited and if it provides law enforcement and the judiciary with a reasonable standard to prevent arbitrary and discriminatory legal enforcement. See *In re Omar M.*, 2012 IL App (1st) 100866, ¶ 81; accord *Wilson v. County of Cook*, 2012 IL 112026, ¶ 21. Neither

" 'mathematical certainty' " nor " 'perfect clarity and precise guidance' " have ever been required in an ordinance in order for it to survive a vagueness challenge. *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 164 (1993) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)); *Omar M.*, 2012 IL App (1st) 100866, ¶ 81 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989))); accord *Wilson*, 2012 IL 112026, ¶ 22. Rather, whenever possible, each word or phrase of the ordinance is to be given its plain, ordinary and popularly understood meaning, and these are to be read in the context of the legislation as a whole. See *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 26. An ordinance will not be deemed vague simply because someone may be able to "conjure up hypothetical situations in which the meaning of some terms may be in question." *Granite City*, 155 Ill. 2d at 164. Moreover, there is a "great[] tolerance for vagueness in civil" ordinances (*Omar M.*, 2012 IL App (1st) 100866, ¶ 81; *Wilson*, 2012 IL 112026, ¶ 23), and, in order for vagueness to be found, it must " 'permeate[] the text of' " the law (*Wilson*, 2012 IL 112026, ¶ 23 (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999)). It does not even matter if the ordinance may be susceptible to misapplication or if its construction is somewhat doubtful. See *Granite City*, 155 Ill. 2d at 164-65. Ultimately, as long as "the plain text of the ordinance sets forth clearly perceived boundaries, our inquiry is ended." *Wilson*, 2012 IL 112026, ¶ 24.

¶ 31 Plaintiffs challenge various terms and phrases found in sections 2-120-600, 2-120-610(6), 2-120-620, 2-120-630, 2-120-640, 2-120-650, 2-120-700 and 2-120-730 of the Ordinance. However, in light of the standards we have just discussed, we find that none of these render the

Ordinance void for vagueness.

¶ 32 1. Section 2-120-600

¶ 33 This section deals with the qualifications of those who may become members of the Commission. It states that these are to be "professionals in the disciplines of history, architecture, historic architecture, planning, archaeology, real estate, historic preservation, or related fields, or shall be persons who have demonstrated a special interest, knowledge, or experience in architecture, history, neighborhood preservation, or related disciplines." Municipal Code of Chicago, Ill. § 2-120-600 (2008). Plaintiffs attack the terms "special interest" and "related disciplines" as vague. However, when read in the context of this whole section, we do not believe that they are. First, "special" is defined as having an unusual quality, something different than the norm and better, or more important. See Webster's Third New International Dictionary, 2186 (1981). When read as part of the Ordinance, this excludes anyone with merely a passing fancy in these subjects, but includes anyone who has seriously studied them and can make significant contributions to a discussion on landmarks and redistricting. Second, "related" means being closely connected in some way. See Webster's Third New International Dictionary, 1916 (1981). Thus, a potential Commission member must be someone who is familiar with the subjects listed, *i.e.*, "architecture, history, neighborhood preservation," or with one that is connected to these. Indeed, upon examination of this section, we need not even use our imaginations to decipher what a "related discipline" might be, since several examples are provided in the very phrase that begins this section: "historic architecture, planning, archaeology, real estate, [and] historic preservation."

¶ 34 Thus, when read together, the phrase "have demonstrated a special interest, knowledge, or experience in architecture, history, neighborhood preservation, or related disciplines" clearly indicates that qualified members of the Commission must have some above-average quality with respect to the disciplines specifically listed or with respect to one that is commonly associated with these. These terms, when given their plain and ordinary meanings, are quite reasonable and conclusive.

¶ 35 2. Sections 2-120-610(6) and 2-120-650

¶ 36 Section 2-120-610(6) states that the Commission "shall have and may exercise *** duties, powers and responsibilities *** [t]o advise and assist owners or prospective owners of designated or potential landmarks *** on technical and financial aspects of preservation, renovation, rehabilitation and reuse, and to establish standards and guidelines therefor." Municipal Code of Chicago, Ill. § 2-120-610(6) (2008). Section 2-120-650 provides that the commission "shall *** notify the owner of the property of the reasons for and effects of the proposed designation and request that the owner consent in writing to the proposed designation." Municipal Code of Chicago, Ill. § 2-120-650 (2008).

¶ 37 We group plaintiffs' challenges to these two sections together because they do not allege that any specific term or phrase therein is vague. Instead, they claim that section 2-120-610(6) leaves a reasonable person guessing as to whether and what kinds of information the Commission is required to provide an owner regarding the financial and technical aspects of landmarking, and that section 2-120-650 does not impose guidelines or standards on the Commission with respect to advising owners about the effects of a proposed designation when

seeking their consent, such as on their mortgages, insurance, replacement costs, etc. However, these concerns do not amount to a vagueness challenge. To the contrary, they comprise concerns over the Commission's discretion in dealing with owners and the information it provides them. What the Commission shall do and what it may do are clearly articulated in these sections, and plaintiffs' concerns over the Commission's discretion, as granted by the City Council, do not render these sections unconstitutionally vague.

¶ 38 3. Sections 2-120-620, 2-120-630, 2-120-700 and 2-120-730

¶ 39 Plaintiffs further challenge terms in section 2-120-620, which contains the seven criteria the Commission is to use in making a landmark recommendation, such as "may or may not," "or other," "value," "exemplary," "critical," "historic," and "significant." Municipal Code of Chicago, Ill. § 2-120-620 (2008). They also challenge phrases in section 2-120-630, which directs the Commission to consider, in addition to the seven criteria, whether there is a significant historic, community, architectural, or aesthetic interest or value in the property, as well as sections 2-120-700 and 2-120-730, which provide for the City Council's consideration of the Commission's recommendation and for amendment, recision and reconsideration of a designation. Municipal Code of Chicago, Ill. §§ 2-120-630, 700, 730 (2008).

¶ 40 We reject plaintiffs' vagueness challenge to these regulations. As we have already discussed, an ordinance's words are to take on their plain and ordinary meaning, and it is of no moment that they might not be "mathematically" precise, particularly when read as only part of the ordinance as a whole. Without having to define each and every word challenged (which the trial court has already done at length in this cause), in our view, we find that all of them have

popular understandings and are used commonly enough to not be considered vague in the context of a constitutional challenge. In addition, we would note that the terms plaintiffs cite from the Ordinance are terms that have been challenged before in the arena of historic preservation law and, significantly, have consistently been upheld by courts of law as constitutional. See *International College of Surgeons v. City of Chicago*, 1995 WL 9243 at *13 (N.D. Ill. Jan. 9, 1995), *rev'd on other grounds*, 91 F.3d 981 (7th Cir. 1996), *rev'd*, 522 U.S. 156 (1997), *original opinion aff'd*, 153 F.3d 356 (7th Cir. 1998) (stating that a vagueness challenge to such terms "ignores the complex interrelationship between architecture, history, economics and cultural and social factors," and noting that "[a] whole set of different concerns is at play in the landmarks context"); see also *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 107-08 (1978) (upholding similar landmark preservation law while noting that jurisdictions all over the country have enacted same); *Maher v. City of New Orleans*, 516 F.2d 1051 (1975) (upholding landmark preservation law even though there could be some concern that certain terms are not precisely quantified). There is much more at play here than the precise definition of some isolated words or phrases. In the broader context, the Ordinance deals with historic preservation, which encompasses a greater purpose and objective. Because the words used to implement this have common meaning and are intelligible, as reflected by the standards discussed, we find that the challenged terms and phrases are sufficiently detailed under the circumstances to guide the Commission in its duties and responsibilities.

¶ 41 4. Section 2-120-640

¶ 42 Section 2-120-640 provides that the Commission request a report from the Commission

of Planning and Development that evaluates the relationship of the proposed landmark designation to the "Comprehensive Plan of the City of Chicago," and the effect of the designation on the surrounding neighborhood. See Municipal Code of Chicago, Ill. § 2-120-640 (2008). Significantly, this section also provides that the Commission may proceed without receiving this report. See Municipal Code of Chicago, Ill. § 2-120-640 (2008).

¶ 43 Plaintiffs argue that this section is vague because the City does not have a "Comprehensive Plan," and because it does not specify what information should be in the report. However, whether this is true and what information a report should contain is irrelevant. As noted, this section is not a mandatory part of the Ordinance. While it states that the Commission is to ask for the report, it does not prevent the Commission from acting and completing its duties and responsibilities if it does not receive the report. Thus, since this section has no effect on the Commission's operations, there is no issue of vagueness here.

¶ 44 Ultimately, we do not find that any of plaintiffs' challenges render the Ordinance unconstitutionally vague. While some of the cited terms may be somewhat subjective, this is only to be expected in the area of landmarking and preservation which, admittedly, involves ephemeral concerns–concerns noted by courts before us yet consistently upheld. We choose not to depart from these. Rather, we find that the plain text of the Ordinance sets forth clearly perceived boundaries. This is where our judicial inquiry ends, and we hold that summary judgment was properly granted to defendants with respect to count I.

¶ 45 B. Improper Delegation of Authority (Counts II and III)

¶ 46 Plaintiffs next argue that the trial court erred in granting summary judgment in favor of

defendants because the Ordinance improperly delegates authority to the Commission due to the vague guidance it provides (count II), and due to section 2-120-705 which allows the Commission's landmarking recommendation to become law if the City Council does not act upon in within 365 days (count III). We disagree.

¶ 47 "The question of vagueness and the question of delegation of legislative authority are intertwined." *East St. Louis Federation of Teachers, Local 1220, American Federation of Teachers, AFL-CIO v. East St. Louis School District No. 189 Financial Oversight Panel*, 178 Ill. 2d 399, 424 (1997). While a vagueness challenge focuses on the specific language used, a delegation challenge examines the relationship between the legislature and its administering bodies. See *East St. Louis*, 178 Ill. 2d at 423-24. The legislature, and only the legislature, has the sovereign power to make laws, and it cannot delegate this power to determine what the law should be. See *East St. Louis*, 178 Ill. 2d at 423. However, it can delegate the power to execute the law, as long as it provides sufficient standards to guide an administrative body as it exercises its functions. See *East St. Louis*, 178 Ill. 2d at 423. Just as with a vagueness challenge, in delegating this power to execute, the legislature need not provide " 'absolute criteria whereby every detail necessary' " to the enforcement of the law is anticipated but, rather, it need only provide intelligible standards by which the administrative body is to operate in enforcing the law. *East St. Louis*, 178 Ill. 2d at 423 (quoting *Hill v. Relyea*, 34 Ill. 2d 552, 555 (1966). Thus, if the Ordinance adequately identifies (1) the persons or activities potentially subject to regulation, (2) the harm sought to be prevented, and (3) the general means available to the administrator to prevent that harm, it is a proper delegation of authority. See *East St. Louis*, 178 Ill. 2d at 423.

¶ 48 With respect to plaintiffs' claim that the Ordinance improperly delegates authority to the Commission due to the vague guidance it provides, this brings us back, once again, to a review of the language used and, in particular, of the seven criteria they challenged on vagueness grounds. We have already discussed at length that we find nothing vague as to how the Ordinance is worded or how it is implemented. Specifically, it makes clear that while the Commission–the administrative body–is to make recommendations to the City Council–the legislative body–about what properties are landmark worthy, it remains the province of the City Council, and only the City Council, to enact an ordinance to make such a designation. See Municipal Code of Chicago, Ill. §§ 2-120-630, 690 (2008). Again, the Commission may use criteria to evaluate a property, request reports and make recommendations, but these actions must follow the specific procedures outlined in the Ordinance and it is ultimately the City Council that will choose to follow that recommendation and enact a landmark ordinance or not to follow it and not to enact a landmark ordinance. We find no improper delegation of authority with respect to these procedures and the criteria we have already confirmed is not vague, and thus, summary judgment was proper with respect to count II.

¶ 49 We further find that plaintiffs cannot succeed in their challenge to section 2-120-705, which allows for a landmarking recommendation of the Commission to become law if the City Council does not act upon in within 365 days. See Municipal Code of Chicago, Ill. § 2-120-705 (2008). This is because plaintiffs do not, nor have they ever had, proper standing to challenge this provision. A party has standing to challenge the constitutionality of a law only when he has suffered under it. See *In re Veronica C.*, 239 Ill. 2d 134, 150 (2010) (party lacked standing to

challenge constitutionality of statute because she was not adversely affected by its operation); accord *Cwik v. Giannoulias*, 237 Ill. 2d 409, 423 (2010) (party has standing to challenge constitutionality of statute only when it negatively impacts his own rights). The record makes clear that section 2-120-705 was not involved in this cause. The Arlington Deming and East Village districting that directly affected plaintiffs here, via the Ordinance, did not come into being because the City Council did not act upon the Commission's recommendations before the expiration of 365 days. To the contrary, the establishment of these landmark districts followed the procedures outlined in section 2-120-700, which describes that the City Council is to review the Commission's recommendation, hold public hearings and then choose to make the designation via an ordinance pursuant to the seven criteria to be considered. Nor have plaintiffs ever contended that the districting they challenge originated via the 365-day rule. Thus, without standing, summary judgment in favor of defendants with respect to count III was proper.

¶ 50 C. Arlington Deming and East Village Districts (Counts IV and V)

¶ 51 Finally, plaintiffs argue that summary judgment should not have granted with respect to counts IV and V, which challenge the Arlington Deming and East Village landmark designations affecting their specific properties as enacted by the City Council via the Ordinance. Tracking their challenge as found in count I of their third amended complaint, they claim that these are unconstitutional because they rely on the same vague words used in the Ordinance. They also cite some additional terms, such as "high style," "high quality" and "distinctive," as found in the ordinances that created these designations, asserting that these, too, are vague.

¶ 52 However, in addressing plaintiffs' assertion that these landmark designations must be

declared unconstitutional because they use the same words as the Ordinance, we note that we have already found that the language used in the Ordinance, contrary to their claim, is not unconstitutionally vague. In the same way, we do not find the additional terms they cite to be unconstitutionally vague either, in light of the points and standards we discussed at length when reviewing their vagueness challenge to the Ordinance in count I. Again, we understand that some people may find certain terms to be potentially subjective but, as our courts have recognized, this is part and parcel of landmark law, which comprises the complex, and important, concern of preserving the social, cultural and historic aspects of a community's property. Thus, having found that the Ordinance sets forth clearly perceived boundaries via its language and procedures, we find the same is true with these designations and, therefore, summary judgment was proper with respect to counts IV and V.

¶ 53 In sum, we conclude that defendants were entitled to judgment as a matter of law on counts I through V of plaintiffs' third amended complaint. Plaintiffs were required to show by clear and convincing evidence that the Ordinance, which is to be presumed constitutional, was arbitrary or capricious; having reviewed their contentions, they have not met this heavy burden with their claims. While these may exhibit a difference of opinion between plaintiffs and defendants with respect to the reasonableness of the Ordinance, this is not enough to find unconstitutionality. Accordingly, summary judgment was properly granted in defendants' favor.

¶ 54 II. Motion to Dismiss

¶ 55 Our affirmance of the trial court's grant of summary judgment, however, does not end this cause. There remains plaintiffs' appeal from the trial court's grant of defendants' motion to

dismiss counts VI through XXI of their third amended complaint. These counts deal with equal protection and substantive due process challenges, both facially and as applied, to the specific landmark ordinances that designated the Arlington Deming District and the East Village District, which directly affected plaintiffs' properties. As noted earlier, defendants filed a section 2-615 motion to dismiss counts VI through XXI of the third amended complaint, alleging that plaintiffs failed to state a cause of action in this regard. The trial court granted defendants' motion, finding that plaintiffs did not negate any conceivable basis for finding a rational relationship between the formation of these districts and the legitimate state interest of historic preservation, and that plaintiffs failed to show that the action of the legislature here was arbitrary or capricious. For the reasons that follow, we find that the trial court erred in granting this dismissal.

¶ 56 We are not unfamiliar with motions to dismiss as they relate to the instant cause. See *Hanna*, 388 Ill. App. 3d 909 (2009) (reversing trial court's grant of defendants' motion to dismiss counts I through III). However, at the outset here, we would reiterate that the legal standard used in reviewing a motion for summary judgment is clearly different from that used in reviewing a motion to dismiss pursuant to section 2-615. This is only natural, since a cause in the summary judgment stage is in a completely different procedural posture than one that is in the motion to dismiss stage. While the former examines whether the pleadings, affidavits, depositions and admissions of record, when construed strictly against the moving party, show that there is no genuine issue as to any material fact, the latter examines only the legal sufficiency of the complaint itself to see if there are any facial defects. See *Napleton*, 229 Ill. 2d at 305; accord *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Thus, we are not to determine whether plaintiffs have

met the heavy burden of proving that these ordinances are unconstitutional but, rather, something quite short of this, namely, only whether they have alleged sufficient facts to allow this portion of the cause to proceed further.

¶ 57 On a section 2-615 motion to dismiss, a court must accept as true all well pled facts in the complaint, as well as any reasonable inferences that may arise therefrom. See *DeHart*, 2013 IL 114137, ¶ 18 (citing *Doe ex rel. Ortega-Piron v. Chicago Board of Education*, 213 Ill. 2d 19, 28 (2004)). The merits of the case, at this point, are not yet considered. See *Kilburg v. Mohiuddin*, 2013 IL App (1st) 113408, ¶ 19. Rather, a court is to construe the complaint liberally and should not dismiss it unless it is clearly apparent from the pleadings that "no set of facts can be proved which would entitle [] plaintiff[s] to recover." *Napleton*, 229 Ill. 2d at 305; see also *DeHart*, 2013 IL 114137, ¶ 18; *Kilburg*, 2013 IL App (1st) 113408, ¶ 20. Our inquiry upon review, then, is whether the allegations of the complaint, when construed in the light most favorable to plaintiffs, were sufficient to establish a cause of action upon which relief may be granted. See *DeHart*, 2013 IL 114137, ¶ 18; *Napleton*, 229 Ill. 2d at 305. We perform this review *de novo*. See *DeHart*, 2013 IL 114137, ¶ 18; *Napleton*, 229 Ill. 2d at 305.

¶ 58 To state a cause of action for a violation of equal protection, plaintiffs must allege that there are other people similarly situated to them, that these people are treated differently than them, and that there is no rational basis for this differentiation. See *Safanda v. Zoning Board of Appeals of the City of Geneva*, 203 Ill. App. 3d 687, 695 (1990); accord *Kaczka v. Retirement Board of Policemen's Annuity and Benefit Fund of the City of Chicago*, 398 Ill. App. 3d 702, 707-08 (2010). To state a cause of action for a violation of substantive due process, plaintiffs

must allege that the deprivation of their property interest is arbitrary, unreasonable or capricious, and that the legislation at issue bears no rational relationship to the public welfare. See *Safanda*, 203 Ill. App. 3d at 695.

¶ 59 These two claims share a reliance on the rational basis test. Legislation violates equal protection or substantive due process concerns if it does not bear a rational relationship to a legitimate legislative purpose, and is arbitrary or discriminatory. See *People v. Boeckmann*, 238 Ill. 2d 1, 7 (2010); *Kaltsas v. City of North Chicago*, 160 Ill. App. 3d 302, 306-07 (1987). Admittedly, as the most deferential of the constitutional scrutiny tests, to overcome this standard is difficult. See *Boeckmann*, 238 Ill. 2d at 7 (citing *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 26 (2004), and *Arangold v. Zehnder*, 204 Ill. 2d 142, 147 (2003)) (there need only be a conceivable basis to find that legislation is rationally related to state interest, and this may be based on reasonable speculation that need not be supported by empirical evidence or data). However, the rational basis test is not " 'toothless,' " and should be not be applied as a rubber stamp to all challenged legislation. See *Boeckmann*, 238 Ill. 2d at 7 (citing *People v. Jones*, 223 Ill. 2d 569, 596 (2006) (quoting *Mathews v. De Castro*, 429 U.S. 181, 185 (1976))). Rather, in applying the test, a court must examine whether the public interest the legislation is intended to serve is a legitimate interest, then determine whether the legislation bears a rational relationship to that interest, and finally, decide whether the method chosen by the legislature to protect that interest is reasonable. See *Stokovich*, 211 Ill. 2d at 125-26.

¶ 60 There are, thus, two major standards at play here: the motion to dismiss standard and the rational basis standard. The conflict they present has not been lost on our judiciary. See

Wroblewski v. City of Washburn, 965 F.2d 452, 459-60 (7th Cir. 1992).[4] As the *Wroblewski* court noted, the rational basis standard requires the government to prevail if any set of facts reasonably may be conceived to justify the classification in its legislation, while the motion to dismiss standard requires plaintiffs to prevail if relief could be granted under any set of facts that could be proved consistent with their allegations. See *Wroblewski*, 965 F.2d at 459. Which standard, then, is to take precedence? The critical difference between them is that the former is substantive–it is the substantive burden plaintiffs ultimately have to meet in order to prevail in their lawsuit, while the latter is procedural–it only determines whether plaintiffs have sufficiently stated a cause of action in order to allow them to move beyond the pleadings stage to discovery and further litigation. See *Wroblewski*, 965 F.2d at 459-60. Precisely because of this difference, it is clear that "[t]he rational basis standard, of course, cannot defeat *** plaintiffs' benefit of the broad [section 2-615] standard." *Wroblewski*, 965 F.2d at 459.

¶ 61 Thus, the procedural standard must precede the substantive standard in the posture of this cause. And, therefore, the facts alleged by plaintiffs in their third amended complaint are critical. Again, to survive dismissal, and regardless, at this point, of whether they can be proven, we must determine whether plaintiffs alleged sufficient facts, and not merely conclusions, to establish that the legislation at issue is arbitrary and capricious.

¶ 62 Plaintiffs' third amended complaint is quite lengthy. Counts VI through XIII address their

---

[4]We are cognizant that *Wroblewski* is a federal case that deals with Federal Rule of Civil Procedure 12(b)(6) and not section 2-615. However, Rule 12(b)(6) undeniably employs the same standard, as it comprises the dismissal of a cause of action for failure to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6). Any difference here is irrelevant. See *Holloway v. Meyer*, 311 Ill. App. 3d 818, 823 (2000).

equal protection arguments regarding the Arlington Deming and East Village districts, and Counts XIV through XXI address their substantive due process arguments. Regarding the Arlington Deming District, plaintiffs provide information about the area including its history, photographs and other details. They specifically describe the different classifications of residential and commercial property in that area according to the Cook County Tax Assessor. They discuss that there are 1230 total units in the area, and point out that the area contains varying building widths, lot widths, building setbacks, stories per building and dwelling units per building. They then discuss facts describing two other neighborhoods near the Arlington Deming District that are not landmarked. By providing information regarding the history and building styles of those areas and how similar they are, plaintiffs use these facts as a basis to support their allegations. The same is true regarding the allegations with respect to the East Village District. Again, plaintiffs provide factual descriptions of the area, its history and details about its buildings, and then compare this area to the Little Village and Pilsen neighborhoods to contend that, while they are all very similar, only the East Village District has been landmarked. Plaintiffs also attach several exhibits to their third amended complaint to support their allegations that owners in the areas in question did not consent to the landmarking, that landmarking has negative effects on neighborhoods, and that the legislators here had ulterior motives in approving the particular ordinances that created the Arlington Deming and East Village districts.

¶ 63 While it cannot be denied that there is a presumption of rationality applied to government classifications such as the landmark districts herein, we find that plaintiffs, via the allegations of their third amended complaint, plead sufficient facts to overcome this. They allege that their

properties were landmarked and, consequently, burdened while other similarly situated properties that have essentially the same characteristics were not landmarked. We have no doubt that defendants will most likely offer a basis for the creation of these districts as opposed to others, but, at this point in the procedural posture of this cause, whether plaintiffs can defeat the substantive issues and the rational basis test is not yet relevant. What plaintiffs have done, however, is surmount the standards of a section 2-615 dismissal via their detailed factual allegations to bring this portion of their cause to the next stage of the procedural process.

¶ 64 Viewing the allegations of counts VI through XXI of the third amended complaint in the light most favorable to plaintiffs, we conclude that they did state a cause of action alleging equal protection and substantive due process violations with respect to the Arlington Deming and East Village district designations and, therefore, that the trial court erred in granting defendants' section 2-615 motion dismissing these counts.

¶ 65 CONCLUSION

¶ 66 Accordingly, for all the foregoing reasons, we affirm the trial court's order granting defendants' cross motion for summary judgment with respect to counts I through V, but we reverse the trial court's order granting defendants' section 2-615 motion to dismiss counts VI through XXI and remand this cause for further proceedings with respect to these counts only.

¶ 67 Affirmed in part, reversed and remanded in part.