No. _____

In the

Supreme Court of the United States

145 FISK, LLC,

Petitioner

v.

F. WILLIAM NICKLAS.

Respondent

On a Petition for Writ of Certiorari
To The United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether false information, which a city official knows to be false, is a "rational basis" for terminating a preliminary agreement allocating city funds to a private developer for the redevelopment of an abandoned Hospital into a hotel with commercial business space;
2. Whether the Seventh Circuit should have remanded the instant case to the district court when the Seventh Circuit's opinion does not expressly affirm the dismissal of the Plaintiff's complaint "with prejudice," and when the Seventh Circuit's opinion strongly indicates that amending the complaint would be neither futile nor unwarranted;
3. Whether the Plaintiff forfeited its "close party theory" on appeal, when the district court, for the first time in its final order and opinion, raised such a theory as a potential cure for the Plaintiff's allegedly defective First Amendment Retaliation claim. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (Forfeiture is the failure to make the **timely** assertion of a right) (emphasis added);
4. Whether the Plaintiff otherwise sufficiently pled plausible claims for First Amendment Retaliation, Violation of Due Process and Violation of Equal Protection;
5. In the alternative, whether it was certain from the face of the complaint that granting the Plaintiff leave to amend its Federal claims would be futile or otherwise unwarranted as to justify the district court's dismissal of the Plaintiff's Federal claims with prejudice.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the instant petition is filed on behalf of 145 Fisk, LLC (hereinafter sometimes referred to as "Fisk), which is a privately owned, non-governmental, Illinois Limited Liability Company. Fisk has no parent corporation, and no publicly held company owns any stock in Fisk.

LIST OF ALL PROCEEDINGS

- *145 Fisk, LLC v. F. Williams Nicklas*, No. 19-cv-50093, U.S. District Court for the Northern District of Illinois Western Division. Judgment entered on April 28, 2020.
- *145 Fisk, LLC v. Nicklas,* No. 20-1868, U.S. Court of Appeals for the Seventh Circuit. Judgment entered on January 26, 2021.

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The Seventh Circuit's opinion is reported at *145 Fisk, LLC v. Nicklas,* 986 F.3d 759 (7th Cir. 2021), and is reprinted at App. 1a-18a. The district court's decision has not yet been reported but is reprinted at App. 43a-47a.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), under which the Plaintiff seeks the Court's review of the Seventh Circuit's final judgment entered on January 26, 2021, which affirmed the district court's dismissal of the Plaintiff's First Amended Complaint at Law. The Plaintiff timely filed the instant Petition for Writ of Certiorari on April 26, 2021.

FEDERAL RULES INVOLVED

The pertinent provisions of the Federal Rules of Civil Procedure state as follows:

> "**Rule 8. General Rules of Pleading**
>
> (a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:
>
> > (2) a short and plain statement of the claim showing that the pleader is entitled to relief;" Fed. R. Civ. P. 8 (a)(2).
>
> "**Rule 15. Amended and Supplemental Pleadings**
>
> (a) AMENDMENTS BEFORE TRIAL.
>
> > (1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:
> >
> > (A) 21 days after serving it, or
> >
> > (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
> >
> > (2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or

the court's leave. The court should freely give leave when justice so requires. Fed. R. Civ. P. 15 (a) (1) (2).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution state as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 2.

STATUTES INVOLVED

The Pertinent Provisions of the Illinois Industrial Project Revenue Bond Act state as follows:

"It is hereby found and declared:

(a) In certain municipalities of the State there exist commercial blight or conservation areas where a major portion of the commercial buildings and structures are detrimental to the health, safety and welfare of the occupants and the welfare of the urban community because of age, dilapidation, overcrowding or faulty arrangement, or lack of ventilation, light, sanitation facilities, adequate utilities or access to transportation, commercial marketing centers or to adequate labor supplies.

(b) Such commercial blight or conservation areas are usually situated in the older and centrally located areas of the municipalities involved, and once existing, spread unless eradicated.

(c) As a result of these degenerative conditions the commercial properties embraced in a commercial blight or conservation area fall into a state of non-productiveness or limited productiveness, and fail to produce their due and proper share of taxes.

(d) The conditions in a commercial blight or conservation area necessitate excessive and disproportionate expenditures of public funds for crime prevention, public health and safety, fire and accident protection, and other public services and facilities and constitute a drain upon the public revenue. These conditions impair the efficient, economical and indispensable

governmental functions of the municipalities embracing such areas, as well as the governmental functions of the State.

(e) In order to promote and protect the health, safety, morals and welfare of the public it is necessary to provide for the eradication and elimination of commercial blight or conservation areas and the construction of redevelopment projects and commercial projects in these areas.

(f) The eradication and elimination of commercial blight or conservation areas and the construction of redevelopment projects financed by private capital, with financial assistance from governmental bodies, in the manner provided in this Division are hereby declared to be a public use essential to the public interest." 65 ILCS 5/11-74.2-1 (LexisNexis 2021).

"'Commercial blight area' or 'blight area' means any improved or vacant area of not less in the aggregate than 2 acres located within the territorial limits of a municipality where, if improved, industrial, commercial and residential buildings or improvements, because of a combination of 5 or more of the following factors: age; dilapidation; obsolescence; deterioration; illegal use of individual structures; presence of structures below minimum code standards; excessive vacancies; overcrowding of structures and community facilities; lack of ventilation, light or sanitary facilities; inadequate utilities; or excessive land coverage; deleterious land use or layout; depreciation or lack of physical maintenance; lack of community planning, are detrimental to the public safety, health, morals or welfare, or if vacant, the sound growth of the area is impaired by, (1) a combination of 2 or more of the following factors: obsolete platting of the vacant land; diversity of ownership of such land; tax and special assessment delinquencies on such land; deterioration of structures or site improvements in neighboring areas to the vacant land, or (2) the area immediately prior to becoming vacant qualified as a blighted improved area" 65 ILCS 5/11-74.2-2 (b) (LexisNexis2021).

INTRODUCTION

The Illinois Industrial Project Revenue Bond Act (hereinafter sometimes referred to as the "TIF Act") aims to promote and protect the public health, safety, morals, and welfare by providing government financial assistance to private developers for the purpose of eradicating and eliminating areas of "commercial blight." 65 ILCS 5/11-74.2-1 (a)(e)(f) (LexisNexis 2021), 65 ILCS 5/11-74.2.2 (b) (LexisNexis 2021). In the City of DeKalb, Illinois, such government financial

assistance is known as Tax Incremental Financing Allocation or "TIF" funds (App. 50a ¶6, 124a-125a). Not long after the Plaintiff became the City Manager, the Plaintiff caused the City to terminate a preliminary agreement to allocate TIF funds to the Plaintiff, notwithstanding that the Plaintiff's plan to transform an abandoned hospital into a boutique hotel was consistently supported by the City for the past two years. App. 51a-54a ¶¶8-11, 14, 17-18; 59a ¶39, 63a ¶¶58-59, 68a-69a ¶¶80-82.

STATEMENT OF THE CASE

A. The City formally approves the allocation of TIF funds to the Fisk Project.

On December 13, 2018, the Plaintiff, which consists of two principals (one "Attorney Principal" and one "Non-Attorney Principal"), formed as a holding company to fund a development project (hereinafter sometimes referred to as the "Fisk Project" or the "Project") to transform an abandoned Hospital, commonly known as 145 Fisk Avenue and located in DeKalb Illinois, into a hotel, banquet and convention center, and other commercial business space. App. 50a-51a ¶¶ 3, 7-8; 10. The Plaintiff had originally approached the City about converting the Hospital into luxury apartments, but at the City's request, the Plaintiff agreed to develop a hotel with other commercial business space to generate increased sales tax and hotel tax revenue for the City. App. 51a ¶¶ 9-10. From early winter of 2016 through the end of 2018, the Plaintiff's principals and City staff collaborated to bring a development plan for the Fisk Project into fruition App. 51a ¶8.

On July 9, 2018, the Fisk Project received a unanimous vote of confidence from the DeKalb City Council (hereinafter sometimes referred to as the "City Council"). App. 51a-52a ¶¶11, 14. On or around November 30, 2018, the City Attorney, Dean Frieders (hereinafter sometimes referred to as "Attorney Frieders"), informed the Plaintiff that the City would vote upon formal approval of the Project on December 18, 2018. App. 52a ¶13.

On December 18, 2018, City Council passed Resolution 2018-166, which formally approved a proposed Preliminary Development Incentive Agreement between the Plaintiff and the City, and which officially allocated TIF funds to the Fisk Project. App. 117a. Two other projects, including a project headed by John Pappas (hereinafter sometimes referred to as the "Pappas Project") also received formal approval for TIF allocations. App. 57a ¶28. Sometime prior to December 18, 2018 and as a condition precedent to the recommendation of the Project for final approval, the Plaintiff's submitted a *pro-forma* document which the City accepted and deemed "consistent" with similar projects previously recommended for formal approval. App. 61a ¶49. Also, on December 18, 2018, City Council voted and approved the Defendant as the new City Manager. App. 53a ¶17.

On January 1, 2019, the Parties executed the Preliminary Development Incentive Agreement (hereinafter sometimes referred to as the "PDA"). App. 119a-137a. Pursuant to the PDA, the city would provide $2.5 million in TIF funds for the Project, while the Plaintiff would invest no less than $7,100 into the Project. App. 125a. The PDA further acknowledged that commercial financing was necessary to

make the Project possible, and that to secure commercial financing, the Plaintiff had to secure the City's commitment to allocate the TIF funds to the Project. App. 127a.

B. The Defendant becomes City Manager and takes control of the Fisk Project.

On or around January 1, 2019, The Defendant began working as the Dekalb City Manager. App. 53a-54a ¶ 17. Prior to becoming the DeKalb City Manager, the Defendant had once been the city manager of the neighboring town of Sycamore, Illinois. App. 65a ¶70. As they Sycamore City Manager, the Defendant worked with and came to know Shodeen, a local developer. App. 55a-56a ¶¶21, 23-25; 65a-66a ¶72. In or around December of 2013, the Defendant and Shodeen attempted their own hotel development project in DeKalb, which ultimately failed due to lack of public support. App. 55a-56a ¶¶ 22-25.

In January of 2019 and shortly after the Defendant became DeKalb City Manager, the Defendant and Shodeen discussed potentially allocating $8.8 million in TIF funds to Shodeen for the development of a "full-service business class hotel" App. 56a ¶26. On January 25, 2019, at a meeting of the City's Joint Review Board, the Defendant stated that two of the projects that had been approved on December 18, 2018 would "very likely" materialize but stated that the Fisk Project was "a very preliminary commitment," and referred to the Fisk Project as "a placeholder really of $2,500,00." App. 57a ¶28. By the end of January of 2019, the Defendant fired all City staff that had collaborated with the Plaintiff on the Fisk Project and began overseeing the Project himself. App. 57a ¶33. Previous DeKalb City Managers, of

which there were at least two, had never worked with, met, nor otherwise discussed the Project with the Plaintiff. App. 51a ¶8, 54a ¶19.

C. The Defendant repeatedly tries to sabotage the Fisk Project.

Sometime before February 6, 2019, the Defendant took the unusual and extraordinary step of sending the Plaintiff's development plans to the DeKalb planning and zoning board for a preliminary review. App. 58a-59a ¶38. On February 6, 2019, the planning and zoning board held a preliminary review meeting, in which the Defendant was present, during which the public could comment, and in which the planning and zoning board offered its support and confidence in continuing with the Project. App. 59a ¶¶ 39-40. Sometime after the preliminary review meeting, the Defendant requested a meeting with the Plaintiff. App. 59a ¶¶ 40-14.

On February 19, 2019, the Plaintiff submitted the next set of plans for City staff to review and approve. App. 61a ¶51. On February 22, 2019, the Defendant met with the Plaintiff's Non-Attorney Principal. App. 59a ¶ 41. The Attorney Principal was not present because the Attorney Principal was prosecuting a jury trial, of which the Defendant had been made aware. *Id*. At the meeting, the Defendant stated that wanted all personal financial information on the Plaintiff's principals, as well as financial information on any organization with which the Plaintiff's principals were affiliated. App. 60a ¶45. The Defendant, while having no familiarity with the Plaintiff's Non-Attorney Principal, stated that he did have some familiarity with the Plaintiff's Attorney Principal. App. 59a ¶42.

D. The Attorney Principal had disclosed an unflattering email written by the Defendant in an unrelated lawsuit.

The Plaintiff's Attorney Principal is currently prosecuting and defending a Lawsuit regarding an "impact fee" ordinance that was in effect while the Defendant was the Sycamore City Manager. App. 65a ¶70. In 2017, the Attorney Principal disclosed the Defendant as a material witness in the Lawsuit. In disclosing the Defendant as a material witness, the Attorney Principal disclosed an email in which the Defendant responded to a request from Shodeen for a favor regarding impact fees, and in which the Defendant referred to the Constitution as "pesky." App. 54a-55a ¶20, 58a-59a ¶42, 65a ¶¶70-71. Outside of the Lawsuit, the Attorney Principal had no association, interaction, or relationship with the Defendant.

Sometime after the February 22, 2019 meeting, the City stated that the Plaintiff now needed to complete a second *pro forma* document regarding the financial viability of the Project. App. 61a ¶50. On March 8, 2019, the City informed the Plaintiff that it could proceed with the next phase of the Project. App. 61a ¶51. Upon receiving approval to proceed, the Plaintiff scheduled a meeting for March 13, 2019 to review the original *pro-forma* document, and to discuss the second *pro-forma* document with the Defendant. App 61a-62a ¶¶ 50, 52.

At the March 13, 2019 meeting, the Defendant refused to review the *pro-forma* documents. Instead, the Defendant demanded that the Plaintiff's principals disclose the names of their personal bankers. App. 61a-62a ¶¶ 51-52. After receiving

the names of two banks that could be used for the project, the Defendant contacted the Attorney Principal's personal banker. App. 62a ¶53. The Attorney Principal's banker assured the Defendant that the Attorney Principal had the financial wherewithal for the Project. App. 62a ¶54. The Defendant never attempted to contact the Non-Attorney Principal's personal banker. *Id*.

E. The Defendant refuses to place the Plaintiff's rezoning petition on the city agenda.

The PDA acknowledged that to redevelop the Hospital into a hotel, it was "necessary" that the Hospital be rezoned as "Planned Development-Commercial." App. 120a ¶C. On March 22, 2019, the Plaintiff filed a petition to rezone the Hospital and paid a $500 application fee. App. 63a ¶57. On or around March 27, 2019, the City informed the Plaintiff that the Defendant refused to place the Plaintiff's rezoning petition on the City's planning and zoning agenda. App. 63a ¶58.

On April 1, 2019, the Defendant emailed that Plaintiff and stated that he had reviewed the Plaintiff's financial information on March 27, 2019. App. 103a. The Defendant opined that the Plaintiff did not have the experience or the financial capacity to qualify for the $2.5 million TIF allocation. App. 103a. Stating that he did not want to "embarrass" the Plaintiff "on the basis of a public report at an upcoming Council meeting," the Defendant recommended that the Plaintiff withdraw its application for the TIF allocation. App. 104a. The Plaintiff responded by enumerating **in detail** how the Defendant's opinion was based on false information.

The Plaintiff also asked the Defendant twice about his refusal to add the Plaintiff's rezoning petition to the City's planning and zoning agenda. App. 110a-113a.

The City, via Attorney Frieders, responded to the Plaintiff and stated that the question of zoning approvals was **independent** from whether the City would provide TIF funds. App. 107a (emphasis added). Attorney Frieders stated that the Defendant's "fundamental" objective was to determine the "appropriateness" and or the "necessity" of the TIF allocation, and then reiterated that that zoning consideration was "**independent** of any economic incentive." App. 107-109a (emphasis added). Attorney Frieders further tried to convince the Plaintiff that requiring a *second pro-forma* document, **after** a preceding *pro-forma* document had already been reviewed and accepted by the City as **condition** of the City's formal approval of the Project for a TIF allocation, and **after** the City had given such formal approval, was somehow consistent with the City's "past practice" of requiring the "submission of a detailed pro-forma" as a component of a request for TIF funds. App. 108a.

F. The City terminates its approval of the PDA.

In an April 19, 2019 memorandum to City Council, and notwithstanding the PDA's express acknowledgement that commercial financing was needed to make the Project **possible,** the Defendant stated that because the Plaintiff "suggested" that it would obtain commercial financing for the Project, that meant the Plaintiff "had no collateral." App. 66a-67a ¶77. On April 22, 2019, the City terminated Resolution 2018-166, which effectively terminated the PDA. App. 69a ¶82, 117a.

G. The Defendant requests reallocation of the TIF funds to one of his preferred developers.

On April 23, 2019, the Defendant wrote and circulated a memorandum proposing that $2,075,000 of the $2.5 million that had been allocated to the Fisk project be reallocated to the Pappas Project. App. 144a, 146a. The Pappas Project's major investor had previously been a client of "Nicklaus Consulting," the Defendant's former consulting business. App. 57a ¶31. The memorandum further disclosed the discussions between the City and Shodeen about the potential allocation of TIF funds to develop a "full-service business class hotel." App. 145a.

H. The Plaintiff sues in Federal Court.

On April 22, 2019, the Plaintiff filed suit in the United States District Court, Northern District of Illinois, Western Division. At issue here is the Plaintiff's First Amended Complaint (hereinafter sometimes referred to as the "Complaint") that was filed on November 5, 2019. App. 49. The Complaint alleged Counts against the Defendant for Tortious interference with a Business Expectancy; First Amendment Retaliation; Violation of Due Process; Defamation *Per Se;* Defamation *Per Quod*, Tortious Interference with a Contract, and Violation of Equal Protection. App. 70a, 72a, 74a, 76a-77a, 81a. The district court had subject matter jurisdiction over the Plaintiff's Federal claims pursuant to 28 U.S.C. §§1331, 1343 (a)(3), and 42 U.S.C. § 1983, and had supplemental jurisdiction over the Plaintiff's state law claims pursuant to 28 U.S.C § 1367.

I. The Seventh Circuit affirms the district Court's dismissal of the Plaintiff's Federal claims.

On April 27, 2020, the District Court issued its opinion dismissing the Plaintiff's Federal claims with prejudice, and relinquishing jurisdiction over the Plaintiff's state law claims[1]. App. 43a. On May 26, 2020, the Plaintiff timely appealed to the United States Court of Appeals for the Seventh Circuit. App. 176a. On January 26, 2021, the Circuit Court affirmed the District Court's dismissal of the Plaintiff's Complaint. App. 16a, 42a. The Plaintiff timely filed the instant Petition for Writ of Certiorari on April 26, 2021.

REASONS FOR ALLOWANCE OF WRIT

I. In considering the Defendant's motion to dismiss and in direct contradiction of established judicial principals, the Seventh Circuit Construed the Plaintiff's Complaint in the light most favorable to the Defendant.

In affirming the district court's dismissal of the Plaintiff's Equal Protection claim, the Seventh Circuit did not take the well-pleaded allegations in the Plaintiff's Complaint as true, and the Seven Circuit drew all reasonable inferences in favor of the Defendant. The Seventh Circuit's construction of the Plaintiff's Equal Protection claim in the light most favorable to the Defendant far departs from the usual and accepted course of judicial proceedings and calls for an exercise of the Court's supervisory authority. *See* Sup. Ct. R. 10 (a).

[1] The Plaintiff's state law claims are currently pending in the Circuit Court for DeKalb County, Illinois, Twenty-Third Circuit, as Case No. 20 L 34, and are not subject to the instant Petition.

A Circuit Court reviews a district court's dismissal of a complaint *de novo*. *Shipley v. Chicago Board of Election Commissioners*, 947 F.3d 1056, 1060 (7th Cir. 2020). In reviewing a district court's dismissal of a complaint, a Circuit Court accepts all well-pled allegations as true and draws all reasonable inferences in favor of the plaintiff. *Id* at 1060-61. While it is still somewhat unclear as to what exactly constitutes "well-pleaded" allegations, plaintiffs do have to raise factual allegations in their complaints, such allegations must be more than mere **legal** conclusions, and such allegations must amount to more than a mere recitation of the elements of a claim. *Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 859 (7th Cir. 2017), *Ashcroft v. Iqbal*, 556 U.S. 662, 679-81(2009). A claim that has been adequately pled may then be supported by showing any set of facts consistent with the well-pleaded allegations. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

In affirming the district court, the Seventh Circuit stated that alleging that the Defendant's reasons for terminating the PDA were "untrue," was "generalized" and "conclusory" and was therefore insufficient to plead that the Defendant had no "conceivable" rational basis for terminating the PDA. App. 15a, 40a. Given that the falsity of the Defendant's statements is not an essential element of a "class of one" Equal Protection claim, the alleged "generalized" or "conclusory nature" of the Plaintiff's allegation is irrelevant. The essential elements of a "class of one" Equal Protection claim are 1) that the plaintiff was intentionally treated differently than others similarly situated, and 2) that there is no rational basis for the difference in

treatment. *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Accordingly, the allegations regarding the falsity of the Defendant's statements are facts pled to support and to raise the inference that the Defendant had no rational basis for terminating the PDA and are not merely recitations of the legal conclusion that the Defendant had no rational basis for terminating the PDA.

Even if the Plaintiff's allegations of "untruth" were facially insufficient, in taking the facts pleaded in a complaint as true and in raising all inferences in favor of the plaintiff, a court considers the complaint as well as all attached exhibits. *Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013). In affirming the district court, the Seventh Circuit stated that the Plaintiff failed to point to sufficient "evidence" to invalidate the Defendant's "justifications" for terminating the PDA, and that the Plaintiff failed to "refute" any of the Defendant's concerns about the Plaintiff's financial health or "inexperience." App. 16a, 41a. The Seventh Circuit itself has stated that evidence is not required at the pleading stage and that applying a heightened evidentiary standard at the pleading stage is "too demanding a standard" and "set(s) the bar too high." *Abu-Shawish v. United States*, 898 F.3d 726, 738 (7th Cir. 2018). Therefore, inconsistent with the law and inconsistent with itself, the Seventh Circuit incorrectly insinuated that for the Plaintiff's Complaint to survive, the Plaintiff was required to provide some initial proof of its allegations.

Regardless, attached to its Complaint as "Exhibit 5" is a copy of email correspondence between the Defendant and the Plaintiff's Attorney Principal, and between the Defendant and the City's Attorney. App. 106a-115a. In response to the

Defendant's "concerns," the Plaintiff's Attorney Principal stated that he had various real estate businesses, that as evidenced by canceled checks to the City, both the Plaintiff's principals had spent "significant personal money" to fund the project, that the Defendant had spoken the Plaintiff's personal banker who had assured the Defendant that the Attorney Principal had the financial wherewithal for the project, that the Attorney Principal graduated *summa cum laude* in accounting, and that because the Attorney Principal was "self-employed" with various businesses, the Attorney Principal had "multiple ways to carry tax burdens." App. 110a-112a. Therefore, in reviewing the Complaint and the attached Exhibit 5, the Plaintiff's allegations that the Defendant terminated the PDA based on falsities were well pleaded and the Seventh Court should have taken such allegations as true.

In taking the Plaintiff's well-pleaded allegations in support of its Equal Protection claim as true, and in drawing all reasonable inferences from the well-pleaded allegations in favor of the Plaintiff, the Plaintiff plausibly pled that almost immediately after the Defendant became City Manager, the Defendant, with the intent of diverting the TIF funds to his preferred developer, John Pappas, and with the intent to give his other preferred developer, Shodeen, the option to pursue TIF funds for a similar development in the future, the Defendant engaged in a campaign to thwart the Fisk Project. *See supra* pp. 6-10. When the Defendant observed that the Project had the support of the planning and zoning board and had the support of the public, the Defendant then conveyed false information to City Council regarding the Plaintiff's financial health and the Plaintiff's "inexperience." *See supra* pp. 7-10.

Based on the Seventh Circuit's recitation of the facts in general, the Seventh Circuit's reference to the Defendant's campaign as "due diligence," the Seventh Circuit's assumption that the Defendant was "unsatisfied with previous due diligence," and the Seventh Circuit's assumption that the Defendant's "concerns" were true despite the Plaintiff's allegations to the contrary, the Seventh Circuit clearly drew its inferences in favor of the Defendant. *See generally* App. 8a-10a, 21a-27a, *see also* App. 7a at 762, 8a at 763, 9a at 763-64, 10a at 765, 14a at 770, 15a at 771, 16a at 773. In refusing to take the Plaintiff's allegations as true and in drawing all inferences in favor of the Defendant, the Seventh Circuit's decision is the direct opposite of the established, usual, and acceptable judicial standard for reviewing pleadings when considering a motion to dismiss.

Finally, because the Seventh Circuit found that the Complaint stated a rational basis for the Defendant's conduct, the Seventh Circuit found it unnecessary to address whether the Plaintiff had "failed" to identify a "valid comparator." App. 15a at 771. Nevertheless, the Seventh Circuit faulted the Plaintiff for "fail(ing) to identify a valid comparator." App. 16a at 773. '**Normally**, a class-of-one plaintiff will show an absence of rational basis by identifying some comparator—that is, some similarly situated person who was treated differently.' *Fares Pawn, LLC v. Indiana Department of Financial Institutions*, 755 F.3d 839, 845 (7th Cir. 2014) (emphasis added) (cited in App. 15a at 771). However, in *Miller v. City of Monona*, 784 F.3d 1113, 1120 (7th Cir. 2015), which was decided after and which specifically references *Fares Pawn*, the Seventh Circuit found that while identifying a

comparator may sometimes be required to **prove** a "class-of-one" claim, a plaintiff is not required to identify a comparator in its complaint. *Id* (emphasis added). *Miller* acknowledges that while the 'class-of-one standard' is 'in flux' in the Seventh Circuit, the Seventh Circuit has **repeatedly** confirmed that **a 'class-of-one' plaintiff is not required to identify specific examples of similarly situated persons in its complaint**. *Id*. (emphasis added) (citing *Thayer v. Chiczewski*, 705 F.3d 237, 254 (7th Cir. 2012), *Del Marcelle v. Brown County Corp.*, 680 F.3d 887, 913 (7th Cir. 2012) (en banc), *Capra v. Cook Cnty. Bd. of Review*, 733 F.3d 705, 717 (7th Cir. 2013), *Geinosky v. City of Chicago*, 675 F.3d 743, 748 n.3 (7th Cir. 2012)). The Seventh Circuit's contention that the Plaintiff is required to identify a "valid comparator" in its **Complaint** far departs from the common thread in *Miller* of what is otherwise a divided issue within the Circuit. Therefore, the Seventh Circuit's affirmation of the district court's dismissal of the Plaintiff's Equal Protection claim so far departs from the established, accepted, and usual judicial principles for construing pleadings, that a call for this Court's supervisory authority is warranted, and the Plaintiff's Petition for Writ of Certiorari should be granted.

II. If the Seventh Circuit truly intended to deprive the Plaintiff of the reasonable opportunity to amend its Complaint, such deprivation is a far departure from the well-established judicial standard requiring liberal amendments to pleadings.

A question exists as to whether the Seventh Circuit's affirmation of "the opinion of the district court granting defendant's motion to dismiss" is an actual affirmation of the district court's dismissal of the Plaintiff's complaint with **prejudice.** App. 16a, 42a (emphasis added). The fact that the Seventh Circuit

omitted the phrase "with prejudice" from its affirmation of the district court's judgment, along with statements such as "**Up to this point**, Fisk has not adequately pleaded any of its claims," and "Thus, the only way Fisk could proceed **at this juncture** would be to identify a sufficiently similar developer with 'red flags' regarding its financial wherewithal and other deficiencies," strongly indicate that the Seventh Circuit did not intend to uphold the district court's deprivation of the Plaintiff's opportunity to have its Federal claims decided justly and on their merits. App. 16a at 773 (emphasis added), *see also Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 520 (7th Cir. 2015). Therefore, the Court's supervisory authority is warranted to clarify the Seventh Circuit's Opinion and to remand the Plaintiff's Federal claims to the district court for further proceedings.

In the alternative, the Seventh Circuit's affirmation of the district court's dismissal of the Plaintiff's Complaint with **prejudice** is a far departure from the Seventh Circuit's own "well-established liberal standard for amendment (to pleadings) with leave of court." *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 520, 523 (7th Cir. 2015). Pursuant to *Runnion*, the liberal amendment of pleadings is especially important in the wake of *Twombly* and *Iqbal* because considerable uncertainty and variation still exist as to just how demanding pleading standards have become. *Id.* In the face of such uncertainty, applying the liberal standard for amending pleadings, **especially in the early stages of a lawsuit**, **is the best way to ensure that cases will be decided justly** and on their merits. *Id* at 520 (emphasis added).

In the absence of any **declared** or **apparent** reason, such as futility, undue delay or undue prejudice to the opposing party, bad faith or dilatory motive by the pleader, or **repeated** failure to cure deficiencies by amendments previously allowed, **leave to amend a complaint should be freely given when such leave is sought by the pleading party**[2]. *Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 687 (7th Cir. 2004) (emphasis added). Unless it is **certain** on the face of the complaint that **any** amendment would be futile or otherwise unwarranted, a plaintiff should be given **every opportunity** to cure a formal defect in its pleading. *Id* (emphasis added)., *Runnion*, 786 F.3d at 520 (emphasis added).

While the Seventh Circuit repeatedly attacks the Plaintiff's Complaint as insufficiently pled, the Seventh Circuit never declares, nor does the Seventh Circuit's Opinion make apparent, how permitting the Plaintiff to amend its Complaint would be futile or otherwise unwarranted. The Seventh Circuit's statement that the Plaintiff has not adequately pleaded **any** of its claims "up to this point," and the Seventh Circuit's suggestion as to how the Plaintiff could cure the alleged defects in its Equal Protection claim "at this juncture" implicitly declare that the alleged defects in the Plaintiff's Complaint can be potentially "cured."

While truly futile amendments need not be allowed, the Seventh Circuit itself has stated that when a court identifies **a fatal but possibly curable flaw** in a pleading, the pleading party must be given a **fair opportunity** to try **to correct**

[2] In opposing the Defendant's motion to dismiss, the Plaintiff alternatively requested leave to amend its Complaint. App. 10a at 765.

the flaw. *Abu-Shawish v. United States*, 898 F.3d 726, 738 (7th Cir. 2018) (emphasis added). Regarding the Plaintiff's First Amendment Retaliation claim, the Seventh Circuit contended that the Attorney Principal's disclosure of the Defendant as a witness in a separate lawsuit was not protected First Amendment activity of the Attorney Principal but was rather protected First Amendment activity of the Attorney Principal's client. App. 11a at 766-67. The Seventh Circuit concluded that since the Plaintiff did not allege that its actual corporate entity engaged in protected conduct, the Plaintiff's failed to allege a viable First Amendment Retaliation claim. App. 12a at 768. The Seventh Circuit's conclusion identifies a potential "cure" for the Plaintiff's First Amendment claim and the Seventh Circuit should have afforded the Plaintiff the reasonable opportunity to pursue such "cure."

Regarding the Plaintiff's Violation of Due Process Claim, the Seventh Circuit stated that the Plaintiff "cannot" claim a constitutionally protected property interest. App. 14a at 770. However, the Seventh Circuit's policy of giving a plaintiff **every opportunity** to cure its pleadings applies **even when a court doubts that a plaintiff will be able to overcome the defects in its initial pleading**. *Barry Aviation*, 377 F.3d at 687 (emphasis added). In the instant case, the Seventh Circuit stated that to state a due process claim, the Plaintiff must identify some substantive property interest embedded within Resolution 2018-166. App. 13a at 769. Once again, the Seventh Circuit identified a potential "cure" to the Plaintiff's allegedly defective Due Process claim and the Seventh Circuit should have afforded the Plaintiff a reasonable opportunity to pursue such "cure."

Finally, albeit incorrectly, the Seventh Circuit identified a variety of "flaws" as well as the "cures" for such "flaws" in the Plaintiff's Equal Protection claim. App. 15a-16a at 772-773, *see Abu-Shawish*, 898 F.3d at 738 (to the extent the district court found, **correctly or not**, that plaintiff's petition fell short of what was required, the court should have given him leave to replead) (emphasis added). The most obvious "flaw" and "cure" identified by the Seventh Circuit was the Plaintiff's alleged failure to identify a similarly situated developer with 'red flags' regarding its financial health and "other deficiencies," and the Seventh Circuit's statement that identifying such a developer would be the "only way (the Plaintiff) could proceed at this juncture." App. 16a at 773. The Seventh Circuit further revealed that the Plaintiff could potentially "cure" the alleged defects in its Equal Protection Claim by alleging what working capital and collateral that its principals had in hand, and by alleging that the Plaintiff and/or its principals had experience in developing hotels. App. 15a-16a at 772. The Seventh Circuits refusal to afford the Plaintiff the reasonable opportunity to pursue the litany of potential "cures" to the alleged defects in the Plaintiff's Federal claims, is a far departure from the accepted and usual judicial principals for which the Seventh Circuit has continuously and vehemently advocated. *See Abu-Shawish v. United States*, 898 F.3d 726 (7th Cir. 2018), *Mulvania v. Sheriff of Rock Island County*, 850 F.3d 849, 854 (7th Cir. 2017), *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, (7th Cir. 2015), and *Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n,* 377 F.3d 682 (7th

Cir. 2004). Such departure calls for an exercise of this Court's supervisory authority and the Plaintiff's Petition for Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Plaintiff's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

_____
Jonathan R. Marko

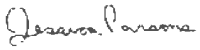

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TABLE OF APPENDICES

Document: 145 Fisk, LLC v. Nicklas, 986 F.3d 759

145 Fisk, LLC v. Nicklas, 986 F.3d 759

United States Court of Appeals for the Seventh Circuit

December 10, 2020, Argued; January 26, 2021, Decided

No. 20-1868

Reporter

986 F.3d 759 * | 2021 U.S. App. LEXIS 2093 **

145 FISK, LLC, Plaintiff-Appellant, v. F. WILLIAM NICKLAS, Defendant-Appellee.

Prior History: [**1] Appeal from the United States District Court for the Northern District of Illinois, Western Division. No. 19-cv-50093. Philip G. Reinhard, Judge.

Core Terms

rational basis, district court, property interest, right of petition, contingencies, funding, lawsuit, courts, plans, financing, blocking, reasons, rights, constitutionally protected, retaliation, alleges, parties, animus, redress of grievance, protected activity, no rational basis, retaliation claim, conceivable, argues, hotel, business relationship, protected conduct, corporate entity, due process, class-of-one

Case Summary

Overview

HOLDINGS: [1]-Plaintiff limited liability company's First Amendment retaliation claim alleging that defendant city manager blocked a development incentive and retaliated against the company because its attorney member exposed unflattering information about him and named him in discovery in an earlier, unrelated lawsuit was properly dismissed because the company did not engage in protected activity as the underlying right to be free from retaliation for petitioning the government belonged to neither the company nor its attorney member but to the attorney member's nonparty client in the prior lawsuit; [2]-The company's retaliation argument based on the exercise of free speech rights through the attorney member was waived for failure to raise the issue below; [3]-The company's procedural due process claim failed because it had no constitutionally protected property interest.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1 **Standards of Review, De Novo Review**
The appellate court reviews the district court's grant of the defendant's motion to dismiss de novo to determine whether the plaintiff has stated a claim upon which relief can be granted. A court accepts well-pleaded facts as true and draws all reasonable inferences in the plaintiff's favor. Notwithstanding that deference, to survive a motion to dismiss, a plaintiff must allege enough facts to state a claim to relief that is plausible on its face. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms >

Freedom to Petition

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech >

Scope

HN2 **Fundamental Freedoms, Freedom to Petition**
To make a prima facie showing on its First Amendment retaliation claim, the plaintiff must establish that (1) it engaged in activity protected by the First Amendment, (2) it suffered a deprivation that would likely deter First Amendment activity in the future, and (3) the First Amendment activity was at least a motivating factor in the defendant's decision to take the retaliatory action. Courts have recognized that a plaintiff's exercise of the First Amendment right to petition the government for the redress of grievances may qualify for the first prong of a First Amendment retaliation claim. Furthermore, the right to petition extends to the courts in general and applies to litigation in particular. More like this Headnote

Shepardize® - Narrow by this Headnote

Labor & Employment Law > ... > Retaliation > Elements >

Protected Activities

HN3 **Elements, Protected Activities**
A plaintiff claiming retaliation cannot rely on another plaintiff's injury in support of its own claim to show it engaged in protected activity. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms >

Freedom to Petition

HN4 **Fundamental Freedoms, Freedom to Petition**
The right to petition provides additional protection for communication specifically aimed at the redress of grievances. More like this Headnote

Shepardize® - Narrow by this Headnote

Civil Procedure > Appeals > Reviewability of Lower Court Decisions >

Preservation for Review

HN5 **Reviewability of Lower Court Decisions, Preservation for Review**
In civil litigation, issues not presented to the district court are normally forfeited on

appeal. More like this Headnote

Shepardize® - Narrow by this Headnote

Civil Rights Law > ... > Section 1983 Actions > Scope > Due Process in State Proceedings

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN6 **Scope, Due Process in State Proceedings**
To prevail on a procedural due process claim, a plaintiff must make a threshold showing that it possessed a constitutionally protected property interest. A property interest for purposes of the Due Process Clause is created by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. More like this Headnote

Shepardize® - Narrow by this Headnote

Civil Rights Law > ... > Section 1983 Actions > Scope > Due Process in State Proceedings

Governments > Local Governments > Ordinances & Regulations

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN7 **Scope, Due Process in State Proceedings**
To demonstrate a property interest worthy of protection under the Fourteenth Amendment's Due Process Clause, a party may not simply rely upon the procedural guarantees of state law or local ordinance. Only when the mandated procedure contains within it a substantive liberty or property interest can such purely procedural rules of local law give rise to a due process claim. The Illinois Supreme Court has pronounced that a resolution or order is not a law, but merely the form in which the legislative body expresses an opinion. The existence of the Resolution alone thus does not suffice to create a protected property interest; a plaintiff must identify some other substantive liberty or property interest embedded within relevant procedural regulations. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > Substantive Due Process > Scope

HN8 **Constitutional Law, Substantive Due Process**
Where the requisite mandatory language is lacking, no protected interest is created. A rule or regulation must have binding force in order to create constitutionally protected property. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > Substantive Due Process > Scope

HN9 **Constitutional Law, Substantive Due Process**
Under Illinois law, the existence of a business relationship may be cognizable for tort protection. But Illinois tort law only recognizes that a person's business relationships constitute a property interest for purposes of creating an entitlement to protection from unjustified tampering by another. Illinois tort law does not transform a business relationship into a constitutionally protected property right. Courts are urged to look behind labels and instead ask whether under Illinois law the interest in question is securely and durably the plaintiffs. When determining the existence of a property interest courts must look behind labels. More like this Headnote

Shepardize® - Narrow by this Headnote

Civil Rights Law > ... > Section 1983 Actions > Scope > Due Process in State Proceedings

HN10 **Scope, Due Process in State Proceedings**
To have a protectable property interest in a benefit a plaintiff must have more than an abstract need or desire for it and more than a unilateral expectation of it. More like this Headnote

Shepardize® - Narrow by this Headnote

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN11 **Zoning, Administrative Procedure**
The property zoning process is merely a local procedural protection, which does not by itself give rise to a federal due process interest. More like this Headnote

Shepardize® - Narrow by this Headnote

Civil Rights Law > ... > Section 1983 Actions > Scope > Due Process in State Proceedings

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN12 **Scope, Due Process in State Proceedings**
Regardless of how a plaintiff labels an objectionable land-use decision (i.e., as a taking or as a deprivation without substantive or procedural due process), recourse must be made to state rather than federal court. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN13 **Equal Protection, Nature & Scope of Protection**
Under the Fourteenth Amendment's Equal Protection Clause, a plaintiff who is not a member of a protected class may nonetheless bring a claim under the so-called class-of one theory. To state a claim under this theory, a plaintiff must allege (1) that it has been intentionally treated differently from others similarly situated, and (2) that there is no rational basis for the difference in treatment. For the second criteria, the court asks whether a conceivable rational basis for the difference in treatment exists. In fact, the rational basis need not even be the actual justification. Any reasonably conceivable state of facts that could provide a rational basis will suffice. It is only when courts can hypothesize no rational basis for the action that allegations of animus come into play. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN14 **Equal Protection, Nature & Scope of Protection**
Normally, a class-of-one plaintiff will show an absence of rational basis by identifying some comparator, that is, some similarly situated person who was treated differently. If all principal characteristics of the two individuals are the same, and one received more favorable treatment, this may show there was no proper motivation for the disparate treatment. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > Equal Protection > Judicial Review >

Standards of Review

HN15 **Judicial Review, Standards of Review**
The rational-basis requirement sets the legal bar low. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > Equal Protection > Judicial Review >

Standards of Review

HN16 **Judicial Review, Standards of Review**
It is only when courts can hypothesize no rational basis for the action that allegations of animus come into play. More like this Headnote

Shepardize® - Narrow by this Headnote

Counsel: For 145 FISK, LLC, Plaintiff - Appellant: Christopher Nicholas Cronauer, Attorney, CRONAUER LAW LLP, Sycamore, IL.

For F. WILLIAM NICKLAS, individually, CITY OF DEKALB, Defendant - Appellee: Michael L. Resis, Attorney, SMITHAMUNDSEN LLC, Chicago, IL; Daniel R. Whiston, Attorney, SMITHAMUNDSEN LLC, St. Charles, IL.

Judges: Before SYKES, Chief Judge, and FLAUM and KANNE, Circuit Judges.

Opinion by: FLAUM

Opinion

[*762] FLAUM, *Circuit Judge*. Illinois authorizes municipalities to invest in revitalizing areas of "commercial blight." *See* 65 Ill. Comp. Stat. 5/11-74.4 *et seq.* The City of DeKalb, Illinois (the "City"), entered into a preliminary agreement to allocate just such an incentive to 145 Fisk, LLC ("Fisk"). After more due diligence, however, the City reversed course.

Fisk is convinced the City would have proceeded with the funding as planned but for the meddling of City Manager F. William Nicklas. According to Fisk, Nicklas sought to retaliate against it and favor other local developers in violation of its First and Fourteenth

Amendment rights. The district court dismissed Fisk's suit for failure to state a claim upon which relief can be granted [**2] and relinquished supplemental jurisdiction over the remaining state law claims. Because we agree that Fisk has not plausibly stated grounds for relief, we affirm the judgment of the district court.

I. Background

Plaintiff-appellant Fisk is a limited liability company. The entity was formed on December 13, 2018, and it consisted of two members, one of whom is an attorney ("Attorney Member").

Fisk alleges that for over two years it collaborated with the City regarding a proposed redevelopment of a dilapidated property at 145 Fisk Avenue in DeKalb. On December 18, 2018, the City adopted Resolution 2018-166 approving a Preliminary Development Incentive Agreement ("PDA") with Fisk regarding potential financing for the project. The PDA, into which the parties entered on or about January 1, 2019, provided that if Fisk met certain contingencies set forth therein, the City would provide an approximate $ 2,500,000 Development Incentive ("Development Incentive") in Tax Increment Financing ("TIF") to Fisk for the redevelopment. Per the PDA, the Development Incentive was "intended to be repaid as a forgivable incentive, payable through the generation of revenues from the development **[*763]** of the Property [**3] after the date of final plan approval."

Both the PDA and the Resolution, however, imposed conditions and obligations on both parties before finalizing the development agreement and distributing the funds. The Resolution provided that the City Council "hereby approves of the Development Incentive Agreement ... subject to such amendments as shall be acceptable to the Mayor with the recommendation of the City Manager. Staff is authorized to negotiate and proceed with presentation of [the] Final Development Agreement for consideration of approval at a future date."

The PDA likewise subjected the Development Incentive to various contingencies. For example, Recital C of the PDA states "the Parties have entered into this Agreement so as to provide an incentive for [Fisk] to ... proceed with the proposed project, subject to the contingencies outlined herein." Recital E continued: "[Fisk] acknowledges that the City is not required to provide the incentive contemplated herein ...." Indeed, the extent of the arrangement is an "agreement to conditionally approve." The PDA further states in Article II(A) that "[Fisk] acknowledges all contingencies outlined in this Agreement, and agrees and acknowledges [**4] that until all such contingencies are fully satisfied, it has no basis to detrimentally rely upon the representations of the City with respect to the availability of incentive funding." With respect to costs incurred, under Article II(A) "[Fisk] agrees and acknowledges that any costs incurred prior to approval of a planned development agreement as contemplated herein ... are *incurred at [Fisk]'s sole risk* and cost until such point in time as the Property is rezoned and the planned development agreement is approved, and any other conditions or contingencies outlined herein are satisfied in full." (Emphasis added). Even in defining the "Development Incentive," Article V(B) states "All provisions of this Article V are contingent upon [Fisk] obtaining final approval of its plans, rezoning the Property, lender financing, and executing a planned development agreement as described above."

Amid the negotiations over the redevelopment project, a transition in the City's personnel marked the beginning of the end for Fisk's proposed Development Incentive. Around January 1, 2019, F. William Nicklas became the new City Manager. Unsatisfied with previous due diligence, Nicklas opened his own inquiries [**5] into Fisk's financial affairs and development plans. This included a series of in-person meetings and exchanges during February and March 2019 between Nicklas and Fisk's principals. Nicklas requested "personal information" about the principals, their affiliates, and their financial situation. Nicklas even spoke with the Attorney Member's personal banker. Nicklas also requested information about the corporate entity itself, including a worksheet to indicate its "financial viability." Fisk never, however, affirmatively states in the record what amount of working capital the principals or the corporate entity

the record what amount of working capital the principals of the corporate entity specifically had to fund the project contemplated by the PDA. By Fisk's account, all Nicklas's requests duplicated the City's prior ones and were not required by the Resolution or PDA.

Nicklas's review exposed cracks in the project's foundation. In an email to Fisk dated April 1, 2019, Nicklas stated he felt "duty-bound" to inform the Council that in his opinion Fisk did not have "the financial capacity or the experience" needed for the funding. Nicklas based this conclusion on submissions from Fisk, including the financial worksheet, a budget for three years of operation following [**6] 145 Fisk Avenue's **[*764]** completion, and the principals' own "acknowledgment" during a March 2019 meeting that neither "ha[d] ever developed a hotel property in the past." Nicklas recommended Fisk withdraw its application. Specifically, Nicklas stated:

[M]y judgment is based upon the following conclusions:

> 1. No balance sheet for 145 Fisk LLC has been submitted, but your submittal shows no current or long-term assets that can be pledged as collateral. The corporation controls a 24,000 square foot, uninhabitable facility with an estimated market value of only $ 300,000.
>
> 2. 145 Fisk LLC has not secured any sources of income to complete the project or operate the project upon its completion.
>
> 3. 145 Fisk LLC has no working capital and its operations are not generating any capital to pay for current expenses, much less the ongoing professional consulting fees incurred to date in the conceptual planning phase of the project.
>
> 4. On the basis of your submittal, it appears that 145 Fisk LLC is relying upon a $ 2.5 million TIF grant from the City and 100% of the balance of the equity funding from one or more financial institutions. Your submittal offers no working cash from the principals, or pledged private [**7] assets, or lines of credit, or other private equity to help finance the project.
>
> 5. You do not reveal the real and comparable hotel development upon which you are basing the projected three-year profit and loss prospectus you submitted. Since you have not developed a hotel, your numbers are not rooted in an actual operation, so far as you have revealed. They [sic] are so many numbers on a page.
>
> 6. As you may know, TIF assistance carries a federal income tax liability. Your submittal shows no indication that 145 Fisk LLC could carry that liability except at the expense of the project's development. 1

Disagreement ensued. In a series of subsequent exchanges, the Attorney Member reiterated that the corporate entity was "simply a holding [LLC] at this point" and Nicklas's "specific comments 1-6 [were]n't accurate, include[d] erroneous assumptions, [we]re disingenuous, or [we]re completely out of context." The Attorney Member emphasized "[a]ll [they] need is a loan commitment to proceed, but ... commitment and income sources cannot be secured until a formal commitment from the City is finalized." Fisk also rejected Nicklas's recommendation to withdraw its application for the Development Incentive. [**8]

As it turns out, the events of 2019 were not the first encounter between Nicklas and Fisk's members. The Attorney Member represented a client in a state court lawsuit involving the City of Sycamore. In response to an interrogatory dated April 21, 2017, that client identified Nicklas—who was previously Sycamore's City Manager—as a witness. Through the proceedings, an email surfaced in which Nicklas referred to regulatory requirements imposed by "[t]hat pesky Constitution" which **[*765]** "has strictures against artificial distinctions." However, the client in that suit was not Fisk. In fact, Fisk had not yet come into corporate existence.

During that same period, Nicklas considered two other development projects with which, Fisk alleges, Nicklas had previous financial and personal ties for funding incentives. The

first was a TIF-backed hotel project with a developer named Shodeen. Nicklas had previously collaborated on a hotel with Shodeen that never came to fruition. The second was a TIF-backed apartment development project with John Pappas. Nicklas had

previously represented Pappas's major investor, who intended to invest in the TIF-backed apartment, in consulting work.

Nicklas ultimately recommended [**9] the City terminate the PDA with Fisk. During an April 22, 2019, meeting, the City Council addressed Nicklas's findings. The City's Agenda notes indicated the City did not receive "the necessary financials and development plans to justify a permanent commitment to the allocation of $ 2.5 million" within 120 days of the Resolution. Specifically, the Council found the financial documents "were barren of any assurance that the LLC could afford ongoing preliminary planning and engineering fees." The Council further cited "insufficient project details" to advance "to a formal development hearing." Specifically, the lack of documentation for a traffic impact study, final site engineering plans, "storm water management report examining the site's runoff," floor plans, and "variances or exceptions from the City's development ordinances." Accordingly, "[t]he Council determined that—on the basis of all known documents— there was no reasonable or informed basis upon which the project could be considered viable." The City Council unanimously voted to terminate the PDA. Fisk filed suit that same day.

Fisk commenced this action in federal court against Nicklas in his individual capacity claiming violations [**10] of state and federal law. The state law claims included tortious interference with Fisk's business expectancy, defamation per se, and defamation *per quod*. Relevant to this appeal, Fisk sued under 42 U.S.C. § 1983 for violations of its rights under the First and Fourteenth Amendments.

Nicklas moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). In lieu of a reply to Nicklas's Rule 12(b)(6) motion, Fisk obtained leave to file an amended complaint. Fisk filed the First Amended Complaint, the operative complaint for this appeal, on November 5, 2019. Pertinent here, Fisk claims Nicklas violated its First Amendment right (Count II), as well as its Fourteenth Amendment rights to due process (Count III) and equal protection (Count IX). Nicklas again moved to dismiss pursuant to Rule 12(b)(6). Fisk opposed and alternatively requested leave to replead.

On April 27, 2020, the district court dismissed Fisk's federal claims against Nicklas for failure to state a claim with prejudice and relinquished jurisdiction over the supplemental state law claims. **2**

II. Discussion

HN1 We review the district court's grant of Nicklas's motion to dismiss de novo to determine whether Fisk has stated **[*766]** a claim upon which relief can be granted. *Bridges v. Gilbert*, 557 F.3d 541, 545 (7th Cir. 2009). "We accept well-pleaded facts as true and draw all reasonable inferences [**11] in the plaintiff['s] favor." *Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1060-61 (7th Cir. 2020). Notwithstanding that deference, "[t]o survive a motion to dismiss, a plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Boucher v. Fin. Sys. of Green Bay, Inc.*, 880 F.3d 362, 365-66 (7th Cir. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

A. First Amendment

Count II of the complaint alleges that Nicklas retaliated against Fisk for exercising its First Amendment right. Specifically, Fisk alleges that as City Manager of DeKalb, Nicklas blocked the Development Incentive and "orchestrated [a] campaign" against Fisk because its Attorney Member exposed unflattering information about Nicklas and named him in discovery in connection with the unrelated 2017 lawsuit. Fisk pleaded that the Attorney Member's representation in the 2017 lawsuit fell within "the First Amendment's right to petition the government for the redress of grievances." The district court dismissed Fisk's First Amendment retaliation claim, reasoning that Fisk did not engage in protected activity. That is because the client in the 2017 lawsuit, who is not a party to this litigation, engaged in protected activity by exercising *his or her* right to petition the government when he or she accessed the courts. Thus, that nonparty client has the right to be free from retaliation for exposing Nicklas, not Fisk.

HN2 To make a prima [**12] facie showing on its First Amendment retaliation claim, Fisk must establish that "(1) it engaged in activity protected by the First Amendment, (2) it suffered a deprivation that would likely deter First Amendment activity in the future, and (3) the First Amendment activity was ... 'at least a motivating factor' in the Defendant['s] decision to take the retaliatory action." *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008) (quoting *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006)). We have recognized that a plaintiff's exercise of "[t]he First Amendment right to petition the government for the redress of grievances" may qualify for the first prong of a First Amendment retaliation claim. *See id.* Furthermore, the right to petition "extends to the courts in general and applies to litigation in particular." *Id.* (citing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972); *NAACP v. Button*, 371 U.S. 415, 429-30, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)).

On appeal, Fisk argues the district court erred in concluding it did not engage in protected conduct to satisfy the first prong of a First Amendment retaliation claim. Fisk asserts that its protected conduct was "the work of one of its principals in [the 2017] litigation." It appears that Fisk *now* contends that the Attorney Member exercised his own First Amendment right to free speech, as distinct from his right to petition the government. Specifically, Fisk asserts that the Attorney Member exposed Nicklas in the 2017 litigation, while acting as Fisk's agent, and thus the protected [**13] conduct is attributable to Fisk. Failing that, Fisk argues that even if we reject its arguments based on agency theory, Nicklas's retaliatory conduct against the Attorney Member for exercise of his free speech right nonetheless chilled Fisk from exercising its own First Amendment rights.

The district court did not "erroneously ignore[] agency principles" when it concluded that Fisk did not engage in protected activity in the 2017 lawsuit. The **[*767]** agency question is irrelevant because the district court rightfully found that the underlying right to be free from retaliation for petitioning the government belonged to neither Fisk nor the Attorney Member. As the district court explained, "[t]he Attorney Member named Nicklas as a witness in that suit on behalf of *his client* in that case. He did not do so on behalf of [Fisk]." (Emphasis added). Stated another way, the *client's* exercise of *its* First Amendment petition rights in 2017 cannot be Fisk's "protected conduct" for the purposes of *Fisk's* "petition for redress of grievances retaliation claim." *See Bridges*, 557 F.3d at 553 (dismissing claim because individual not party to lawsuit "ha[d] no 'underlying claim' that implicates his *own* right of access to the courts" (emphasis added) (quoting *Christopher v. Harbury*, 536 U.S. 403, 415, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2009))). [**14] Fisk did not exercise its First Amendment petition right; in fact, Fisk did not even exist prior to 2018. That First Amendment right ran to the client in the 2017 suit. ***HN3*** Fisk cannot "rely on another plaintiff's injury in support of [its] own ... claim" to show it engaged in protected activity. *Id.* at 554.

To the extent that Fisk advances a retaliation argument based on the exercise of *free speech* rights through the Attorney Member, that argument was waived. **3** Fisk contends that it engaged in protected free speech when the Attorney Member filed evidence and witness disclosures implicating Nicklas in the 2017 suit. *Cf. id.* at 551-52 (reasoning plaintiff's affidavit supplying his eyewitness account of alleged incident of inmate mistreatment by prison officials could plausibly amount to protected First Amendment speech). However, Fisk did not frame Count II in the operative complaint as a retaliation claim based on its exercise of its free speech rights. Rather, Count II

referred exclusively to "[t]he First Amendment right to petition the government for the redress of grievances [that] extends to the courts in general and is protected activity," and alleged "[t]hat filing, prosecuting and defending the lawsuit where Defendant Nicklas was discovered as referring to the Constitution [**15] as 'pesky' was a protected

activity because 'the First Amendment's right to petition the government for the redress of grievances extends to the courts in general and applies to litigation in particular.'" In opposition to Nicklas's Rule 12(b)(6) motion in the district court, Fisk referred to "[t]he right to petition for redress of grievances ... includ[ing] the right to file a claim before a judicial body. [*Cal. Motor Transp.*, 404 U.S. at 510]. ***HN4*** The right to petition provides additional protection for communication specifically aimed at the redress of grievances."

[*768] Fisk therefore advances this free speech theory for the first time on appeal. ***HN5*** "In civil litigation, issues not presented to the district court are normally forfeited on appeal." *Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 308 (7th Cir. 2010).

As a final backstop, Fisk asserts that "[e]ven setting agency principles aside" the First Amendment applies to close parties. In Fisk's view, Nicklas retaliated against the Attorney Member for his protected speech, which then chilled Fisk's speech. As with its free-speech-retaliation theory described above, Fisk did not argue this close-party theory to the district court below, so we decline to reach it on appeal. *Id.* ("[I]t will be a rare case in which failure to present a ground to the district court has caused no one—not [**16] the district judge, not us, not the appellee—any harm of which the law ought to take note." (citation and internal quotation marks omitted)).

Because Fisk has not alleged that the corporate entity itself engaged in any protected conduct, its First Amendment claim fails at the outset.

B. Due Process

We consider next Fisk's claim in Count III that Nicklas deprived it of its property in violation of the Fourteenth Amendment's Due Process Clause. Relying on our decision in *Barrows v. Wiley*, 478 F.3d 776 (7th Cir. 2007), the district court explained that Fisk had no constitutionally protected property interest because the PDA and contract for the purchase provided only "a right to acquire the property," not a right in the property itself, *see id.* at 780.

HN6 To prevail on a procedural due process claim, a plaintiff must make a threshold showing that it "possessed a constitutionally protected property interest." *Kim Constr. Co., Inc. v. Bd. of Trs. of Vill. of Mundelein*, 14 F.3d 1243, 1245 (7th Cir. 1994) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)). "A property interest for purposes of the Due Process Clause is created by 'existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Id.* at 1245-46 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). But as we reiterated in *Kim*, "property is what is securely and durably yours under state ... law, as distinct from what [**17] you hold subject to so many conditions as to make your interest meager, transitory, or uncertain." *Id.* at 1246 (alteration in original) (quoting *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983), *overruled on other grounds by Brunson v. Murray*, 843 F.3d 698 (7th Cir. 2016)).

On appeal, Fisk argues that the Resolution and PDA created a specific property right to the incentive. Alternatively, Fisk contends that the business relationship created by the Resolution, the contract to purchase the underlying land (which was contingent on receipt of the incentive), and the right to zoning approval were, on their own, each sufficient for Fourteenth Amendment purposes.

Fisk's argument that the Resolution created a protectable interest fails. ***HN7*** We have stated that "[t]o demonstrate a property interest worthy of protection under the

stated that "[t]o demonstrate a property interest worthy of protection under the [F]ourteenth [A]mendment's [D]ue [P]rocess [C]lause, a party may not simply rely upon the procedural guarantees of state law or local ordinance." *Cain v. Larson*, 879 F.2d 1424, 1426 (7th Cir. 1989). "[O]nly when the mandated procedure contains within it a *substantive* liberty or **[*769]** property interest" can such "purely procedural rules of ... local law" give rise to a due process claim. *Lavite v. Dunstan*, 932 F.3d 1020, 1033 (7th Cir. 2019). The Illinois Supreme Court has pronounced that "[a] resolution or order is not a law, but merely the form in which the legislative body expresses an opinion." *Chi. & N. Pac. R.R. Co. v. City of Chicago*, 174 Ill. 439, 51 N.E. 596, 598 (Ill. 1898). The [**18] existence of the Resolution alone thus does not suffice to create a protected property interest; Fisk must identify some other "substantive liberty or property interest embedded within [relevant] procedural regulations." *Lavite*, 932 F.3d at 1034.

Fisk has not met that burden, as the plain language of the Resolution belies Fisk's characterization of it as "non-discretionary," i.e., as offering anything more than procedural rights. The Resolution was entitled "Authorizing A *Preliminary* Development Incentive Agreement," and the City Council resolved that "[s]taff is authorized to negotiate and proceed with presentation of *Final* Development Agreement for consideration of approval at a future date." (Emphases added). By its own terms, the Resolution did not bind or otherwise "substantively limit[]" the City "by mandating a particular result when certain clearly stated criteria are met." *See Kim*, 14 F.3d at 1248 (***HN8*** "Where 'the requisite ... mandatory language' is lacking, no protected interest is created." (alteration in original) (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 464, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989))); *Hohmeier v. Leyden Cmty. High Schs. Dist. 12*, 954 F.2d 461, 465 (7th Cir. 1992) ("A rule or regulation ... must have 'binding force' in order to create constitutionally protected property."). We therefore agree with the district court's conclusion that no constitutionally protected [**19] property interest arose from the Resolution.

The clear lack of binding language also defeats Fisk's unsupported assertion that the PDA created a protectable interest. The PDA was riddled with discretionary language. True, the PDA states, "the Parties agree and acknowledge that the Development Incentive as described herein is necessary in order to induce this project to occur, and satisfies all requirements applicable to such an incentive." However, tellingly, Fisk itself describes the PDA as a "mandatory *consideration* of the project." (Emphasis added). The PDA provided that Fisk "acknowledge[d] that the City is not required to provide the incentive contemplated herein." Elsewhere, the PDA further stated that until Fisk met all contingencies outlined in the PDA, "it ha[d] no basis to detrimentally rely upon the representations of the City with respect to the availability of incentive funding." The PDA therefore lacked "sufficient directives to the decisionmaker to support a claim of entitlement" to the Development Incentive. *See Kim*, 14 F.3d at 1248. For that same reason, Fisk's reliance on *Barrows* is misplaced; unlike *Barrows*, the parties here did not agree that "a right to" the contract existed. 478 F.3d at 779. Even [**20] setting that issue aside, *Barrows* offers little help to Fisk, because we held in that case that the plaintiff did not have a cognizable procedural due process claim. *Id.* at 781-82.

Nor does Fisk's argument that the Resolution created a "business relationship" affect our analysis. ***HN9*** Under Illinois law, the existence of a business relationship may be cognizable for tort protection. *See Miller v. Lockport Realty Grp., Inc.*, 377 Ill. App. 3d 369, 878 N.E.2d 171, 175, 315 Ill. Dec. 945 (Ill. App. Ct. 2007). But Illinois tort law only "recognizes that a person's business relationships constitute a property interest" for purposes of creating an "entitle[ment] to protection from unjustified **[*770]** tampering by another." *Id.* (citing *Belden Corp. v. InterNorth, Inc.*, 90 Ill. App. 3d 547, 413 N.E.2d 98, 45 Ill. Dec. 765 (Ill. App. Ct. 1980)). Illinois tort law does not transform a business relationship into a constitutionally protected property right. *See Reed*, 704 F.2d at 948 (urging courts to "look behind labels" and instead "ask whether under Illinois law" the interest in question is "securely and durably" the plaintiff's); *see also Rebirth Christian Acad. Daycare, Inc. v. Brizzi*, 835 F.3d 742, 747-48 (7th Cir. 2016) ("[W]hen determining the existence of a property interest ... 'we must look behind labels.'" (quoting *Reed*, 704 F.2d at 948)). For the reasons already stated, the Resolution did not create a constitutionally protected property interest.

We find similarly unavailing Fisk's remaining argument that the underlying contract for the building and the rezoning [**21] decision established cognizable constitutional property interests. No cognizable interest stems from the underlying contract for the

property interests. No cognizable interest stems from the underlying contract for the building. The contract was conditioned on the execution of a final development agreement, and thus that contract represented not a secure property interest but rather the hope to acquire one. *See Cole v. Milwaukee Area Tech. Coll. Dist.*, 634 F.3d 901, 904 (7th Cir. 2011) (***HN10*** "To have a protectable property interest in a benefit ... a plaintiff must have more than an 'abstract need or desire for it' and more than a 'unilateral expectation of it.'" (quoting *Roth*, 408 U.S. at 577)). ***HN11*** Meanwhile, the contention that Fisk lost "a mechanism for the property to be rezoned" fares no better because the zoning process is merely a "local procedural protection[]," which "do[es] not by [itself] give rise to [a] federal due process interest[]." *Lavite*, 932 F.3d at 1033.

Finally, adequate state law remedies remained available to Fisk. The district court relinquished supplemental jurisdiction over Fisk's state law claims, and whether Nicklas's or the City's conduct violated state laws is for the state courts to decide. ***HN12*** In line with Nicklas's arguments, "[w]e have similarly held that, regardless of how a plaintiff labels an objectionable land-use decision (i.e., as a taking or as a deprivation [**22] without substantive or procedural due process), recourse must be made to state rather than federal court." *CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, 769 F.3d 485, 489 (7th Cir. 2014).

Fisk cannot claim a constitutionally protected property interest, and so its procedural due process claim fails at the threshold. Accordingly, the issue of whether Fisk "was afforded due process before being deprived of that interest does not arise." *Kim*, 14 F.3d at 1245.

C. Equal Protection

Fisk argues in Count IV that Nicklas singled it out for disparate treatment without a rational basis in violation of the Fourteenth Amendment's guarantee against "den[ial] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Specifically, Fisk claims that Nicklas, in his role as City Manager, blocked the Development Incentive arbitrarily and discriminately because of personal animus or favoritism toward other developers. The district court concluded that Fisk pled itself out of court by providing several legitimate reasons for Nicklas's conduct, defeating any "class of one" equal protection claim under the standard articulated in *Miller v. City of Monona*, 784 F.3d 1113, 1121 (7th Cir. 2015) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)).

HN13 Under the Fourteenth Amendment's Equal Protection Clause, a plaintiff **[*771]** who is not a member of a "protected class" may nonetheless bring a claim under the "so-called 'class-of one' theory." *Fares Pawn, LLC v. Ind. Dep't. of Fin. Insts.*, 755 F.3d 839, 841 (7th Cir. 2014). To state a claim under this [**23] theory, a plaintiff must allege "(1) that [it] has been intentionally treated differently from others similarly situated, and (2) that there is no rational basis for the difference in treatment." *Id.* at 845 (citing *Olech*, 528 U.S. at 564). For the second criteria, we ask whether "a *conceivable* rational basis for the difference in treatment" exists. *D.B. ex rel. Kurtis B. v. Kopp*, 725 F.3d 681, 686 (7th Cir. 2013). In fact, the rational basis need not even be "the *actual* justification." *Id.* "[A]ny reasonably conceivable state of facts that could provide a *rational basis*" will suffice. *See Scherr v. City of Chicago*, 757 F.3d 593, 598 (7th Cir. 2014) (quoting *Lauth v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005)). We have further clarified that "[i]t is only when courts can hypothesize no rational basis for the action that allegations of animus come into play." *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 547 (7th Cir. 2008).

Fisk is not a member of a protected class, so it proceeds under this class-of-one theory. On appeal, Fisk argues there was no rational basis for Nicklas's conduct. Failing that, Fisk contends that *McDonald v. City of Winnetka*, 371 F.3d 992 (7th Cir. 2004), held that even if Fisk's complaint revealed a rational basis, its class-of-one-claim can nonetheless survive because Nicklas blocked the Development Incentive out of animus for embarrassing him in the 2017 lawsuit or favoritism, *see id.* at 1001 (quoting *Olech*, 528

U.S. at 564).

The parties dispute whether Fisk can point to an appropriate comparator to satisfy the first criteria [**24] for a class-of-one claim, which requires intentionally different

treatment from others similarly situated. ***HN14*** "Normally, a class-of-one plaintiff will show an absence of rational basis by identifying some comparator—that is, some similarly situated person who was treated differently." *Fares Pawn*, 755 F.3d at 845. "[I]f all principal characteristics of the two individuals are the same, and one received more favorable treatment, this may show there was no proper motivation for the disparate treatment." *Id.* (quoting *Swanson v. City of Chetek*, 719 F.3d 780, 784 (7th Cir. 2013)). As explained below, however, because we conclude that Nicklas had a rational basis for blocking the Development Incentive, we need not resolve the issue of whether Fisk can satisfy the first criteria for a class-of-one claim. *Id.* at 846 (holding summary judgment appropriate where no reasonable jury could find "[plaintiff] and the comparator were similarly situated, or there was a rational basis for any differential treatment").

We agree with the district court that Fisk's complaint revealed a rational basis to explain why Nicklas recommended termination of the PDA. Relying on Fisk's own submissions about the corporate entity and principals' finances, Nicklas ultimately concluded the project was not "financially [**25] viable." Nicklas's due diligence revealed that Fisk had "no current or long-term assets that can be pledged as collateral"—other than the prospect of the Development Incentive—to obtain a loan for the estimated approximate $ 4,600,000 balance needed to pursue the project. Nicklas's concerns about Fisk's financial wherewithal to execute the planned multimillion-dollar project alone qualifies as a "reasonably conceivable state of facts that could provide a rational basis." *Scherr*, 757 F.3d at 598 (emphasis omitted) (citation omitted). Likewise, those financial concerns together with the litany of others cited in the City Council's April 22, 2019, **[*772]** meeting, including Fisk's failure to submit plans for a traffic study, square footage, storm water management, and variances and ordinances, could provide a conceivable rational basis for blocking the Development Incentive.

Fisk attempts to cast doubt on Nicklas's stated reasons for blocking the Development Incentive, but Fisk does not carry its burden to "negative any reasonably conceivable state of facts that could provide a rational basis" for Nicklas's conduct. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (citation and internal quotation marks omitted); *Bell v. Duperrault*, 367 F.3d 703, 707 (7th Cir. 2004) (burden lies with plaintiff). Fisk makes three arguments [**26] why "[l]ogic, reason, and common sense are missing" from this case, "given the patently and knowingly false statements being publicly released." First, Fisk appears to assert that Nicklas's public statements to the media regarding concerns about Fisk represent nothing more than "an orchestrated campaign of retaliation" for the 2017 lawsuit and thus evidence illegitimate animus. Fisk thus questions Nicklas's *motivation* in blocking the Development Incentive, which we do not consider until we can "hypothesize no rational basis." *Flying J*, 549 F.3d at 547.

Second, and more relevant on appeal, Fisk challenges Nicklas's doubts about Fisk's financial health as a rational basis. However, Fisk does not affirmatively state what working capital or collateral the principals had in hand. Fisk's generalized, conclusory argument that Nicklas's stated reasons for terminating the PDA were "untrue reasons" and were "false, illegitimate claims" does not "negative" Nicklas's specific doubts about Fisk's financial health. **4** *See id.* at 546 (applying *Lauth* standard on Rule 12(b)(6) motion). In its reply brief, Fisk adds "alleging depend[e]nce on lender financing is an irrational dichotomy: if [Fisk] had no working capital or collateral, it *could not* receive [**27] lender financing." It was not irrational for Nicklas to conclude the City should not finance a company that relies solely on those City-provided funds to obtain the remainder of the money needed to complete the project. ***HN15*** "The rational-basis requirement sets the legal bar low ...." *Kopp*, 725 F.3d at 686. Nicklas's concerns about the use of millions of dollars in taxpayer funds easily clear that bar.

Third and finally, Fisk argues that another of Nicklas's proffered reasons for terminating the PDA, that the entity lacked hotel experience, is not a rational basis either. Fisk contends that it should have been "evaluated in its own right separate from its principal members or ... only ... through its two principal-agent members." We do not need to

opine on whose experience matters: Fisk has not claimed that Fisk *or* its principals were not inexperienced.[5] Therefore, Fisk has not negated Nicklas's claim that it was inexperienced as a "conceivable" rational basis either. *See Miller v. City of Monona*, 784 F.3d at 1121-22 (reasoning dismissal is warranted where "the complaint reveals a **[*773]** rational basis ... for the actions of [the defendant]").

In sum, the only evidence to which Fisk points to support its position that Nicklas's reasons were neither legitimate [**28] nor true is unavailing. Fisk does not refute any of Nicklas's concerns about Fisk's financial health or inexperience. The only thing lacking "logic, reason, and common sense" is Fisk's convoluted attempt to invalidate these justifications.

Even failing to show a valid comparator, Fisk pushes forward, insisting that its class-of-one claim can proceed because it has alleged that Nicklas acted on animus flowing from the 2017 litigation. Fisk relies on our decision in *McDonald* to argue that "the existence of a rational basis is not necessarily fatal" to its case. Specifically, Fisk points to our statement in *McDonald* that a plaintiff's burden is an either-or proposition: either "there is no rational basis for the difference in treatment *or* the cause of the differential treatment is a 'totally illegitimate animus.'" *McDonald*, 371 F.3d at 1001 (emphasis added). ***HN16*** However, since *McDonald* we have clarified that "[i]t is only when courts can hypothesize no rational basis for the action that allegations of animus come into play." *Flying J*, 549 F.3d at 547. Thus, even assuming Nicklas had an ulterior motive, the finding of a rational basis is "the end of the matter—animus or no." *Fares Pawn*, 755 F.3d at 845.

Up to this point, Fisk has not adequately pleaded any of its claims. [**29] Fisk's additional arguments relying on our decisions in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), and *Swanson v. City of Chetek* do not help Fisk because unlike this case, in those cases we did not find a legitimate basis for the state actors' conduct. *See Esmail*, 53 F.3d at 179-80 (reversing dismissal where "the unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor"); *Swanson*, 719 F.3d at 784-85 (reversing in absence of alternative explanation for government actor's facially illegitimate, hostile conduct).

Fisk's allegations do not carry its burden to invalidate Nicklas's rational basis for blocking the Development Incentive. Thus, the only way Fisk could proceed at this juncture would be to identify a sufficiently similar developer with "red flags" regarding its financial wherewithal and other deficiencies. *Fares Pawn*, 755 F.3d at 848. Fisk did not do so. Accordingly, nothing in the complaint "cause[s] us to question" Nicklas's treatment of Fisk. *See Sung Park v. Ind. Univ. Sch. of Dentistry*, 692 F.3d 828, 833 (7th Cir. 2012). Fisk has therefore failed to state a violation of its Fourteenth Amendment equal protection rights.

III. Conclusion

For the foregoing reasons, we AFFIRM the opinion of the district court granting defendant's motion to dismiss.

Footnotes

[1] The City Attorney reiterated these concerns as well. In an April 2, 2019 email attached as an exhibit to Fisk's operative complaint, he wrote the "fundamental question that the City Manager is trying to address is the appropriateness of

and/or necessity for a financial incentive." Moreover, he contextualized that the City required submission of a detailed financial pro forma (along with other documents) in its review of previous requests for incentives for hotel projects

that a third-party consultant reviewed for completeness, reasonableness, and accuracy. The City Attorney also invited Fisk to share any additional information in its possession.

2 Fisk also added the City of DeKalb as a defendant in the First Amended Complaint, claiming breach of contract and the duty of good faith and fair dealing. The City moved to dismiss, or transfer, based on a forum selection clause in the PDA. The district court relinquished the state law claims against the City and therefore denied its motion to transfer as moot.

3 In its opening brief on appeal, Fisk refers broadly to a single form of protected conduct to satisfy the first prong of its First Amendment retaliation claim: "the work of one of its principals in parallel litigation." Then, in reply, Fisk appears to refer to two forms of "protected conduct": "Paragraph 139 of the Amended Complaint alleges a retaliation against speech and for accessing the courts, which is also a speech claim." To the extent Fisk attempts to add a new argument regarding the Attorney Member's *own* "access[] [to] the courts," Fisk may not raise a new theory in its reply brief. *United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834, 843 (7th Cir. 2018) ("Arguments raised for the first time in an appellate reply brief are waived."). However, whether we characterize this argument as two theories or one does not affect the crux of Fisk's argument: The Attorney Member, acting as Fisk's agent, engaged in protected conduct when it participated in the 2017 lawsuit, which in Fisk's view satisfied the first prong for a First Amendment retaliation claim. Nor does it affect our analysis. As we stated above, the petition right belonged to the client, and as we explain *infra*, Fisk never presented the free speech argument to the district court, and therefore it is waived.

4 At oral argument, Fisk for the first time affirmatively stated that it had "working capital." It referred to a March 2019 phone call between Nicklas and the principal's banker about the principal's personal finances. Fisk did not raise this argument before the district court, and it is therefore waived. *See Jackson v. Parker*, 627 F.3d 634, 640 (7th Cir. 2010).

5 Fisk's broad statements that Nicklas's stated reasons were "untrue" do not

suffice here either. Although Fisk affirmatively argued that the principals had experience for the first time during oral argument, it did not raise this argument

before the district court or in its briefing on appeal, and it is therefore waived as well. *See Jackson*, 627 F.3d at 640.

In the

United States Court of Appeals

For the Seventh Circuit

No. 20-1868

145 FISK, LLC,

Plaintiff-Appellant,

v.

F. WILLIAM NICKLAS,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.
No. 19-cv-50093 — **Philip G. Reinhard**, *Judge*.

ARGUED DECEMBER 10, 2020 — DECIDED JANUARY 26, 2021

Before SYKES, *Chief Judge*, and FLAUM and KANNE, *Circuit Judges*.

FLAUM, *Circuit Judge*. Illinois authorizes municipalities to invest in revitalizing areas of "commercial blight." *See* 65 Ill. Comp. Stat. 5/11-74.4 *et seq.* The City of DeKalb, Illinois (the "City"), entered into a preliminary agreement to allocate just such an incentive to 145 Fisk, LLC ("Fisk"). After more due diligence, however, the City reversed course.

Fisk is convinced the City would have proceeded with the funding as planned but for the meddling of City Manager F. William Nicklas. According to Fisk, Nicklas sought to retaliate against it and favor other local developers in violation of its First and Fourteenth Amendment rights. The district court dismissed Fisk's suit for failure to state a claim upon which relief can be granted and relinquished supplemental jurisdiction over the remaining state law claims. Because we agree that Fisk has not plausibly stated grounds for relief, we affirm the judgment of the district court.

I. Background

Plaintiff-appellant Fisk is a limited liability company. The entity was formed on December 13, 2018, and it consisted of two members, one of whom is an attorney ("Attorney Member").

Fisk alleges that for over two years it collaborated with the City regarding a proposed redevelopment of a dilapidated property at 145 Fisk Avenue in DeKalb. On December 18, 2018, the City adopted Resolution 2018-166 approving a Preliminary Development Incentive Agreement ("PDA") with Fisk regarding potential financing for the project. The PDA, into which the parties entered on or about January 1, 2019, provided that if Fisk met certain contingencies set forth therein, the City would provide an approximate $2,500,000 Development Incentive ("Development Incentive") in Tax Increment Financing ("TIF") to Fisk for the redevelopment. Per the PDA, the Development Incentive was "intended to be repaid as a forgivable incentive, payable through the generation of revenues from the development of the Property after the date of final plan approval."

Both the PDA and the Resolution, however, imposed conditions and obligations on both parties before finalizing the development agreement and distributing the funds. The Resolution provided that the City Council "hereby approves of the Development Incentive Agreement … subject to such amendments as shall be acceptable to the Mayor with the recommendation of the City Manager. Staff is authorized to negotiate and proceed with presentation of [the] Final Development Agreement for consideration of approval at a future date."

The PDA likewise subjected the Development Incentive to various contingencies. For example, Recital C of the PDA states "the Parties have entered into this Agreement so as to provide an incentive for [Fisk] to … proceed with the proposed project, subject to the contingencies outlined herein." Recital E continued: "[Fisk] acknowledges that the City is not required to provide the incentive contemplated herein …." Indeed, the extent of the arrangement is an "agreement to conditionally approve." The PDA further states in Article II(A) that "[Fisk] acknowledges all contingencies outlined in this Agreement, and agrees and acknowledges that until all such contingencies are fully satisfied, it has no basis to detrimentally rely upon the representations of the City with respect to the availability of incentive funding." With respect to costs incurred, under Article II(A) "[Fisk] agrees and acknowledges that any costs incurred prior to approval of a planned development agreement as contemplated herein … are *incurred at [Fisk]'s sole risk* and cost until such point in time as the Property is rezoned and the planned development agreement is approved, and any other conditions or contingencies outlined herein are satisfied in full." (Emphasis added). Even in defining the "Development Incentive," Article V(B) states "All

provisions of this Article V are contingent upon [Fisk] obtaining final approval of its plans, rezoning the Property, lender financing, and executing a planned development agreement as described above."

Amid the negotiations over the redevelopment project, a transition in the City's personnel marked the beginning of the end for Fisk's proposed Development Incentive. Around January 1, 2019, F. William Nicklas became the new City Manager. Unsatisfied with previous due diligence, Nicklas opened his own inquiries into Fisk's financial affairs and development plans. This included a series of in-person meetings and exchanges during February and March 2019 between Nicklas and Fisk's principals. Nicklas requested "personal information" about the principals, their affiliates, and their financial situation. Nicklas even spoke with the Attorney Member's personal banker. Nicklas also requested information about the corporate entity itself, including a worksheet to indicate its "financial viability." Fisk never, however, affirmatively states in the record what amount of working capital the principals or the corporate entity specifically had to fund the project contemplated by the PDA. By Fisk's account, all Nicklas's requests duplicated the City's prior ones and were not required by the Resolution or PDA.

Nicklas's review exposed cracks in the project's foundation. In an email to Fisk dated April 1, 2019, Nicklas stated he felt "duty-bound" to inform the Council that in his opinion Fisk did not have "the financial capacity or the experience" needed for the funding. Nicklas based this conclusion on submissions from Fisk, including the financial worksheet, a budget for three years of operation following 145 Fisk Avenue's completion, and the principals' own

"acknowledgment" during a March 2019 meeting that neither "ha[d] ever developed a hotel property in the past." Nicklas recommended Fisk withdraw its application. Specifically, Nicklas stated:

> [M]y judgment is based upon the following conclusions:
>
> 1. No balance sheet for 145 Fisk LLC has been submitted, but your submittal shows no current or long-term assets that can be pledged as collateral. The corporation controls a 24,000 square foot, uninhabitable facility with an estimated market value of only $300,000.
>
> 2. 145 Fisk LLC has not secured any sources of income to complete the project or operate the project upon its completion.
>
> 3. 145 Fisk LLC has no working capital and its operations are not generating any capital to pay for current expenses, much less the ongoing professional consulting fees incurred to date in the conceptual planning phase of the project.
>
> 4. On the basis of your submittal, it appears that 145 Fisk LLC is relying upon a $2.5 million TIF grant from the City and 100% of the balance of the equity funding from one or more financial institutions. Your submittal offers no working cash from the principals, or pledged private assets, or lines of credit, or other private equity to help finance the project.
>
> 5. You do not reveal the real and comparable hotel development upon which you are basing the

> projected three-year profit and loss prospectus you submitted. Since you have not developed a hotel, your numbers are not rooted in an actual operation, so far as you have revealed. They [sic] are so many numbers on a page.
>
> 6. As you may know, TIF assistance carries a federal income tax liability. Your submittal shows no indication that 145 Fisk LLC could carry that liability except at the expense of the project's development.[1]

Disagreement ensued. In a series of subsequent exchanges, the Attorney Member reiterated that the corporate entity was "simply a holding [LLC] at this point" and Nicklas's "specific comments 1-6 [were]n't accurate, include[d] erroneous assumptions, [we]re disingenuous, or [we]re completely out of context." The Attorney Member emphasized "[a]ll [they] need is a loan commitment to proceed, but … commitment and income sources cannot be secured until a formal commitment from the City is finalized." Fisk also rejected Nicklas's recommendation to withdraw its application for the Development Incentive.

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[1] The City Attorney reiterated these concerns as well. In an April 2, 2019 email attached as an exhibit to Fisk's operative complaint, he wrote the "fundamental question that the City Manager is trying to address is the appropriateness of and/or necessity for a financial incentive." Moreover, he contextualized that the City required submission of a detailed financial pro forma (along with other documents) in its review of previous requests for incentives for hotel projects that a third-party consultant reviewed for completeness, reasonableness, and accuracy. The City Attorney also invited Fisk to share any additional information in its possession.

As it turns out, the events of 2019 were not the first encounter between Nicklas and Fisk's members. The Attorney Member represented a client in a state court lawsuit involving the City of Sycamore. In response to an interrogatory dated April 21, 2017, that client identified Nicklas—who was previously Sycamore's City Manager—as a witness. Through the proceedings, an email surfaced in which Nicklas referred to regulatory requirements imposed by "[t]hat pesky Constitution" which "has strictures against artificial distinctions." However, the client in that suit was not Fisk. In fact, Fisk had not yet come into corporate existence.

During that same period, Nicklas considered two other development projects with which, Fisk alleges, Nicklas had previous financial and personal ties for funding incentives. The first was a TIF-backed hotel project with a developer named Shodeen. Nicklas had previously collaborated on a hotel with Shodeen that never came to fruition. The second was a TIF-backed apartment development project with John Pappas. Nicklas had previously represented Pappas's major investor, who intended to invest in the TIF-backed apartment, in consulting work.

Nicklas ultimately recommended the City terminate the PDA with Fisk. During an April 22, 2019, meeting, the City Council addressed Nicklas's findings. The City's Agenda notes indicated the City did not receive "the necessary financials and development plans to justify a permanent commitment to the allocation of $2.5 million" within 120 days of the Resolution. Specifically, the Council found the financial documents "were barren of any assurance that the LLC could afford ongoing preliminary planning and engineering fees." The Council further cited "insufficient project details" to

advance "to a formal development hearing." Specifically, the lack of documentation for a traffic impact study, final site engineering plans, "storm water management report examining the site's runoff," floor plans, and "variances or exceptions from the City's development ordinances." Accordingly, "[t]he Council determined that—on the basis of all known documents—there was no reasonable or informed basis upon which the project could be considered viable." The City Council unanimously voted to terminate the PDA. Fisk filed suit that same day.

Fisk commenced this action in federal court against Nicklas in his individual capacity claiming violations of state and federal law. The state law claims included tortious interference with Fisk's business expectancy, defamation per se, and defamation *per quod*. Relevant to this appeal, Fisk sued under 42 U.S.C. § 1983 for violations of its rights under the First and Fourteenth Amendments.

Nicklas moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). In lieu of a reply to Nicklas's Rule 12(b)(6) motion, Fisk obtained leave to file an amended complaint. Fisk filed the First Amended Complaint, the operative complaint for this appeal, on November 5, 2019. Pertinent here, Fisk claims Nicklas violated its First Amendment right (Count II), as well as its Fourteenth Amendment rights to due process (Count III) and equal protection (Count IX). Nicklas again moved to dismiss pursuant to Rule 12(b)(6). Fisk opposed and alternatively requested leave to replead.

On April 27, 2020, the district court dismissed Fisk's federal claims against Nicklas for failure to state a claim with

prejudice and relinquished jurisdiction over the supplemental state law claims.[2]

II. Discussion

We review the district court's grant of Nicklas's motion to dismiss de novo to determine whether Fisk has stated a claim upon which relief can be granted. *Bridges v. Gilbert*, 557 F.3d 541, 545 (7th Cir. 2009). "We accept well-pleaded facts as true and draw all reasonable inferences in the plaintiff['s] favor." *Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1060–61 (7th Cir. 2020). Notwithstanding that deference, "[t]o survive a motion to dismiss, a plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Boucher v. Fin. Sys. of Green Bay, Inc.*, 880 F.3d 362, 365–66 (7th Cir. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A. First Amendment

Count II of the complaint alleges that Nicklas retaliated against Fisk for exercising its First Amendment right. Specifically, Fisk alleges that as City Manager of DeKalb, Nicklas blocked the Development Incentive and "orchestrated [a] campaign" against Fisk because its Attorney Member exposed unflattering information about Nicklas and named him in discovery in connection with the unrelated 2017 lawsuit. Fisk pleaded that the Attorney Member's representation in

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[2] Fisk also added the City of DeKalb as a defendant in the First Amended Complaint, claiming breach of contract and the duty of good faith and fair dealing. The City moved to dismiss, or transfer, based on a forum selection clause in the PDA. The district court relinquished the state law claims against the City and therefore denied its motion to transfer as moot.

the 2017 lawsuit fell within "the First Amendment's right to petition the government for the redress of grievances." The district court dismissed Fisk's First Amendment retaliation claim, reasoning that Fisk did not engage in protected activity. That is because the client in the 2017 lawsuit, who is not a party to this litigation, engaged in protected activity by exercising *his or her* right to petition the government when he or she accessed the courts. Thus, that nonparty client has the right to be free from retaliation for exposing Nicklas, not Fisk.

To make a prima facie showing on its First Amendment retaliation claim, Fisk must establish that "(1) it engaged in activity protected by the First Amendment, (2) it suffered a deprivation that would likely deter First Amendment activity in the future, and (3) the First Amendment activity was … 'at least a motivating factor' in the Defendant['s] decision to take the retaliatory action." *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008) (quoting *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006)). We have recognized that a plaintiff's exercise of "[t]he First Amendment right to petition the government for the redress of grievances" may qualify for the first prong of a First Amendment retaliation claim. *See id.* Furthermore, the right to petition "extends to the courts in general and applies to litigation in particular." *Id.* (citing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *NAACP v. Button*, 371 U.S. 415, 429–30 (1963)).

On appeal, Fisk argues the district court erred in concluding it did not engage in protected conduct to satisfy the first prong of a First Amendment retaliation claim. Fisk asserts that its protected conduct was "the work of one of its principals in [the 2017] litigation." It appears that Fisk *now* contends that the Attorney Member exercised his own First

Amendment right to free speech, as distinct from his right to petition the government. Specifically, Fisk asserts that the Attorney Member exposed Nicklas in the 2017 litigation, while acting as Fisk's agent, and thus the protected conduct is attributable to Fisk. Failing that, Fisk argues that even if we reject its arguments based on agency theory, Nicklas's retaliatory conduct against the Attorney Member for exercise of his free speech right nonetheless chilled Fisk from exercising its own First Amendment rights.

The district court did not "erroneously ignore[] agency principles" when it concluded that Fisk did not engage in protected activity in the 2017 lawsuit. The agency question is irrelevant because the district court rightfully found that the underlying right to be free from retaliation for petitioning the government belonged to neither Fisk nor the Attorney Member. As the district court explained, "[t]he Attorney Member named Nicklas as a witness in that suit on behalf of *his client* in that case. He did not do so on behalf of [Fisk]." (Emphasis added). Stated another way, the *client's* exercise of *its* First Amendment petition rights in 2017 cannot be Fisk's "protected conduct" for the purposes of *Fisk's* "petition for redress of grievances retaliation claim." *See Bridges*, 557 F.3d at 553 (dismissing claim because individual not party to lawsuit "ha[d] no 'underlying claim' that implicates his *own* right of access to the courts" (emphasis added) (quoting *Christopher v. Harbury*, 536 U.S. 403, 415 (2009))). Fisk did not exercise its First Amendment petition right; in fact, Fisk did not even exist prior to 2018. That First Amendment right ran to the client in the 2017 suit. Fisk cannot "rely on another plaintiff's injury in support of [its] own … claim" to show it engaged in protected activity. *Id.* at 554.

To the extent that Fisk advances a retaliation argument based on the exercise of *free speech* rights through the Attorney Member, that argument was waived.[3] Fisk contends that it engaged in protected free speech when the Attorney Member filed evidence and witness disclosures implicating Nicklas in the 2017 suit. *Cf. id.* at 551–52 (reasoning plaintiff's affidavit supplying his eyewitness account of alleged incident of inmate mistreatment by prison officials could plausibly amount to protected First Amendment speech). However, Fisk did not frame Count II in the operative complaint as a retaliation claim based on its exercise of its free speech rights. Rather, Count II referred exclusively to "[t]he First Amendment right to petition the government for the redress of grievances [that] extends to the courts in general and is protected activity," and alleged "[t]hat filing, prosecuting and defending the lawsuit where Defendant Nicklas was discovered as referring to the

[3] In its opening brief on appeal, Fisk refers broadly to a single form of protected conduct to satisfy the first prong of its First Amendment retaliation claim: "the work of one of its principals in parallel litigation." Then, in reply, Fisk appears to refer to two forms of "protected conduct": "Paragraph 139 of the Amended Complaint alleges a retaliation against speech and for accessing the courts, which is also a speech claim." To the extent Fisk attempts to add a new argument regarding the Attorney Member's *own* "access[] [to] the courts," Fisk may not raise a new theory in its reply brief. *United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834, 843 (7th Cir. 2018) ("Arguments raised for the first time in an appellate reply brief are waived."). However, whether we characterize this argument as two theories or one does not affect the crux of Fisk's argument: The Attorney Member, acting as Fisk's agent, engaged in protected conduct when it participated in the 2017 lawsuit, which in Fisk's view satisfied the first prong for a First Amendment retaliation claim. Nor does it affect our analysis. As we stated above, the petition right belonged to the client, and as we explain *infra*, Fisk never presented the free speech argument to the district court, and therefore it is waived.

Constitution as 'pesky' was a protected activity because 'the First Amendment's right to petition the government for the redress of grievances extends to the courts in general and applies to litigation in particular.'" In opposition to Nicklas's Rule 12(b)(6) motion in the district court, Fisk referred to "[t]he right to petition for redress of grievances … includ[ing] the right to file a claim before a judicial body. [*Cal. Motor Transp.*, 404 U.S. at 510]. The right to petition provides additional protection for communication specifically aimed at the redress of grievances."

Fisk therefore advances this free speech theory for the first time on appeal. "In civil litigation, issues not presented to the district court are normally forfeited on appeal." *Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 308 (7th Cir. 2010).

As a final backstop, Fisk asserts that "[e]ven setting agency principles aside" the First Amendment applies to close parties. In Fisk's view, Nicklas retaliated against the Attorney Member for his protected speech, which then chilled Fisk's speech. As with its free-speech-retaliation theory described above, Fisk did not argue this close-party theory to the district court below, so we decline to reach it on appeal. *Id.* ("[I]t will be a rare case in which failure to present a ground to the district court has caused no one—not the district judge, not us, not the appellee—any harm of which the law ought to take note." (citation and internal quotation marks omitted)).

Because Fisk has not alleged that the corporate entity itself engaged in any protected conduct, its First Amendment claim fails at the outset.

B. Due Process

We consider next Fisk's claim in Count III that Nicklas deprived it of its property in violation of the Fourteenth Amendment's Due Process Clause. Relying on our decision in *Barrows v. Wiley*, 478 F.3d 776 (7th Cir. 2007), the district court explained that Fisk had no constitutionally protected property interest because the PDA and contract for the purchase provided only "a right to acquire the property," not a right in the property itself, *see id.* at 780.

To prevail on a procedural due process claim, a plaintiff must make a threshold showing that it "possessed a constitutionally protected property interest." *Kim Constr. Co., Inc. v. Bd. of Trs. of Vill. of Mundelein*, 14 F.3d 1243, 1245 (7th Cir. 1994) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985)). "A property interest for purposes of the Due Process Clause is created by 'existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Id.* at 1245–46 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). But as we reiterated in *Kim*, "property is what is securely and durably yours under state … law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain." *Id.* at 1246 (alteration in original) (quoting *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983), *overruled on other grounds by Brunson v. Murray*, 843 F.3d 698 (7th Cir. 2016)).

On appeal, Fisk argues that the Resolution and PDA created a specific property right to the incentive. Alternatively, Fisk contends that the business relationship created by the

Resolution, the contract to purchase the underlying land (which was contingent on receipt of the incentive), and the right to zoning approval were, on their own, each sufficient for Fourteenth Amendment purposes.

Fisk's argument that the Resolution created a protectable interest fails. We have stated that "[t]o demonstrate a property interest worthy of protection under the [F]ourteenth [A]mendment's [D]ue [P]rocess [C]lause, a party may not simply rely upon the procedural guarantees of state law or local ordinance." *Cain v. Larson*, 879 F.2d 1424, 1426 (7th Cir. 1989). "[O]nly when the mandated procedure contains within it a *substantive* liberty or property interest" can such "purely procedural rules of … local law" give rise to a due process claim. *Lavite v. Dunstan*, 932 F.3d 1020, 1033 (7th Cir. 2019). The Illinois Supreme Court has pronounced that "[a] resolution or order is not a law, but merely the form in which the legislative body expresses an opinion." *Chi. & N. Pac. R.R. Co. v. City of Chicago*, 51 N.E. 596, 598 (Ill. 1898). The existence of the Resolution alone thus does not suffice to create a protected property interest; Fisk must identify some other "substantive liberty or property interest embedded within [relevant] procedural regulations." *Lavite*, 932 F.3d at 1034.

Fisk has not met that burden, as the plain language of the Resolution belies Fisk's characterization of it as "non-discretionary," i.e., as offering anything more than procedural rights. The Resolution was entitled "Authorizing A *Preliminary* Development Incentive Agreement," and the City Council resolved that "[s]taff is authorized to negotiate and proceed with presentation of *Final* Development Agreement for consideration of approval at a future date." (Emphases added). By its own terms, the Resolution did not bind or

otherwise "substantively limit[]" the City "by mandating a particular result when certain clearly stated criteria are met." *See Kim*, 14 F.3d at 1248 ("Where 'the requisite ... mandatory language' is lacking, no protected interest is created." (alteration in original) (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 464 (1989))); *Hohmeier v. Leyden Cmty. High Schs. Dist. 12*, 954 F.2d 461, 465 (7th Cir. 1992) ("A rule or regulation … must have 'binding force' in order to create constitutionally protected property."). We therefore agree with the district court's conclusion that no constitutionally protected property interest arose from the Resolution.

The clear lack of binding language also defeats Fisk's unsupported assertion that the PDA created a protectable interest. The PDA was riddled with discretionary language. True, the PDA states, "the Parties agree and acknowledge that the Development Incentive as described herein is necessary in order to induce this project to occur, and satisfies all requirements applicable to such an incentive." However, tellingly, Fisk itself describes the PDA as a "mandatory *consideration* of the project." (Emphasis added). The PDA provided that Fisk "acknowledge[d] that the City is not required to provide the incentive contemplated herein." Elsewhere, the PDA further stated that until Fisk met all contingencies outlined in the PDA, "it ha[d] no basis to detrimentally rely upon the representations of the City with respect to the availability of incentive funding." The PDA therefore lacked "sufficient directives to the decisionmaker to support a claim of entitlement" to the Development Incentive. *See Kim*, 14 F.3d at 1248. For that same reason, Fisk's reliance on *Barrows* is misplaced; unlike *Barrows*, the parties here did not agree that "a right to" the contract existed. 478 F.3d at 779. Even setting that issue aside, *Barrows* offers little help to Fisk, because we held in that case

that the plaintiff did not have a cognizable procedural due process claim. *Id.* at 781–82.

Nor does Fisk's argument that the Resolution created a "business relationship" affect our analysis. Under Illinois law, the existence of a business relationship may be cognizable for tort protection. *See Miller v. Lockport Realty Grp., Inc.*, 878 N.E.2d 171, 175 (Ill. App. Ct. 2007). But Illinois tort law only "recognizes that a person's business relationships constitute a property interest" for purposes of creating an "entitle[ment] to protection from unjustified tampering by another." *Id.* (citing *Belden Corp. v. InterNorth, Inc.*, 413 N.E.2d 98 (Ill. App. Ct. 1980)). Illinois tort law does not transform a business relationship into a constitutionally protected property right. *See Reed*, 704 F.2d at 948 (urging courts to "look behind labels" and instead "ask whether under Illinois law" the interest in question is "securely and durably" the plaintiff's); *see also Rebirth Christian Acad. Daycare, Inc. v. Brizzi*, 835 F.3d 742, 747–48 (7th Cir. 2016) ("[W]hen determining the existence of a property interest … 'we must look behind labels.'" (quoting *Reed*, 704 F.2d at 948)). For the reasons already stated, the Resolution did not create a constitutionally protected property interest.

We find similarly unavailing Fisk's remaining argument that the underlying contract for the building and the rezoning decision established cognizable constitutional property interests. No cognizable interest stems from the underlying contract for the building. The contract was conditioned on the execution of a final development agreement, and thus that contract represented not a secure property interest but rather the hope to acquire one. *See Cole v. Milwaukee Area Tech. Coll. Dist.*, 634 F.3d 901, 904 (7th Cir. 2011) ("To have a protectable

property interest in a benefit … a plaintiff must have more than an 'abstract need or desire for it' and more than a 'unilateral expectation of it.'" (quoting *Roth*, 408 U.S. at 577)). Meanwhile, the contention that Fisk lost "a mechanism for the property to be rezoned" fares no better because the zoning process is merely a "local procedural protection[]," which "do[es] not by [itself] give rise to [a] federal due process interest[]." *Lavite*, 932 F.3d at 1033.

Finally, adequate state law remedies remained available to Fisk. The district court relinquished supplemental jurisdiction over Fisk's state law claims, and whether Nicklas's or the City's conduct violated state laws is for the state courts to decide. In line with Nicklas's arguments, "[w]e have similarly held that, regardless of how a plaintiff labels an objectionable land-use decision (i.e., as a taking or as a deprivation without substantive or procedural due process), recourse must be made to state rather than federal court." *CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, 769 F.3d 485, 489 (7th Cir. 2014).

Fisk cannot claim a constitutionally protected property interest, and so its procedural due process claim fails at the threshold. Accordingly, the issue of whether Fisk "was afforded due process before being deprived of that interest does not arise." *Kim*, 14 F.3d at 1245.

C. Equal Protection

Fisk argues in Count IV that Nicklas singled it out for disparate treatment without a rational basis in violation of the Fourteenth Amendment's guarantee against "den[ial] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Specifically, Fisk claims

that Nicklas, in his role as City Manager, blocked the Development Incentive arbitrarily and discriminately because of personal animus or favoritism toward other developers. The district court concluded that Fisk pled itself out of court by providing several legitimate reasons for Nicklas's conduct, defeating any "class of one" equal protection claim under the standard articulated in *Miller v. City of Monona*, 784 F.3d 1113, 1121 (7th Cir. 2015) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

Under the Fourteenth Amendment's Equal Protection Clause, a plaintiff who is not a member of a "protected class" may nonetheless bring a claim under the "so-called 'class-of-one' theory." *Fares Pawn, LLC v. Ind. Dep't. of Fin. Insts.*, 755 F.3d 839, 841 (7th Cir. 2014). To state a claim under this theory, a plaintiff must allege "(1) that [it] has been intentionally treated differently from others similarly situated, and (2) that there is no rational basis for the difference in treatment." *Id.* at 845 (citing *Olech*, 528 U.S. at 564). For the second criteria, we ask whether "a *conceivable* rational basis for the difference in treatment" exists. *D.B. ex rel. Kurtis B. v. Kopp*, 725 F.3d 681, 686 (7th Cir. 2013). In fact, the rational basis need not even be "the *actual* justification." *Id.* "[A]ny reasonably conceivable state of facts that could provide a *rational basis*" will suffice. *See Scherr v. City of Chicago*, 757 F.3d 593, 598 (7th Cir. 2014) (quoting *Lauth v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005)). We have further clarified that "[i]t is only when courts can hypothesize no rational basis for the action that allegations of animus come into play." *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 547 (7th Cir. 2008).

Fisk is not a member of a protected class, so it proceeds under this class-of-one theory. On appeal, Fisk argues there

was no rational basis for Nicklas's conduct. Failing that, Fisk contends that *McDonald v. City of Winnetka*, 371 F.3d 992 (7th Cir. 2004), held that even if Fisk's complaint revealed a rational basis, its class-of-one-claim can nonetheless survive because Nicklas blocked the Development Incentive out of animus for embarrassing him in the 2017 lawsuit or favoritism, *see id.* at 1001 (quoting *Olech*, 528 U.S. at 564).

The parties dispute whether Fisk can point to an appropriate comparator to satisfy the first criteria for a class-of-one claim, which requires intentionally different treatment from others similarly situated. "Normally, a class-of-one plaintiff will show an absence of rational basis by identifying some comparator—that is, some similarly situated person who was treated differently." *Fares Pawn*, 755 F.3d at 845. "[I]f all principal characteristics of the two individuals are the same, and one received more favorable treatment, this may show there was no proper motivation for the disparate treatment." *Id.* (quoting *Swanson v. City of Chetek*, 719 F.3d 780, 784 (7th Cir. 2013)). As explained below, however, because we conclude that Nicklas had a rational basis for blocking the Development Incentive, we need not resolve the issue of whether Fisk can satisfy the first criteria for a class-of-one claim. *Id.* at 846 (holding summary judgment appropriate where no reasonable jury could find "[plaintiff] and the comparator were similarly situated, or there was a rational basis for any differential treatment").

We agree with the district court that Fisk's complaint revealed a rational basis to explain why Nicklas recommended termination of the PDA. Relying on Fisk's own submissions about the corporate entity and principals' finances, Nicklas ultimately concluded the project was not "financially viable."

Nicklas's due diligence revealed that Fisk had "no current or long-term assets that can be pledged as collateral"—other than the prospect of the Development Incentive—to obtain a loan for the estimated approximate $4,600,000 balance needed to pursue the project. Nicklas's concerns about Fisk's financial wherewithal to execute the planned multimillion-dollar project alone qualifies as a "reasonably conceivable state of facts that could provide a rational basis." *Scherr,* 757 F.3d at 598 (emphasis omitted) (citation omitted). Likewise, those financial concerns together with the litany of others cited in the City Council's April 22, 2019, meeting, including Fisk's failure to submit plans for a traffic study, square footage, storm water management, and variances and ordinances, could provide a conceivable rational basis for blocking the Development Incentive.

Fisk attempts to cast doubt on Nicklas's stated reasons for blocking the Development Incentive, but Fisk does not carry its burden to "negative any reasonably conceivable state of facts that could provide a rational basis" for Nicklas's conduct. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (citation and internal quotation marks omitted); *Bell v. Duperrault*, 367 F.3d 703, 707 (7th Cir. 2004) (burden lies with plaintiff). Fisk makes three arguments why "[l]ogic, reason, and common sense are missing" from this case, "given the patently and knowingly false statements being publicly released." First, Fisk appears to assert that Nicklas's public statements to the media regarding concerns about Fisk represent nothing more than "an orchestrated campaign of retaliation" for the 2017 lawsuit and thus evidence illegitimate animus. Fisk thus questions Nicklas's *motivation* in blocking the Development Incentive, which we do not consider until we can "hypothesize no rational basis." *Flying J*, 549 F.3d at 547.

Second, and more relevant on appeal, Fisk challenges Nicklas's doubts about Fisk's financial health as a rational basis. However, Fisk does not affirmatively state what working capital or collateral the principals had in hand. Fisk's generalized, conclusory argument that Nicklas's stated reasons for terminating the PDA were "untrue reasons" and were "false, illegitimate claims" does not "negative" Nicklas's specific doubts about Fisk's financial health.[4] *See id.* at 546 (applying *Lauth* standard on Rule 12(b)(6) motion). In its reply brief, Fisk adds "alleging depend[e]nce on lender financing is an irrational dichotomy: if [Fisk] had no working capital or collateral, it *could not* receive lender financing." It was not irrational for Nicklas to conclude the City should not finance a company that relies solely on those City-provided funds to obtain the remainder of the money needed to complete the project. "The rational-basis requirement sets the legal bar low …." *Kopp*, 725 F.3d at 686. Nicklas's concerns about the use of millions of dollars in taxpayer funds easily clear that bar.

Third and finally, Fisk argues that another of Nicklas's proffered reasons for terminating the PDA, that the entity lacked hotel experience, is not a rational basis either. Fisk contends that it should have been "evaluated in its own right separate from its principal members or … only … through its two principal-agent members." We do not need to opine on whose experience matters: Fisk has not claimed that Fisk *or* its

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[4] At oral argument, Fisk for the first time affirmatively stated that it had "working capital." It referred to a March 2019 phone call between Nicklas and the principal's banker about the principal's personal finances. Fisk did not raise this argument before the district court, and it is therefore waived. *See Jackson v. Parker*, 627 F.3d 634, 640 (7th Cir. 2010).

principals were not inexperienced.[5] Therefore, Fisk has not negated Nicklas's claim that it was inexperienced as a "conceivable" rational basis either. *See Miller v. City of Monona*, 784 F.3d at 1121–22 (reasoning dismissal is warranted where "the complaint reveals a rational basis … for the actions of [the defendant]").

In sum, the only evidence to which Fisk points to support its position that Nicklas's reasons were neither legitimate nor true is unavailing. Fisk does not refute any of Nicklas's concerns about Fisk's financial health or inexperience. The only thing lacking "logic, reason, and common sense" is Fisk's convoluted attempt to invalidate these justifications.

Even failing to show a valid comparator, Fisk pushes forward, insisting that its class-of-one claim can proceed because it has alleged that Nicklas acted on animus flowing from the 2017 litigation. Fisk relies on our decision in *McDonald* to argue that "the existence of a rational basis is not necessarily fatal" to its case. Specifically, Fisk points to our statement in *McDonald* that a plaintiff's burden is an either–or proposition: either "there is no rational basis for the difference in treatment *or* the cause of the differential treatment is a 'totally illegitimate animus.'" *McDonald*, 371 F.3d at 1001 (emphasis added). However, since *McDonald* we have clarified that "[i]t is only when courts can hypothesize no rational basis for the action that allegations of animus come into play." *Flying J*, 549 F.3d at 547. Thus, even assuming Nicklas had an ulterior motive,

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[5] Fisk's broad statements that Nicklas's stated reasons were "untrue" do not suffice here either. Although Fisk affirmatively argued that the principals had experience for the first time during oral argument, it did not raise this argument before the district court or in its briefing on appeal, and it is therefore waived as well. *See Jackson*, 627 F.3d at 640.

the finding of a rational basis is "the end of the matter—animus or no." *Fares Pawn*, 755 F.3d at 845.

Up to this point, Fisk has not adequately pleaded any of its claims. Fisk's additional arguments relying on our decisions in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), and *Swanson v. City of Chetek* do not help Fisk because unlike this case, in those cases we did not find a legitimate basis for the state actors' conduct. *See Esmail*, 53 F.3d at 179–80 (reversing dismissal where "the unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor"); *Swanson*, 719 F.3d at 784–85 (reversing in absence of alternative explanation for government actor's facially illegitimate, hostile conduct).

Fisk's allegations do not carry its burden to invalidate Nicklas's rational basis for blocking the Development Incentive. Thus, the only way Fisk could proceed at this juncture would be to identify a sufficiently similar developer with "red flags" regarding its financial wherewithal and other deficiencies. *Fares Pawn*, 755 F.3d at 848. Fisk did not do so. Accordingly, nothing in the complaint "cause[s] us to question" Nicklas's treatment of Fisk. *See Sung Park v. Ind. Univ. Sch. of Dentistry*, 692 F.3d 828, 833 (7th Cir. 2012). Fisk has therefore failed to state a violation of its Fourteenth Amendment equal protection rights.

III. Conclusion

For the foregoing reasons, we AFFIRM the opinion of the district court granting defendant's motion to dismiss.

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ILLINOIS

WESTERN DIVISION

145 FISK, LLC,	)	
Plaintiff,	)	19 C 50093
v.	)	
F. WILLIAMS NICKLAS, Individually,	)	Judge Philip G. Reinhard
Defendant.	)	

ORDER

For the reasons stated below, Nicklas's motion to dismiss [33] is granted. Plaintiff's federal claims set forth in Counts II, III and IX are dismissed with prejudice. The court relinquishes supplemental jurisdiction over the remaining claims against Nicklas and the City which are all dismissed without prejudice. The City's motion to dismiss [31] is denied as moot. This case is terminated.

STATEMENT-OPINION

Plaintiff, 145 Fisk, LLC brings this action against the only remaining defendants[1], F. William Nicklas, in his individual capacity, and City of DeKalb, Illinois ("City"). Jurisdiction is premised on 28 U.S.C. §§ 1331 and 1367. The federal claims are brought under Section 1983 (42 U.S.C. § 1983) against Nicklas for First Amendment retaliation (Count II), deprivation of property without due process (Count III) and denial of equal protection of the laws (Count IX). The remaining claims against Nicklas, and all the claims against the City, are state law claims. The state law claims against Nicklas are tortious interference with a business expectancy (Count I), defamation per se (Count IV), defamation per quod (Count V) and tortious interference with a contract (Count VIII). The state law claims against the City are breach of contract (Count VI) and breach of good faith and fair dealing (Count VII). Nicklas moves to dismiss [33] for failure to state a claim. Fed. R. Civ. P. 12(b)(6). The City moves to dismiss, or transfer [31], based on a forum selection clause in the Preliminary Development Agreement ("PDA") between the City and plaintiff.

Overview

Plaintiff is a limited liability company with two members. One of the members is an attorney (Attorney Member). On January 1, 2019, plaintiff entered a Preliminary Development Incentive Agreement ("PDA") with the City. The PDA provided that if plaintiff met certain contingencies set forth in the PDA, the City would provide $2.5 million in TIF financing to plaintiff for use in plaintiff's project to redevelop a dilapidated property in DeKalb.

[1] Plaintiff had named others as respondents in discovery but they have been dismissed on plaintiff's motion [60].

Also, on or about January 1, 2019, Nicklas began working for the City as its City Manager. At some point prior to Nicklas's employment with the City, plaintiff's Attorney Member had been representing a different client in a lawsuit. In that case, the Attorney Member, on behalf of his client, had named Nicklas as a witness. After becoming its City Manager, Nicklas recommended the City terminate the PDA. On April 22, 2019, the City terminated the PDA at a city council meeting and plaintiff filed this lawsuit the same day. The original complaint named only Nicklas as a defendant. An amended complaint later added the City as a defendant.

In considering a motion to dismiss, all well-pleaded factual allegations are taken as true. Horist v. Sudler & Co., 941 F.3d 274, 278 (7th Cir. 2019). To survive a motion to dismiss, the complaint "must plausibly suggest a right to relief above the speculative level." Id. The plausibility determination is context specific and requires a court to draw on its judicial experience and common sense. Ashcroft v, Iqbal, 556 U.S. 662, 679 (2009). "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]' — 'that the pleader is entitled to relief.' Fed. Rule Civ. Proc. 8(a)(2)." Id.

First Amendment Retaliation (Count II)

To prevail on a First Amendment retaliation claim, plaintiff must show that (1) it engaged in activity protected by the First Amendment; (2) it suffered a deprivation likely to deter it from engaging in First Amendment activity in the future; and (3) its First Amendment activity was at least a motivating factor for Nicklas's decision to take retaliatory action. Bridges v. Gilbert, 557 F.3d 541, 553 (7th Cir. 2009). "The First Amendment right to petition the government for redress of grievances includes the right of access to the courts." Id.

Plaintiff alleges Nicklas, by his tortious interference, defamation and misrepresentations while serving as city manager, persuaded the City to terminate the PDA. The PDA would have provided $2.5 million in TIF financing for plaintiff's redevelopment project. Plaintiff alleges that its Attorney Member's acting as counsel and naming Nicklas as a witness in the prior unrelated lawsuit was protected First Amendment activity because it fell within the right to petition the government for redress of grievances protected by the First Amendment. Plaintiff asserts that its Attorney Member's protected First Amendment activity was at least a motivating factor in Nicklas taking adverse action against plaintiff.

The alleged protected activity was taken by the Attorney Member in his capacity as an attorney for a litigant in a separate lawsuit. The alleged protected activity was not engaged in by plaintiff. The Attorney Member named Nicklas as a witness in that suit on behalf of his client in that case. He did not do so on behalf of plaintiff. He was not acting as a manager or member of plaintiff when he was representing his client in that case. The complaint does not plausibly allege that plaintiff took any action in the lawsuit in which the Attorney Member served as counsel, much less, any action falling within the right to petition the government for redress of grievances protected by the First Amendment. The complaint does not show plaintiff had anything to do with that case at all. Plaintiff does not cite, nor could the court find, any case in which the actions taken by an attorney while representing a client in a lawsuit has been held to be protected First Amendment activity engaged in by a business entity, which did not exist at the

time the attorney took the action, but was later formed and in which the attorney became a member, shareholder or partner.

Plaintiff argues Bridges supports its claim. But Bridges held that retaliation against Bridges for providing an affidavit in another person's wrongful death case could only affect the access to the courts of that other person. Bridges could not rely on someone else's injury to support his own denial of access claim. Id., at 554. Plaintiff was not a party to the lawsuit in which the Attorney Member acted. Only that party could assert an injury for denial of access to the courts.

Plaintiff suggests that its Attorney Member was akin to the "jailhouse lawyer" referenced in Bridges but that jailhouse lawyer was a prisoner who had been transferred to another prison for exercising his own right to access the courts and assisting other prisoners in exercising their right of access to the courts. The court noted "we have acknowledged that these advocates have standing to assert their fellow inmates' denial of access claims" because otherwise "prison officials could simply transfer troublesome jailhouse lawyers and leave the remaining inmates without an alternate means to access the courts." Id. But this case does not involve inmate litigation. The Attorney Member's client in the prior case has not been alleged to have been denied access to the courts and been left unable to assert a claim for that denial therefore requiring plaintiff to be allowed to assert the claim on its behalf. That party could assert an injury for denial of access to the courts itself and is the only party that could do so. Plaintiff cannot bring that claim and plaintiff has not engaged in any protected First Amendment activity itself. Therefore, the first element of a claim for First Amendment retaliation is not shown by the complaint and the complaint, therefore, fails to state a claim for First Amendment retaliation.

Due Process Violation (Count III)

Count III asserts a due process violation. To sustain a claim for a deprivation of property without due process, plaintiff must show "(1) a cognizable property interest; (2) a deprivation of that property interest; and (3) a denial of due process." Khan v. Bland, 630 F.3d 519, 527 (7th Cir. 2010). Plaintiff argues it has a protected property interest in the PDA and in its contract to purchase the real estate which is the subject of the PDA. It asserts Nicklas deprived it of that property without due process when he used defamation to improperly influence the "public sentiment and City Council" against plaintiff's redevelopment project, induced the City to breach the PDA, and "fired or forced to resign most of the City Staff that had been working on Plaintiff's project." Plaintiff also alleges Nicklas refused to provide a mechanism for the property to be rezoned in retaliation for plaintiff's First Amendment activity set out in Count II.[2]

An opportunity to acquire property does not qualify as a constitutionally protected property interest and "[l]osing the opportunity to acquire property does not constitute a deprivation." Barrows v. Wiley, 478 F.3d 776, 780 (7th Cir. 2007); Lake Forest Real Estate Investors, LLC v. Village of Lincolnwood, Illinois, 19 C 2263, 2019 WL 5694311, * 5 (N.D. Ill. Nov. 4, 2019). Plaintiff did not own the property. It had only a right to acquire the property. Dkt # 25, p.27, par. 103; Dkt # 25-7, p. 4, Recitals par. B, and this right does not create a

[2] As discussed above, plaintiff did not engage in protected First Amendment activity, so it has not stated a First Amendment retaliation claim.

constitutionally protected property interest. Further, because a municipality's decision whether to rezone property is discretionary, the party seeking rezoning has no property interest in the rezoning decision or in access to participation in the zoning process. Lake Forest, 2019 WL 5694311, * 5. The allegation that Nicklas refused to provide a mechanism for the property to be rezoned does not state a claim for deprivation of a constitutionally protected property interest.

Plaintiff contends it has a protectible property interest in the PDA. The PDA is a contract. It provides that if certain contingencies are met the City will pay $2.5 million in TIF funds to plaintiff for plaintiff's use in its redevelopment project. In its complaint, plaintiff alleges the City breached this contract (Count VI). It alleges Nicklas tortiously interfered with the contract and induced its breach (Count VIII). It alleges Nicklas induced the breach by defaming plaintiff. Defamation is alleged in Counts IV and V.

Due process usually means notice and an opportunity to be heard. Goros v. County of Cook, 489 F.3d 857, 859 (7th Cir. 2007). Due process does not require a hearing to resolve disputes about the meaning and effect of contracts. Id., at 859-60. Section 1983 may not be used to determine whether a "contract creates a property interest in the abstract; unless the plaintiff maintains that the state actor had to offer a hearing to resolve some contested issue of fact, the dispute belongs in state court under state law." Id., at 860. The City terminated the PDA by a vote of its city council. Whether doing so was a breach of contract depends on the meaning of the terms of the PDA. Plaintiff does not assert the City was required to provide it a hearing before terminating the PDA. Plaintiff alleges the termination violated the terms of the PDA. This is a matter of state law to be determined by state courts. The PDA did not create a property interest protectible under the Due Process Clause of the Fourteenth Amendment. Because plaintiff had no constitutionally protected property interest in the PDA, plaintiff has no due process claim against Nicklas for any actions he took to induce a breach of the PDA by the City.[3]

Equal Protection (Count IX)

Plaintiff's Count IX alleges an equal protection denial by Nicklas. It asserts Nicklas discriminated against plaintiff "via defamation in order to interfere with the project as a result of the First Amendment speech, access to the court system, and the right to counsel" after Nicklas was involved as a witness in the prior litigation discussed above. In its brief, plaintiff argues in support of its equal protection claim that the TIF Act is not being applied in an indiscriminate fashion but instead that Nicklas steered the TIF funds (which under the PDA would have gone to plaintiff) to a previous client of Nicklas's in retaliation against plaintiff "whose speech he did not agree with given the underlying lawsuit." Plaintiff contends the TIF Act "is therefore being applied arbitrarily and discriminately based on speech and a business association that [Nicklas] determines rather than any legitimate government interest."

[3] To the extent plaintiff is asserting a substantive due process claim, that claim also fails for lack of a property interest. "[T]he lack of a protectible property interest is fatal to a substantive due process claim." General Auto Service Station v. City of Chicago, 526 F.3d 991, 1002 (7th Cir. 2008).

The court has already concluded above that plaintiff could not state a First Amendment retaliation claim because plaintiff did not engage in any protected First Amendment activity in the lawsuit in which the Attorney Member named Nicklas as a witness. So, a claim plaintiff was denied equal protection because of its alleged protected First Amendment activity would also fail due to the absence of any such activity.

Plaintiff argues Nicklas applied the TIF Act arbitrarily and discriminately both in retaliation for plaintiff's First Amendment activity and, also based on a business association of Nicklas's. Plaintiff has not alleged that it is a member of any protected class, so its equal protection claim is a "class of one" claim. Under the least demanding standard articulated by the Court of Appeals, to state a claim for class of one equal protection denial, a plaintiff must allege "that the state actors lacked a rational basis for singling them out for intentionally discriminatory treatment." Miller v. City of Monona, 784 F.3d 1113, 1121 (7th Cir. 2015). "It is not enough for a complaint to suggest an improper motive." Id. At the pleading stage, all it takes to defeat a class of one claim "is a conceivable rational basis for the difference in treatment." Id. (emphasis in original). A plaintiff may plead itself out of court if its "complaint reveals a potential rational basis for the actions of local officials." Id.

Plaintiff's complaint reveals a potential rational basis for Nicklas's action. The complaint's Exhibit 4 [25-4] sets forth several reasons for Nicklas to recommend termination of the PDA, including lack of financial capacity, lack of experience, no working capital, no working cash from the principals, and no pledged assets. While plaintiff challenges the accuracy of these reasons, for purposes defeating a class of one equal protection claim these reasons are "conceivable" which is all that is needed to defeat the equal protection claim.

Because all plaintiff's federal claims are dismissed, the court in its discretion will decline to exercise supplemental jurisdiction over the remaining state law claims. A district court may decline to exercise supplemental jurisdiction where it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C.§ 1367(c)(3). "Absent unusual circumstances, district courts relinquish supplemental jurisdiction over pendant state law claims if all claims within the court's original jurisdiction have been resolved before trial." Coleman v. City of Peoria, 925 F.3d 336, 352 (7th Cir. 2019).

For the foregoing reasons, Nicklas's motion to dismiss [33] is granted. Plaintiff's federal claims set forth in Counts II, III and IX are dismissed with prejudice. The court relinquishes supplemental jurisdiction over the remaining claims against Nicklas and the City which are all dismissed without prejudice. The City's motion to dismiss [31] is denied as moot. This case is terminated.

Date: 4/27/2020

ENTER:

Philip G. Reinhard

United States District Court Judge

Electronic Notices. (LC)

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

145 Fisk. LLC, Plaintiff(s), v. F. Williams Nicklas, Individually, Defendant(s).	Case No. 19 C 50093 Judge Philip G. Reinhard

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendant(s) F. Williams Nicklas, Individually
and against plaintiff(s) 145 Fisk. LLC.

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Plaintiff's federal claims set forth in Counts II, III, and IX are dismissed with prejudice. The court relinquishes supplemental jurisdiction over the remaining claims against Nicklas and the City of DeKalb, which are all dismissed without prejudice. The City of DeKalb's motion to dismiss is denied as moot.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Philip G. Reinhard on a motion to dismiss.

Date: 4/28/2020

Thomas G. Bruton, Clerk of Court
/S/ Susan Bennehoff, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

145 FISK, LLC, Plaintiff, v. F. William Nicklas, individually, & the City of DeKalb, Defendants, and John F. Pappas, Pappas Development, LLC, PNG Development, LLC, and Heartland Real Estate Holdings, LLC Respondents in Discovery.	Case No.: 19 CV 50093 **Jury Trial Demanded**

FIRST AMENDED COMPLAINT AT LAW

NOW COMES the Plaintiff, 145 FISK, LLC, by and through its undersigned attorney, and complains of the Defendants, F. William Nicklas and the City of DeKalb, and Respondents in Discovery John Pappas, Pappas Development, LLC, and PNG Development, LLC, and Heartland Real Estate Holdings, LLC, as follows:

JURISDICTION AND VENUE

1. This court has non-waivable subject-matter jurisdiction over the Plaintiff's (hereinafter "Plaintiff") claims pursuant to 28 U.S.C. §1331 (federal question jurisdiction) and § 1343(a)(3) (42 U.S.C. § 1983 jurisdiction). This court also has supplemental jurisdiction over the Plaintiff's other state law claims pursuant to 28 U.S.C § 1367.

2. Venue is proper in the Northern District of Illinois District Court, Western Division, because the Plaintiff's principal place of business is within the Northern District, Western Division,

and the Defendants and Respondents in Discovery all reside within the Western Division of the Northern District and because the Western Division, Northern District, is where all the tortious acts have occurred.

THE PARTIES

3. At all times relevant hereto, the Plaintiff is a holding company that is an Illinois Limited Liability Company registered within the State of Illinois having its principal place of business in Sycamore, Illinois and at all times acted through its two principals, Bulson and Cronauer. (Plaintiff hereinafter).

4. Since January 1, 2019, the Defendant F. William Nicklas worked and was employed by the City of DeKalb, located in DeKalb County, Illinois, as the City Manager. He also resides in DeKalb County, Illinois.

5. Respondents in Discovery work within DeKalb County and reside within DeKalb County.

FACTS PERTINENT TO ALL COUNTS

A. THE 145 FISK DEVELOPMENT

6. At all times relevant hereto, the City of DeKalb is a municipal corporation and body politic located within DeKalb County, Illinois with the authority to allocate TIF incentives for certain financially unviable projects pursuant to 65 ILCS 5/11-74.2-1 that are in "blighted" areas. In this case, the City of DeKalb passed a resolution on December 13, 2018 in favor of Plaintiff for rehabilitation an abandoned building into a boutique hotel because, per the resolution language, it "would not be economically feasible and the Owner, would not acquire the properties, would not remediate unsafe buildings, and would not undertake the project."

7. Plaintiff was formed by two principals who are member managers of the LLC on December 13, 2018 in order to carry out the development and rehabilitation of a parcel of real estate

and improvements thereon pursuant to a preliminary development agreement with the City of DeKalb using Tax Increment Financing ("TIF").

8. The principals for Plaintiff had been working diligently and well with the City of DeKalb (hereinafter "City") and its then staff beginning in the early winter of 2016-2017 through 2018 in order to develop a project that would meet the needs of the City by transforming a blighted, run-down building commonly known as 145 Fisk Avenue into an economic vehicle for the benefit of the community. Plaintiff never worked, met, or otherwise talked to any City Manager of the City of DeKalb about the project and worked exclusively with City staff at all times relevant herein prior to January 1, 2019.

9. As reflected in the July 5, 2018 memorandum to the City Council, attached hereto as **Exhibit 13,** the Plaintiff initially proposed, and the City initially was receptive to, the idea of the building housing apartments with a first-floor commercial aspect; however, that concept was eventually changed at the City's request after Plaintiff incurred planning costs for an apartment complex above commercial space. The City then did not want additional apartment structures being built and also expressed concern that the property tax generated from a proposed apartment complex was not sufficient to support a return on a TIF investment since property taxes do not primarily benefit the City.

10. This request for a better return on TIF and increased sales/hotel tax revenue to the City caused the principals to create a plan to transform the dilapidated, blighted building into a boutique hotel that could serve as a destination venue for banquets, conferences, and weddings and generate significant hotel room tax.

11. The City Council gave a unanimous vote of confidence in the hotel project on July 9, 2018 after a memorandum and subsequent presentation from the then economic development planner. As

was being expressed to the City Council in the memorandum for the preliminary vote being taken on July 9, 2018:

> In an effort to reduce financial risk on this project, the Developer has requested to bring a concept plan forward to Council prior to closing on the property and investing in planning documents that would be required for the rezoning process. Therefore, this project is being presented to Council for discussion only and no action would be taken at this time. Should Council determine there is consensus to support this project and the incentive, staff would work with the Developer to streamline an approval process for consideration of an incentive and any required zoning approvals that allows the Developer to start construction as soon as possible.

12. Plaintiff immediately began working with City staff on the project and started the planning process. In August or September 2018, issues arose due to allegations made by other taxing bodies about the City of DeKalb and its improper use of TIF funds and uncertainty arose about whether any funds could be allocated anymore, or if the TIF district would continue past the end of the 2018 year-end. Thereafter, the Plaintiff was told by City staff during several meetings to simply sit idle and wait to see how the TIF controversy played out before incurring additional planning costs. A subsequent meeting was held where the Plaintiff was told it would likely have to wait for a year in order for a new TIF district to be created and become funded for the project to proceed.

13. On or about November 30, 2018, the City Attorney Frieders called one of Plaintiff's principals and informed the principal that the City would be entering into preliminary TIF agreements before the end of the year in order to allocate TIF funds, and that this project would be voted upon for formal approval on December 18, 2018.

14. Prior to the December 18, 2018 vote, the City gave a preliminary vote of confidence to the project on July 9, 2018, so that the principals could proceed with development. The vote was made after information was submitted to the City staff employed to oversee TIF projects. The City of DeKalb City Council thus voted twice to approve the Plaintiff's project, and on December 18, 2018 formally approved a preliminary development agreement, which was codified as resolution 2018-166

awarding two million five-hundred thousand dollars ($2.5 million) to the Plaintiff for the business, which would be 35% of the construction costs.

15. The passed resolution states, in pertinent part, the following:

> WHEREAS, Owner has proposed to commit funds to the competition of improvements on the Premises, subject to the City's commitment to provide economic development funding for this project; *see* Resolution 2018-166, 4th WHEREAS.
>
> WHEREAS, the City Council of the City of DeKalb has determined that it is necessary and advantageous and supports the public health, welfare, and safety to provide an economic incentive to ensure the revitalization of an otherwise obsolete property; *id.* at 5th WHEREAS
>
> the project has a significant financing gap and would not independently be financeable because of the blight and deterioration of the Property, the Owner has indicated that but-for the provision of the incentive contemplated herein, it would not undertake the project. *See* Resolution 2018-166, at Recitals, C.
>
> * * *
>
> Further, the Parties acknowledge that but for the provision of the incentive described herein, the Developer would be unable to undertake the project contemplated herein, as based upon extensive study of the proposed project and its costs, and the Parties have mutually concluded that this project would not be economically feasible and the Owner, would not acquire the properties, would not remediate unsafe buildings, and would not undertake the project. Accordingly, the Parties agree and acknowledge that the Development Incentive as described herein is necessary in order to induce this project to occur, **and satisfies all requirements applicable to such an incentive**. *See Id.*, at Article V(A) (Page 7 of 19).

16. Additionally, the resolution explicitly states that the funding was absolutely necessary for the project to even proceed:

> In order to secure commercial financing, the Owner is required to demonstrate the funding and availability of the Development Incentive, and in order to make that demonstration, the City is obligated to allocate presently available funds to this project, to budget and appropriate said funds within FY2019. *See id.*, at Article V(G) (Page 9-10 of 19).

17. Also, on December 18, 2018, the City of DeKalb voted to hire a new City Manager, Defendant F. William Nicklas, who began his employment on or about January 1, 2019. Despite the December

18, 2018 resolution, the preliminary development agreement was not available to be signed until the middle to end of the first week of January 2019.

18. Before Defendant Nicklas' employment, Plaintiff worked cooperatively with the City of DeKalb staff and both sides worked dynamically and flexibly so that the project could succeed. Prior to Defendant Nicklas' employment as the City Manager, Defendant Nicklas sat on an advisory committee for a community college that reviewed City TIF projects. The Defendant made statements that he did not support the Plaintiff's project during these meetings.

B. DEFENDANT NICKLAS' HISTORY

19. Very soon after Defendant Nicklas began his employment with the City, he intentionally and purposefully began working to surreptitiously nullify the resolution supporting the preliminary agreement executed by the City of DeKalb with Plaintiff despite the fact the resolution stated that Plaintiff's project **satisfies all requirements applicable to such an incentive**. Despite Plaintiff working with City Staff and never having any contact with the prior City Managers, which were at least two, Defendant Nicklas took immediate and biased interest in Plaintiff's project.

20. Prior to his employment as City Manager, Defendant Nicklas resigned from his prior employment with Northern Illinois University ("NIU") after he left a voicemail for the wrong number. Defendant Nicklas left a message for a friend telling him to call him back so that he could become a preferred vender with Northern Illinois University and avoid the statutory procurement process and procedure that is mandated by State Law before entering into contracts. *See* **Exhibit 1**. Defendant Nicklas has a habit of having worked behind the scenes to benefit people of his choosing. On April 21, 2017, Defendant Nicklas was disclosed as a witness in a pending lawsuit, and part of the reason for his disclosure was due to his prior conduct as Manager. The witness disclosure appears below:

¶

→ **William Nicklas,** is expected to testify consistent with his deposition, if taken, and will discuss the process, procedures, and personal knowledge of the City inspection process and the homes identified in the complain that he inspected, his dealings with the City and lack of home development, and his dealings with developers in order to help spur development growth, and how he used impact fees to raise revenue for the town, as well as how he would get around the

procurement code for City contracts.¶

→ **Pursuant to Rule 213(e), any individual identified in any document produced or interrogatory response. The subject matter will be consistent with the information contained in the record where the person is identified.**¶

¶

→ **Pursuant to Rule 213(e), a Park District Representative will testify consistent with the information contained in the documents disclosed herein.**¶

¶

→ **Any individual disclosed by the Defendant or deposed in tbis matter.**¶

21. While employed by NIU, Nicklas became intimately familiar with holding companies and how they actually work. Defendant Nicklas had formed a holding company in December 2013 known as College Town Partners, and attempted to redevelop an area near the subject property under a concept known as DeKalb 2020. Defendant Nicklas sought to acquire foreclosed homes for the redevelopment. Defendant Nicklas had input in creating the DeKalb 2020 marketing material, which is attached hereto as **Exhibit 2**. The holding company he formed for his development is attached hereto as **Exhibit 6**.

22. Defendant Nicklas' DeKalb 2020 project ultimately was unsuccessful due to a lack of public support. Defendant Nicklas was seeking to execute his concept in part by relying on banks to provide him foreclosed home information, which is well documented in his NIU emails.

23. Defendant Nicklas knew, given his own involvement in trying to develop a hotel conference center in College Town Partners, that there was and is a great need for the community and region to have a conference center hotel that would serve to supply banquet and meeting space that is not found in a single facility.

24. Defendant Nicklas believes that the development of a hotel and convention center in the Ellwood neighborhood would stimulate community pride and create a facility for entertainment, and be sustainable.

25. Defendant Nicklas attempted his hotel development in conjunction with Shodeen, a developer he has worked with and came to know well over the course of his career in City government, which is referenced in the DeKalb 2020 publication. Defendant Nicklas referred to them during a February 1, 2019 joint review meeting as a potential for TIF funds.

C. DEFENDANT'S CONDUCT AS THE DEKALB CITY MANAGER

26. On February 1, 2019, and before Defendant Nicklas ever met with the Plaintiff's principals, Defendant Nicklas began talking about bringing Shodeen to DeKalb, who previously wanted to develop a hotel in DeKalb .Defendant Nicklas sought to work with Shodeen for his own prior development project. Defendant Nicklas authored a document that was released to the public April 23, 2019, wherein he wrote that "Shodeen" had a development plan for "University Park Commons" which "featured a full-service business-class hotel." Defendant Nicklas stated he'd had had "some discussion with Shodeen representatives . . . since the first of this year but no development plan or incentive initiative is under review." *See* April 23, 2019 TIF Joint Review Board Agenda, attached hereto as **Exhibit 9**.

27. In January of 2019, before meeting with Plaintiff or reviewing any information, Defendant Nicklas intimated that the Plaintiff's project was less likely to proceed despite having done no work with the Plaintiff to assess the project nor request any information from the Plaintiff. Up to that point

Plaintiff had been working with City staff for planning and zoning, and had submitted blueprints, elevations, and other materials requested of it by City staff that certified engineers generated.

28. During a January 25, 2019 Joint Review Board meeting, Defendant Nicklas was asked about the three TIF projects that were all approved on December 18, 2018 for "preliminary development agreements." Defendant Nicklas stated that the two other projects approved with Plaintiff's where "very likely" to come to fruition but Plaintiff's project was "very preliminary commitment" and a "placeholder really of $2,500,000."

29. Defendant was asked during the meeting if the TIF money would become surplus and therefore distributed to the taxing bodies if any project did not come to fruition, to which Defendant Nicklas responded "yes."

30. Defendant Nicklas, by calling the Plaintiff's project a "placeholder of $2,500,000" was a "Freudian slip" because Defendant Nicklas knew then that he would seek to reallocate Plaintiff's TIF funds to a different project being spearheaded by developer John Pappas and that he was very familiar with John Pappas and his major investor in the project.

31. Defendant Nicklas had personally represented Pappas' major investor before under his consulting company, "Nicklas Consulting" for, presumably, remuneration, in order to act as a consultant/lobbyist and gain support for a development by the City of Sycamore City Council after public pushback and initial votes by public bodies showed a lack support for the project.

32. Defendant Nicklas knew that his client was an investor in the Pappas project and the investor's name was disclosed in public meetings about the project.

33. Toward the end of January 2019, Defendant Nicklas caused the Council to fire the staff that Plaintiff had been working with to develop its business. Nicklas then took control of overseeing the project and began requesting material that was not pertinent to the resolution requirements, planning and zoning, or had already been provided prior to the December 18, 2018 vote, or had never

been previously needed nor requested (since it was totally irrelevant to planning and zoning and was not a factor). The preliminary agreement provided that the City had everything needed for the TIF funds other than being rezoned because the project "**satisfies all requirements applicable to such an incentive**." *See* Resolution 18-166, at Article V(A) (Page 7 of 19), attached hereto as **Exhibit 7**.

34. Defendant Nicklas also requested material that he knew was not necessary given his work and involvement in being a director of College Town Partners, which published the DeKalb 2020 material attached hereto as an **Exhibit 2**.

35. Defendant Nicklas was acting in bad faith by requesting information with no clear objective, guidelines or metrics, nor could he provide any ability to comply with his subjective requests given the language in the resolution. Defendant Nicklas was simply seeking to torpedo the project with arbitrary requests that he could then use to subjectively determine non-compliance and reallocate the funds to John Pappas, which he had been working with to bring to the council a different project that would benefit Pappas and Defendant Nicklas' prior consulting client.

36. Defendant Nicklas intended for these requests to distract from the planning and zoning time-frame in the preliminary development agreement.

37. Publicly, and on January 25, 2019, Defendant Nicklas told the taxing bodies and the general public that if the Plaintiff's TIF allocation did not come to fruition, then the money allocated to Plaintiff would be distributed to the area school district and taxing bodies. Defendant Nicklas however told Plaintiff's principals privately that if it's project failed then he could then re-allocate the pledged TIF funds to other projects within the City of DeKalb, which he confirmed publicly on April 19, 2019.

38. Defendant Nicklas took the unusual and out of the ordinary step of sending the Plaintiff's project to a preliminary review by planning and zoning on February 6, 2019, purely so that the public could offer opinions as to the project. Defendant Nicklas did this based on his prior failed attempt to

develop a hotel in the hope that the public would not support this project and then effectively end the Plaintiff's development on that date.

39. At the February 6, 2019 planning and zoning meeting, two people spoke against the project, one of which was an area landlord rather than a resident. More people spoke in support of the project rather than against it. The planning and zoning board offered its support and confidence in proceeding with the project during the meeting.

40. Defendant Nicklas attended the February 6, 2019 planning and zoning meeting and was aware of its preliminary support to proceed with the project by the planning and zoning committee.

D. PLAINTIFF'S INTERACTIONS WITH DEFENDANT NICKLAS

41. On February 22, 2019, Defendant Nicklas met with principal Bulson at Defendant's request despite Plaintiff trying to work through planning and zoning with those responsible for reviewing the project submissions. Defendant Nicklas arrived at the meeting with a tone, and demeanor that was aggressive, angry, and unprofessional. Nicklas proceeded to then intimidate principal Bulson by interrogation of trivial issues unrelated and irrelevant to anything with planning and zoning or the preliminary development agreement. The other principal was unable to attend the meeting because he was still engaged in prosecuting a civil jury trial that had started on February 5, 2019, which Defendant Nicklas was made aware.

42. During the February 22, 2019 meeting, Defendant Nicklas stated that he did not know anything about Principal Bulson who he met with, but that he was somewhat familiar with the other Principal. The other principal's only association, interaction, or relationship with Defendant Nicklas prior to him becoming the City Manager was through the lawsuit where Defendant Nicklas called the Constitution "pesky," which is depicted below:

I'll send a note around to my counterparts on Friday. I should mention that if any revisions were approved, they would have to apply to all new homes and developments in Sycamore. That pesky Constitution has strictures against artificial distinctions, and choosing one subdivision over another without some exigent circumstances would qualify as an "artificial" distinction.

I'll be in touch.

Bill

43. Defendant Nicklas only attempted to obtain background information on the principal associated with the lawsuit in which Defendant Nicklas was disclosed as a witness and never sought to obtain any information or background on principal Bulson because he was not the person who discovered the email where Nicklas called the Constitution "pesky."

44. On February 22, 2019, Defendant Nicklas informed the principal during this meeting that he was in the back of the room during the February 6, 2019 planning and zoning meeting, and intimated that it was inappropriate for him to be at the planning and zoning meeting because he does not make those decisions but that he was there in an attempt to influence the panel.

45. During the meeting, Defendant Nicklas stated to the principal that he was now running the City of DeKalb, and wanted all personal information on the principals and any organization they were affiliated with, and then began name dropping people in the community who were bankers that he would use as sources from which to gather information about the principals.

46. Defendant Nicklas continuously sought and attempted to intimidate the principal during the meeting from proceeding with the project.

47. The principal assured Defendant Nicklas that the project is low risk because it is a rehabilitative reuse of an existing structure with a build out for adaptive use because the exterior is essentially finished. Defendant Nicklas was also informed that the project was essentially a parking lot and interior build out because the super-structure was complete and that Plaintiff had a structural and

civil engineer and architect review the structure for suitability, all of whom found it was suitable for the intended use.

48. Defendant Nicklas was informed that, according to the Architect, Civil, and Structural Engineer, whose plans were submitted to the City staff, the structure is capable of handling the proposal. Defendant Nicklas did not care about any of the facts as it related to planning and zoning.

49. Prior to December 18, 2018, Plaintiff's principals had submitted a *pro forma* document to a City staff that was reviewed, approved, and accepted, and was deemed "consistent" with his experience working on other similar projects. As such, the project was then recommended based on that *pro forma* document, which then led to the preliminary development agreement on December 18, 2018.

50. After the February 22, 2019, meeting Plaintiff's principal received a call from the City employee and he indicated that the Plaintiff now needed to provide another *pro forma* document for the project indicating its financial viability. This *pro forma* document was required only by Defendant Nicklas, but was not required by the preliminary agreement because a pro forma document already had been reviewed and approved by City staff before the December vote. Defendant Nicklas eventually refused to review or discuss the *pro forma* document with the Plaintiff during a March meeting.

51. It was not until March 8, 2019 that Plaintiff received an email from City staff that Plaintiff could proceed with its planning. Plaintiff could not proceed any further up to that point until its plans were reviewed and approved. On February 19, 2019, Plaintiff had sent its plans for review by City staff.

52. After Plaintiff's finally received word from City staff that it could now proceed, Plaintiff's principals quickly arranged for a meeting with Defendant Nicklas, which occurred on March 13, 2019 at 5:00 p.m. The additional hotel *pro forma* document despite not being required by the preliminary

development agreement which had already been reviewed and approved by City staff before December 18, 2018. The ostensible purpose was to review the document again. At the meeting however, Defendant Nicklas refused to review the *pro forma* document and began asking who the principals' bankers were. He refused to look at, consider, critique, or offer any other advice as to the second *pro forma* document.

53. Defendant Nicklas was told of two banks that could be used for the project. The meeting did not address any planning and zoning issues or any other issue pertinent to the preliminary agreement terms. Plaintiff's principals left the meeting again, without any substance for proceeding from Defendant Nicklas. Defendant Nicklas simply demanded access to their personal information despite the preliminary agreement stating everything had been satisfied for the incentive to proceed to planning and zoning.

54. Early morning the next day, one of the principals received a call from a banker at one of the above referenced banks. Defendant Nicklas had called the bank and requested personal information about the principal even though it was not relevant nor related to the preliminary agreement or planning and zoning. Regardless, Defendant Nicklas talked to the banker and was made aware that his financial concerns about the principal presently lacked merit. Defendant Nicklas, after receiving this information, made no attempt to contact any bank associated with principal Bulson even though principal Bulson offered for him to talk to his banker. Defendant Nicklas never attempted to learn anything about Bulson, his background, or experience.

55. Defendant Nicklas, upon learning of the positive financial position of one of Plaintiff's principals, then changed his position from focusing on the principals' personal wherewithal (which is not pertinent nor required for TIF nor the preliminary agreement) and demanded, in writing, that financial information for the LLC doing the project be provided. The LLC is the Plaintiff as a shell, which was still a holding company. Defendant Nicklas intended to and did, misleadingly, the holding

company shell documents in order to deceive the City Council and general public about how the development of the project operates in practice and the viability of the project.

56. Because of this positive personal information Defendant Nicklas gained, Defendant Nicklas then sent financial forms he created himself or obtained from somewhere else rather than use any official City documents for the Plaintiff to complete. He was very specific that he now needed the financials **just for** the entity doing the project, 145 Fisk, LLC, which was a holding company in the middle of planning and zoning work, rather than a going concern. Defendant had access to checks previously written to the City for the project by Plaintiff and knew that the working capital was coming from Plaintiff's principals since the Plaintiff was still a holding company.

57. On March 22, 2019, Plaintiff, through its principal, filed its petition for rezoning and paid the $500 application fee, for which there is a receipt.

D. DEFENDANT'S OVERT MISCONDUCT

58. On or about March 27, 2019, Plaintiff's principal Bulson received a voicemail from a City employee that Defendant Nicklas was refusing to place Plaintiff's petition on the planning and zoning committee agenda. Defendant Nicklas blocked the petition for reasons unrelated to any issue or factor for planning and zoning, and for none of the issues Defendant Nicklas listed on his April 19, 2019 agenda for terminating the project.

59. Defendant Nicklas has blocked, and continues to block, the Plaintiff's planning and zoning petition from proceeding despite accepting $500 for the petition and filing a petition that met all the requirements to initiate a hearing with Planning and Zoning Committee of the City under the terms of the preliminary agreement.

60. 145 Fisk, LLC is a holding company, not yet a going concern, and the funding to support the project is coming from the principals, which Defendant Nicklas understands because he has been part of such a structure.

61. Defendant Nicklas is well aware that a holding company obtains funds from other sources for projects, as is acknowledged in Defendant's emails he sent during his attempt to develop, *inter alia*, a hotel. He previously sent emails requesting funding for his holding (aka "Shell") company from other sources. *See* March 10, 2014 email, attached hereto as **Exhibit 3**.

62. After Defendant Nicklas received financial information for 145 Fisk, LLC, rather than request additional information or request clarification, he sent an email, attached hereto as **Exhibit 4,** asking the Plaintiff, through its principals, to withdraw their petition or else be mindful he could embarrass and harm the reputation of the principals within the community.

63. Defendant Nicklas' email constitutes an unlawful threat to defame the Plaintiff through its principals after his attempts to kill the project failed.

64. Defendant Nicklas threatened the principals with making false statements and disingenuous statements to the DeKalb City Council and public if the Plaintiff did not withdraw the application.

65. Defendant Nicklas threatened to embarrass and harm the Plaintiff through its principals' reputations if it did not withdraw the petition because Defendant Nicklas knew the Plaintiff had otherwise complied with the preliminary agreement for TIF since the preliminary agreement provided that:

> "the Parties have mutually concluded that this project would not be economically feasible and the Owner, would not acquire the properties, would not remediate unsafe buildings, and would not undertake the project. Accordingly, the Parties agree and acknowledge that the Development Incentive as described herein is necessary in order to induce this project to occur, and **satisfies all requirements applicable** to such an incentive."

66. Defendant Nicklas threatened the Plaintiff's principals and attempted to force them to withdraw their petition because he lacked a basis to otherwise inform the Council of valid problems

or issues with the project and knew the principals had initiated a petition for re-zoning that he was blocking.

67. Plaintiff complied with the terms of the preliminary agreement as requested by the City staff, working diligently with the City staff to fulfill the preliminary obligations for the project and proceed to construction. Plaintiff would have been able to complete the project if not for Defendant Nicklas' interference.

68. The Plaintiff through its principals have the same experience and background now as they did in the prior three Council and zoning votes approving the project. Nothing has changed in the equation but for Defendant Nicklas being involved.

69. A principal asked that Defendant Nicklas recuse himself from overseeing this project given his history and public statements. However, Defendant Nicklas refused, adamantly, twice, which is attached hereto as **Exhibit 5.**

70. Defendant Nicklas was the previous City Manager for the City of Sycamore, and litigation is pending over an ordinance in effect during his tenure regarding impact fees. One of the principals is the attorney defending and prosecuting a case regarding the impact fee ordinance.

71. Defendant Nicklas knows he was disclosed by the principal as a material witness in the Sycamore lawsuit due to emails he authored on the topic, one of which referred to the Constitution as being "pesky" when he was talking with a person from Shodeen Development because Nicklas was asked for a favor for subdivsion impact fees.

72. Defendant Nicklas, despite his statement that the constitution was "pesky" while working with Shodeen development on its impact fees, has an ongoing relationship with Shodeen from his tenure being a City Manager at Sycamore. Shodeen previously sought TIF incentives from DeKalb and Defendant Nicklas has begun mentioning them in public TIF meetings. Nicklas is interfering with Plaintiff's preliminary agreement so that the TIF funds can be released and then re-allocated. On

April 19, 2019, Defendant Nicklas publicly stated he could use Plaintiff's TIF funds for other projects despite his prior statements to the taxing bodies that the funds would be deemed surplus and returned to them.

73. Defendant Nicklas is using misstatements in order to manipulate the City Council into voting against a viable project that already received preliminary approval so that he can control the TIF funds for projects and allocate money to developers of his choosing despite the preliminary development agreement.

74. Defendant Nicklas has intentionally misled the DeKalb City Council about the truth of the Fisk Project and his motives for killing the project, and made assertions about the Plaintiff through its principals that lack any basis in fact, such as claiming that the principals have blown off meetings to go over planning and zoning and that they have not done anything to proceed with the project.

75. The principals have incurred tens of thousands of dollars in costs through planning the project and were working cooperatively with the City of DeKalb staff tasked with overseeing the project. After Defendant Nicklas took control he proceeded to improperly and unlawfully interfere with the project in order to end the project, and defamed the Plaintiff through its principals.

76. Defendant Nicklas is aware of his role in the City of Sycamore litigation as a witness and has behaved in a manner that sought to circumvent the legal procurement code to benefit friends.

77. On April 19, 2019, Defendant Nicklas fulfilled his threat to try to embarrass and harm the reputation of the Plaintiff by causing to be published an agenda to the City Council full of material misstatements about Plaintiff, its principals, and the project, as reasons for voting against the project. The Defendant Nicklas also made public statements to local news outlets that were false. Defendant Nicklas alleged that Plaintiff had the inability to complete the project and comply with the preliminary TIF agreement, but he omitted material information, and he intentionally put statements in a false light and made false statements about Plaintiff's principal's working capital and collateral. One

example of a material misstatement (that was not even pertinent to the preliminary development agreement), was Defendant Nicklas stating that the Plaintiff's principals "suggested they were going to get bank financing for the balance, and that means they have no collateral." He also stated there was no working capital on April 19, 2019. Defendant's statement is contrary to the actual development agreement terms, wherein the City agreed and acknowledged "that, in order for Owner to secure commercial financing to render the redevelopment of the Property possible, Owner is required to secure the City's commitment to utilize a development incentive as contemplated herein."

78. Defendant Nicklas knew that his statement regarding bank financing means no collateral was false because, given his prior experience as a banker, it is contrary to the commercial banking rules set forth by the Office of the Comptroller of the Currency, which is attached in relevant part hereto as **Exhibit 10**.

79. Defendant's false statement had the effect he intended on listeners and receivers. That falsehood was adopted and re-published, and shared publicly across social media platforms by others and seen by others, two of which appear below:

Nick Atwood

Resorting to personal attacks without disputing The allegation that the developers don't have any working capital or collateral seemingly supports the city managers decision. TIF money is not seed money, and without sufficient resources, that project is doomed and the city money would be wasted.

5m Like Reply

Michael Howell

The story I heard is that the developer had zero money or collateral and was solely dependent on the TIF money for the project.

80. On April 22, 2019, the Mayor of DeKalb released a statement where the undue influence of Defendant Nicklas false statements were made apparent:

> (Through) the due diligence that Bill and others have done, he has determined that the fiscal wherewithal is simply not there as it relates to the city going forward with a grant of $2.5 million to this project," says Smith. "Is the project dead in (the) water? I think it probably will be. I can't project what the city council is going to do Monday night … I'm inclined to support the recommendation of Bill and that is to terminate the agreement.

81. Defendant Nicklas intentionally and purposefully changed the sequence and series of events for land use approval and delayed review of materials in order to prevent the Plaintiff from

getting to the planning and zoning commission and raised issues entirely irrelevant to planning and zoning.

82. On April 23, 2019, the morning after the City Council unlawfully terminated Resolution 2018-166, which occurred the night of April 22, 2019, Defendant Nicklas had authored and released **Exhibit 9**, wherein he sets forth that he had been working with not only Shodeen, but John Pappas in order to re-develop 204 N. Fourth street into two apartment buildings and therein asks that "the 'Project' monies previously committed in preliminary fashion to the 145 Fisk project be dedicated" primarily to the John Pappas project, which is being funded by an investor that Defendant Nicklas has accepted renumeration from for his consulting business and is a conflict of interest. That Defendant Nicklas authored **Exhibit 9** and substantially generated the content found therein before the City vote repudiating and terminating Plaintiff's project.

83. Defendant Nicklas is not believed to have disclosed his conflict of interest with the Pappas investor to anyone before any vote on the project nor did he recuse himself from the project.

84. That Defendant Nicklas has a habit and pattern of attempting to publicly embarrass people, which the judiciary colloquially calls "borking," as a means to improperly influence third parties. For example, he was previously sued in this court for retaliating publicly against the NIU police chief Donald Grady, *see Grady v. Board of Trustees of N. Ill. Univ.*, quoting *Head v. Chicago Sch. Reform Bd. of Trs.*, 225 F.3d 794 (7th Cir. 2000). There is also another case currently pending by a City of DeKalb landlord in this court for public statements Defendant Nicklas made about the landlord to the local paper. *See* 3:19-cv-50197, ECF # 1, at ¶ 34-35. Additionally, this summer he has had a public feud with the elected City Clerk of DeKalb where he has attempted to publicly embarrass her and question her competence publicly. Defendant' Nicklas' prior pattern, practice, and habit of "borking" third parties he opposes is the same *modus operandi* he carried out in this case against Plaintiff's project and principals.

85. Additionally, as occurred in this case, Defendant Nicklas' habit and *modus operandi* of selectively favoring his "past partnership" developers with government funds. *See* email dated January 25, 2019, attached hereto as **Exhibit 12** . In an August 8, 2019 email, Defendant Nicklas would offer his "next move" to "privately [sic] feel out" nearby government officials he called "taxtakers" for the developer Krusinski and that he would be "discreet." *See* email attached hereto as **Exhibit 11.** Four days later, On August 12, 2019 Defendant Nicklas would publicly state paradoxically to the DeKalb City Council "…. transparency I believe is necessary for open and honest government."

COUNT I: TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY[1] (DEFENDNAT NICKLAS)

NOW COMES the Plaintiff, by its undersigned attorney, and for Count I of his complaint, alleges as follows:

1–85. Plaintiff incorporates the allegations above as if set forth fully herein.

86. The foregoing allegations as a whole given the preliminary agreement for Tax Increment Financing, and Plaintiff's compliance with the agreement and submission for rezoning and assertions from City staff, Plaintiff had a reasonable expectancy of entering into a valid business relationship with the City of DeKalb to develop a dilapidated building into a boutique hotel business.

87. Given the preliminary agreement language, wherein the Parties agreed and acknowledged that the Development Incentive "is necessary in order to induce this project to occur, and **satisfies all requirements applicable to such an incentive,"** plus three votes of confidence and the

[1] So as to avoid any confusion in answering the complaint, tortious interference with a business expectancy is a separate, independent cause of action from tortious interference with a contract. *See*, *i.e., Mannion v. Stallings & Company, Inc.,* 204 Ill.App.3d 179 (1st Dist. 1990); *Miller v. Lockport Realty Group, Inc.,* 377 Ill.App.3d 369 (1st Dist. 2007); *Fellhauer v. City of Geneva,* 142 Ill.2d 495 (1991); *Lusher v. Becker Brothers, Inc.,* 155 Ill.App.3d 866 (3d Dist. 1987); *Clarage v. Kuzma*, 342 Ill.App.3d 573 (3d Dist. 2003); *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA,* 384 Ill.App.3d 849 (1st Dist. 2008).

preliminary agreement entered into with the City, a reasonable expectancy of entering into a valid business relationship existed before Defendant Nicklas tortiously interfered.

88. Defendant had knowledge of the expectancy because he was present for the December 18, 2018 meeting where the expectancy was approved by the City Council.

89. Commencing after Defendant Nicklas started in his position and after Defendant's intimation in January 2019 that the project was less viable compared to other TIF projects (before ever meeting or requesting any information from the Plaintiff), Defendant Nicklas intentionally or purposefully interfered with the project and has prevented the realization of the TIF expectancy by his actions, omissions, misstatements to the City Council and public. He also refused to place the project before the Planning and Zoning Commission for issues unrelated to the preliminary zoning agreement.

90. Defendant Nicklas now seeks to use his undue influence to reallocate the TIF funds to his preferred projects and developers.

91. Given Defendant Nicklas' prior comments against the project before being City Manager, his failed development, his assertions contained in the DeKalb 2020 material, and his anger at being a witness in a lawsuit due to his email with Shodeen about the Constitution being pesky, Defendant used his role as the City Manager to tortiously interfere with the TIF expectancy rather than recuse himself and let the City staff handle the project, which had been the procedure prior to his arrival.

92. Plaintiff has incurred damages resulting from the interference in an amount no less than $2.5 million dollars, plus lost business profits, and development costs.

Wherefore, Plaintiff, 145 FISK, LLC, respectfully requests this Court to enter judgment in its favor after a trial by jury and against Defendant Nicklas in an amount in excess of $2.5 million dollars

for compensatory damages, development costs, plus taxable costs, and any other equitable relief deemed just.

COUNT II: FIRST AMENDMENT RETALIATION CLAIM (DEFENDANT NICKLAS)

NOW COMES the Plaintiff, by its attorney and for his Count II, complains of the Defendant Nicklas as follows pursuant to 42 U.S.C. § 1983:

1-92. Plaintiff re-alleges and re-asserts the above paragraphs as and for this Count II as though fully set forth herein.

93. "The First Amendment right to petition the government for the redress of grievances extends to the courts in general and is protected activity."

94. That filing, prosecuting and defending the lawsuit where Defendant Nicklas was discovered as referring to the Constitution as "pesky" was a protected activity because "the First Amendment's right to petition the government for the redress of grievances extends to the courts in general and applies to litigation in particular."

95. That Plaintiff, given that Defendant Nicklas refusal to recuse himself from Plaintiff's project to develop a boutique hotel with the City Council and City Staff, it suffered a deprivation by Defendant Nicklas because of his tortious interference, defamation, and misrepresentations under the color of state law without due cause, and such economic interference would likely deter First Amendment activity in the future given his malicious, intentional, and improper conduct in his role as the City Manager, and Defendant Nicklas as being identified as a witness in a prior and pending lawsuit where he referred to the Constitution as being "Pesky" is activity that was "at least a motivating factor" in the Defendant Nicklas' decision to take the retaliatory action against Plaintiff described herein since its principal is prosecuting and defending the case.

96. That Defendant Nicklas was acting under the color of state law when taking adverse actions as the City Manager for retaliation purposes against the Plaintiff due to its principal's involvement in uncovering his denigration of the United States Constitution and disclosing him as a witness regarding his voicemail where he asked for a friend to contact him so as to get around the statutory procurement process requirement by State Law.

97. That Defendant Nicklas refused to recuse himself from the Plaintiff's project despite this background and despite being asked by Plaintiff to recuse himself. Defendant Nicklas should have recused himself given his involvement in the prior case and given his business association with a Pappas Investor.

Wherefore, Plaintiff, 145 FISK, LLC respectfully requests this Court after a trial by jury enter a judgment in excess of $2,500,000, for compensatory damages, lost profits, and development costs that may be entered against Defendant F. William Nicklas and any other remedy this court deems equitable and just; and its attorneys' fees and costs for bringing this action under 42 U.S.C. § 1988, and any other remedy this court deems equitable and just.

COUNT III: VIOLATION OF DUE PROCESS (DEFENDANT NICKLAS)

NOW COMES the Plaintiff, by its attorney and for his Count III, complains of the Defendant Nicklas as follows pursuant to 42 U.S.C. § 1983:

1-97. Plaintiff incorporates paragraphs 1-96 above as if set forth fully herein.

98. The Due Process Clause, as applied to States and municipalities through the 14th Amendment, was intended to prevent an individual, such as Defendant Nicklas, from an abuse of power since he is serving as a government official. [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

99. That government action that impedes future job opportunities or has other indirect effects on future income inflicts an actionable deprivation of property, which occurred when Defendant Nicklas used defamation previously outlined herein as a means to influence, improperly, the public sentiment and City Council against Plaintiff's project and induced a breach of the agreement and fired or force to resign most of the City Staff that had been working on Plaintiff's project

100. Historically, this guarantee of due process has been applied to deliberate decisions of government officials like Defendant Nicklas that deprive a person of life, liberty, or property and was intended to secure the individual from the arbitrary exercise of the powers of government by requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property" because the Due Process Clause promotes fairness in such decisions.

101. Due process bars certain government actions regardless of the fairness of the procedures used to implement them because it serves to prevent governmental power from being "used for purposes of oppression."

102. The Fourteenth Amendment is a part of a Constitution generally designed to allocate governing authority among the Branches of the Federal Government and between that Government and the States, and to secure certain individual rights against both State and Federal Government.

103. Plaintiff has a property interest in the contract to purchase the subject property as well as the preliminary agreement passed as a resolution to develop the property using tax increment financing and as part of that property right, was required to rezone the property. Defendant Nicklas blocked and refused to permit due process for rezoning given the fact that the board gave a vote of confidence on February 6, 2019 rather than rejecting it after the public hearing.

104. Defendant Nicklas had a voicemail left refusing to initiate Plaintiff's rezoning petition because the development agreement stated:

> Accordingly, the Parties agree and acknowledge that the Development Incentive as described herein is necessary in order to induce this project to occur, **and satisfies all requirements applicable to such an incentive**. *See Id.*, at Article V(A) (Page 7 of 19).

105. By refusing to provide a mechanism for the property to be rezoned, Defendant Nicklas violated Plaintiff's due process rights in retaliation for its First Amendment Activity as outlined above.

106. As a result of the violation of due process, Plaintiff suffered actual damages of no less than $2.5 million dollars and lost profits.

Wherefore, Plaintiff, 145 FISK, LLC, respectfully requests this Court after a trial by jury enter a judgment in excess of $2,500,000 that may be entered against Defendant and any other remedy this court deems equitable and just; and its attorneys' fees and costs for bringing this action under 42 U.S.C. § 1988, and any other remedy this court deems equitable and just.

COUNT IV: DEFAMATION *PER SE*

NOW COMES the Plaintiff, by its attorney and for its Count IV, complains of the Defendant Nicklas as follows:

1-106. Plaintiff realleges and reincorporates the allegations above as if set forth fully herein.

107. Defendant Nicklas has made material misstatements to the City Council and the public, some of which are alleged above, and others which can only be known through the discovery process but his intent and his threats to embarrass and harm the reputation of Plaintiff are premised upon making statements which are false.

108. Because Plaintiff was working diligently to complete the development and was able to navigate Defendant Nicklas' February 6, 2019 planning and zoning meeting, which Plaintiff never even applied for but was placed on the agenda by Defendant Nicklas, Defendant Nicklas had to resort to defamation and intimidation by asking the Principals to withdraw their project from consideration or else face a public shaming by him.

109. Defendant Nicklas carried through with his April 2019 threat to embarrass and harm the reputation of the Plaintiff by publishing untrue statements of fact to the City Council and other third parties and general public.

110. That Defendant Nicklas conduct in April 2019, which fulfilled his attempt to intimidate and threaten to embarrass the Plaintiff as set forth in **Exhibit 4**, violated 720 ILCS 5/12-6(a)(5)-(6) and 25 CFR § 11.406(a)(3), which sets that standard for ordinary care that the Defendant intentionally deviated from.

111. Defendant Nicklas made the defamatory statements intentionally given his obsessive review of irrelevant, collateral, but personal information of the Plaintiff's through its principals that had no basis in fact nor required by the preliminary TIF agreement or resolution 2018-166. *See* Ex. 7.

112. Defendant Nicklas published the statements with intentional disregard for the truth and with malice in order to harm the Plaintiff and its agents as evidenced by Defendant's prior email, voicemail, Defendant's failed DeKalb 2020 development, witness in a pending lawsuit, and his preference for reallocating the TIF money to his preferred developer.

113. Defendant knew statements contained in the April 19, 2019 agenda as well as statements to local media outlets about working capital and no collateral since bank financing would used were untrue and he knew they were untrue because they are contrary to the very assertions he circulated in his DeKalb 2020 plan, the preliminary agreement, and the information he gleaned talking to one banker.

114. Defendant Nicklas' false statements directly impute the inability of Plaintiff to perform or want of integrity in performing its duties in its trade and business developing the property, which was confirmed by the Mayor's April 22, 2018 statement; creating defamation *per se* and presumed damages, in addition to actual damages that exceed $2.5 million.

Wherefore, Plaintiff, 145 FISK, LLC, respectfully requests this Court enter an order of judgment against Defendant Nicklas in excess of $2.5 million dollars in compensatory damages, plus development costs, punitive damages, taxable costs, and any other remedy this court deems equitable and just.

COUNT V: DEFAMATION PER QUOD (ALTERNATIVE COUNT TO COUNT IV)

NOW COMES the Plaintiff, by its attorney and for its Count V, complains of the Defendant Nicklas as follows:

1-114. Plaintiff realleges and reincorporates the allegations above as if set forth fully herein.

115. Defendant Nicklas' statements, to the extent such statements contained in Exhibit 4 as well as the April 19, 2019 agenda, news outlets outlined above, and the Mayor about the Plaintiff that are not apparent on their face; then extrinsic circumstances show the defamation, such as the fact

of Plaintiff is a holding company still in the planning stages that is not required to yet be fully funded under any agreement or law needed to be fully funded before planning and zoning was done. Defendant Nicklas' prior involvement in directing his holding/shell company as well as serving previously as a banker who no doubt understands this, is extrinsic evidence necessary to demonstrate its injurious meaning he falsely maintained;

116. Due to the defamatory statements, Plaintiff suffered actual damages of $2.5 million.

Wherefore, Plaintiff, 145 FISK, LLC respectfully request this Court, enter an order of judgment against Defendant Nicklas in excess of $2.5 million dollars compensatory damages, punitive damages, taxable costs, and any other remedy this court deems equitable and just.

COUNT VI: BREACH OF CONTRACT (CITY OF DEKALB)

NOW COMES the Plaintiff, by its attorney and for its Count VI, complains of Defendant City of DeKalb as follows:

117. Plaintiff realleges and reincorporates the allegations above as if set forth fully herein.

118. Resolution 2018-166 approved the preliminary development agreement and approved and set forth remedies "Upon a breach of this Agreement," which permits damages for the failure of performance.

119. Article VII(b) states that "in the event of a material breach of this Agreement, the Parties agree that the Party alleged to be in breach shall have forty-five (45) days after written notice of said breach to correct the same prior to the non-breaching Party's seeking of any remedy provided for herein."

120. Defendant City never apprised Plaintiff of any alleged breach of the preliminary development agreement, thus, it never afforded a forty-five (45) days to cure any alleged breach.

121. Plaintiff, on April 24, 2019, informed the City of its breach of the preliminary development agreement by its conduct on April 22, 2019 that repudiated the resolution and

agreement. Plaintiff afforded Defendant City forty-five (45) days to cure its breach. However, to date, no such cure occurred or been attempted and forty-five (45) days has passed precluding it to now cure its default. *See* Correspondence dated April 24, 2019 and attached hereto as **Exhibit 8.**

122. That Resolution 18-166 created a preliminary development agreement that contractual bound the City of DeKalb, and the City breached the agreement on April 22, 2019 by voting to repudiate the agreement and duly passed resolution.

123. Additionally, Defendant City of DeKalb unlawfully repudiated and terminated the preliminary development agreement on April 22, 2019, which was at the absolute most day 112 of the agreement's execution and still within the period for initiating the planning and zoning petition.

124. The agreement did not require the planning and zoning to be completed within one-hundred twenty (120) days, only that the review be initiated. *See* Ex. 7, at Article IV(1).

125. As previously alleged, Defendant Nicklas, per a voicemail he had left, was refusing to permit the Plaintiff's previously filed planning and zoning petition.

126. Plaintiff complied with the terms of the resolution and thus the development agreement and has suffered damages as a result of the City's breach of contract in excess of $2,500,000.

Wherefore, Plaintiff, 145 FISK, LLC respectfully request this Court, enter an order of judgment against Defendant City of DeKalb in excess of $2.5 million dollars compensatory damages, , taxable costs, and any other remedy this court deems equitable and just.

COUNT VII: BREACH OF GOOD FAITH AND FAIR DEALING (DEFENDANT CITY OF DEKALB)

NOW COMES the Plaintiff, by its attorney and for its Count VII, complains of Defendant City of DeKalb as follows:

Plaintiff realleges and reincorporates the allegations above as if set forth fully herein.

127. That the preliminary development agreement is subject to an implied condition of good faith and fair dealing.

128. That the City of DeKalb, through its City Manager, breached its duty of good faith and fair dealing by representing to Plaintiff and the public that the Plaintiff's project was being utilized for a boutique hotel and that if the project did not come to fruition, the funds would be returned to the taxing bodies as surplus.

129. Defendant breached its duty of good faith and fair dealing by using the Plaintiff's project as a "placeholder really" for the Pappas project Defendant Nicklas had been advocating behind the scenes.

130. Defendant breached its duty of good faith and fair dealing by using Plaintiff's project as a means of earmarking in 2018, before the applicable TIF district closed on December 31, 2018 per the TIF statute, as a means to extend the period for allocating TIF funds from the district to another project, which ultimately ended up being John Pappas.

131. Defendant breached its duty of good faith and fair dealing by using Plaintiff's project as a means to extend the period of time for which it could re-allocate TIF funds to a Pappas project that used a large investor that was a prior client of Defendant Nicklas.

Wherefore, Plaintiff, 145 FISK, LLC respectfully request this Court, enter an order of judgment against Defendant City of DeKalb in excess of $2.5 million dollars compensatory damages, , taxable costs, and any other remedy this court deems equitable and just.

COUNT VIII: TORTIOUS INTERFERENCE WITH A CONTRACT (DEFENDNAT NICKLAS)—ALTERNATIVE TO COUNT I

Plaintiff realleges and reincorporates the allegations above as if set forth fully herein.

132. That the preliminary development agreement approved by Resolution 18-166 was the existence of a valid and enforceable contract between the plaintiff and the City of DeKalb and provided terms for any breach of the agreement.

133. The City of DeKalb was required to offer a permanent agreement by the terms of the agreement upon simply a re-zoning of the property, which Plaintiff was precluded by Defendant Nicklas from ever initiating.

134. Defendant was aware of the contract given his presence during the passage of the resolution;

135. Defendant intentionally and unjustifiably induced a breach of the contract as fully set forth above;

136. Defendant Nicklas' wrongful conduct caused a subsequent breach of the agreement by the City of DeKalb by the third party Nicklas, and

137. Plaintiff was damaged as a result of the breach in excess of $2,500,000.

Wherefore, Plaintiff, 145 FISK, LLC respectfully request this Court, enter an order of judgment against Defendant City of DeKalb in excess of $2.5 million dollars compensatory damages, taxable costs, and any other remedy this court deems equitable and just.

COUNT IX: VIOLATION OF EQUAL PROTECTION (DEFENDANT NICKLAS)

Plaintiff realleges and reincorporates the allegations above as if set forth fully herein and pursuant so 42 U.S.C., § 1983, alleges as follows:

138. The equal protection clause applied to the Defendant acting under the color of state law bans intentional discrimination through the 14th Amendment.

139. That Defendant Nicklas discriminated intentionally against the Plaintiff as outlined herein and above *via* defamation in order to interfere with the project as a result of the First Amendment speech, access to the court system, and the right to counsel after Defendant Nicklas was involved ss a witness given his prior correspondence referring to the Constitution as "pesky" with Plaintiff's principal.

140. Defendant Nicklas took action against Plaintiff that were aimed at interfering with the First Amendment and a person's access to the courts and right to an attorney, and that these rights that are protected against private, as well as official, encroachment and is subject to strict scrutiny.

141. As a result of the intentional discrimination in violation of equal protection, Plaintiff suffered nominal damages, attorneys fees, and compensatory damages in excess of $2,500,000.

Wherefore, Plaintiff, 145 FISK, LLC respectfully request this Court, enter an order of judgment against Defendant Nicklas and the City of DeKalb in excess of $2.5 million dollars compensatory damages, lost profits, taxable costs, attorney fees, and any other remedy this court deems equitable and just.

COUNT X: RESPONDENTS IN DISCOVERY

NOW COMES the Plaintiff, 145 FISK, LLC, by and through its undersigned attorney, and pursuant to 735 ILCS 5/2-402, designates as Respondents in Discovery John F. Pappas, Pappas Development, LLC, PNG Development, LLC, and Heartland Real Estate Holdings, LLC by alleging that:

Plaintiff realleges and reincorporates the allegations above as if set forth fully herein.

142. That Respondents engaged in negotiations and eventually executed a contract to purchase real estate within the City of DeKalb that resulted in Defendant Nicklas tortiously interfering with Plaintiff's project in order to steer the TIF funds to his preferred developer, friend, and investor who was a client of his.

143. That this court has supplemental jurisdiction over Plaintiff's state law claims, which permits application of Illinois' civil discovery mechanism found at 735 ILCS 5/2 to the respondents in discovery.

144. That John Pappas, Pappas Development, LLC, and PNG Development, LLC, and Heartland Real Estate Holdings, LLC, are believed to have information essential to the determination of who should properly be named as additional defendants in the action for potential tortious interference and conspiracy and in-concert claims given their involvement in securing Plaintiff's TIF funds and utilizing a contract to purchase the property that was contingent on obtaining TIF funds despite the public and official statements from the City of Dekalb that the TIF funds would become surplus and distributed to the taxing bodies if the Plaintiff's project did not succeed.

WHEREFORE, PLAINTIFF prays that it be permitted to proceed with initial discovery against Respondents in Discovery, and any other relief deemed equitable and just.

Respectfully submitted,

CRONAUER LAW, LLP
Attorney for Plaintiff
1101 DeKalb Avenue, Suite 2
Sycamore, Illinois 60178
815-895-8585/815-895-4070 Fax

145 Fisk, LLC

BY: /s/ C. Nicholas Cronauer
One of its Attorneys (#: 6305683)

1.m4a

Voicemail [00:00:03] Received May 15th at 9:19AM

Bill Nicklas [00:00:08] Ralph it's Bill. I'll give you a try a little bit later, bye.

Voicemail [00:00:11] To replay press 4, to erase press seven. Message saved, Next message from phone number 815-753-3400. Received May 15th at 2:01pm.

Bill Nicklas [00:00:31] Hey Ralph it's Bill It's Thursday afternoon and it's about 2 o'clock. Two things real quick, Just to... So we talk. I through my [inaudible], Evidently the present has... I've a won a little bit of a battle here. The possible is no longer being [inaudible] nearly impossible, So, some of the engineering projects that I thought we had to do, are going to be maybe in phase two and maybe I can push it off to next spring, which would give us time and do some things. One thing I do know that somehow we're going to get you into an "open order status" because that's the way that we can offset some of the harsh constraints of the Illinois procurement system... 'legally in the book work', and I'm not exactly sure how to do that. I'll talk to you... Keep on my end and see what we can do. Because I better do some... There are some architectural work that I need done. Some spritz on some buildings that an architect can help a little bit with design and as much engineering and I might [Inaudible] people, because I got a little bit of relief from shrunk the long list to a shorter list. I can handle some the smaller things in-house right now, but I'll work on the open orders thing and I see what we can do, bye.

City of DeKalb
opportunity · innovation

DeKalb 2020

Prospectus

DRAFT

-A Communiversity Collaboration of-

City of DeKalb

Northern Illinois University Foundation

September 30, 2012

Prepared by:

Roger Hopkins, Hopkins Solutions LLC

Graphics furnished by Land Vision

Table of Contents

Executive Summary

The DeKalb 2020 prospectus creates the framework for a partnership, the roles of the partners and the objective of the partnership. The objectives include:

- A vibrant mixed use facility to serve the needs of business and education, with service and products spanning hospitality, retail, housing, and recreation in harmony with the historic neighborhood.
- Redevelopment of the "College-John" neighborhood with a mixed use project as a bridge between DeKalb's vibrant downtown and the Northern Illinois University Campus.
- Enhancement of the Kishwaukee River front area to for use by the university students, staff, faculty, neighborhood and community residents that will provide a blend of recreation and commerce.
- Creation of jobs and opportunity for students and residents.
- Enhancement of the tax base of the neighborhood and community.

Introduction

Redevelopment of the "College-John" neighborhood has been envisioned since the creation of the Central Area Tax Increment Finance District Redevelopment Plan in 1985. Problems in the neighborhood became evident during flooding that impacted many of the dwellings on the John Street river front in the 1983 flood. Other on-going issues include:

1. Declining appearance of properties converted to rooming houses or apartments,
2. Inadequate maintenance according to the standards of many of the single family owner-occupied homes in the neighborhood,
3. Lifestyle conflicts with excessive litter, from student occupancy of the rooming houses and apartments,
4. Numerous "party" complaints creating tensions between full year owner occupants and student occupancies.

The College-John neighborhood is consequently devoid of the character consistent with many of the nearby Ellwood Neighborhood homes built in the early 1900's as owner occupied homes. In the 1950's and 1960's, the neighborhood transition to student housing began with enrollment growth at the university.

Lacking land for off-street parking and rental units lacking modern amenities, disinvestment in the neighborhood began to take its toll on the maintenance and appearance of rental properties. Students began to generally prefer apartment complexes over the rental homes of the neighborhood. Apartment complexes offered plentiful parking and modern appliances. Private student housing migrated to areas south, west and north of the growing NIU campus.

The Central Area TIF Redevelopment Plan of 1985 offered plans to rehabilitate homes, flood proof properties, acquire declining and dilapidated properties and programs to fund infrastructure repair for the streets, sewer, water, storm water and flooding problems of the neighborhood.

A more focused plan was prepared in May, 1998 as the Central DeKalb Strategic Redevelopment Plan that proposed a "River front" project that would acquire and demolish homes in the floodplain, and other dilapidated properties, and create a hotel convention center, shopping district with broad landscaped public areas that would be located in the floodplain areas offering prominent public space

with aesthetic feature to support the redevelopment. After debate, that plan was set aside, while the City focused new efforts in the core downtown area. The downtown area has subsequently been substantially redeveloped, with plans to develop additional mixed use development up to the Harrison/John/College and Locust Street areas that are the subject of the DeKalb 2020 project.

Similarly, Northern Illinois University has substantially renovated many of the public areas around the adjoining "Lagoon" including the completion of the renovation of Altgeld Hall.

Consequently, both sides of the neighborhood have been redeveloped with efforts of the City and University, working with private sector developers and other public agencies.

In the adjoining neighborhood, the Ellwood Historic Neighborhood Implementation Strategies have defined the older residential neighborhood and the historic structures and uses. The boundaries of that neighborhood effort adjoin the "College-John" neighborhood that is the focus of this project. Only one of the homes in the "College-John" neighborhood is part of the Ellwood House neighborhood.

The Challenge

Based on hotel studies, the greatest need for the community and region is a conference center hotel that would serve to supply banquet and meeting space not found in a single facility. The location of the facility should be a location that is convenient to business, government and education. The College John neighborhood is a very convenient location to NIU, to businesses in the Greater DeKalb area, and reasonably well located relative to government facilities in DeKalb ad Sycamore. See the Map of the propose redevelopment area as Exhibit 1.

Additionally, there is a need for retail and fashion merchandise shopping space that would appeal to both local citizens and fashion conscious students. Eight to twelve men's, women's and fashion accessory stores are needed in the DeKalb market to overcome the lack of apparel and fashion merchandise availability. Further retail needs are more exposure for the increased demand for NIU branded merchandise and greater accessibility for a student book store.

There is a further need for high end apartments and that can serve faculty, staff and community interest in housing with improved access to the visual and preforming arts that are a premier feature of NIU's academic programs. Research and other human interest resources are readily available within easy

walking distance of the College-John neighborhood, including NIU's Founder's Memorial Library, and the DeKalb Public Library.

One further consideration may be the replacement of inexpensive housing currently occupied by many of the visual and performing arts students, and those who treasure the inexpensive and walking distance lifestyle that the neighborhood supplies due to its proximity to the oldest parts of the NIU campus.

Between 24 and 46 properties would be considered as important for the mixed use hotel-conference center, retail and residential complex that could be built as a "City within a City" development to be built. Approximately 21 of those properties are in the designated floodplain if the City and a future use should redevelop these properties to avoid the cost of future damage and cleanup. A map of the properties that need to be acquired is shown in Exhibit 2. The Flood plain map is displayed as Exhibit 3. Exhibit 4 is a table identifying the Parcel numbers and the assessed and equalized market values.

The total area of property is estimated to be 9.7 acres (41 parcels), and a smaller number of parcels may be acquired along the West Side of Harrison Street, and both sides of Locust Street. The site outside the flood plain is generally small for a commercial site, but much of the adjoining flood plain is "fringe area" that can be filled and re-configured with the redevelopment cooperation of the City and NIU, abiding by Federal, State and local government rules and regulations.

Fortunately, the "flood fringe" area is rather shallow that may enable reconfiguration without changing the flow of the river and the storage capacity of the floodplain. Adjoining is the NIU lagoon, elevated well above the Kishwaukee River level, and potentially supplying additional flood storage capacity in order to make the John Street frontage more developable, while not appreciably changing the recreational attributes of the lagoon area. Simply put, the John Street developable area has potentially 7-8 acres, forfeiting only a small area to the floodway and flood storage!

As a commercial use, parts of the commercial facilities could be built as flood proofed facilities in the flood fringe area that would need to be elevated above the flood protection elevation on pillars – leaving room for the occasional floodwaters to pond under the elevated parts of the building or parking facilities.

There is only one historically significant property in the neighborhood, according to the Ellwood Historic Neighborhood Implementation Strategies Report.

Recreational facilities can be built that are flood proofed in the floodplain, and it is suggested that those improvements provide area for the elevated hotel, meeting facilities and parking. Most of the floodplain would be devoted to "river walk" oriented walking, biking, and pedestrian improvements accompanies by aesthetic and landscaping improvements that would be permissible.

Nearly all of the properties are believed to be investor owned homes, including homes converted for apartments, and rooming houses. Acquisition of these properties could be pursued by private partners, with the City providing the option of assisting with the future demolition and site preparation through use of Tax Increment Financing techniques, such as land write down, demolition, site preparation, utilities, public water sewer and open space improvements that would assist with the development of a "river walk." An example of the approach is the partnership the City participates in with ShoDeen for the Downtown "NBT/ShoDeen Square" development project.

Exhibit 1 – Map of the Area

Exhibit 2 – Exhibit Map of the Area

Exhibit 3 – Floodplain Map of the Area

Exhibit 4 – Table of Parcel Numbers and Estimated Property Values

Location	Parcel #	Owner	Address	EAV	Market Value	Flood-plain
West Block	822251002	D-N-J Properties, Inc.	536 College	$47,950		All
	822251003	D-N-J Properties, Inc.	532 College	$106,626		All
	822251004	D-N-J Properties, Inc.	528 College	$147,079		All
	822251005	William & Karla Goldie	522 College	$63,957		All
	822251006	Samuel & Max Hiatt	518 College	$54,197		All
	822251007	AAAM Properties	512 College	$53,100		All
	822251008	Tillman-Wright Real Estate Inv. LLC	504 College	$65,401		All
	822251009	Gerald & Linda Wahlstrom	211 John	$40,583		All
	822251010	William McNew	207 John	$50,761		All
	822251011	William McNew	203 John	$49,453		All
	822251012	Anthony & Heesun Jung Majcher	161 John	$72,046		All
	822251013	NBT Trust 1786	155 John	$69,817		All
	822251014	William McNew	151 John	$59,162		All
	822251015	Robert Suddeth	147 John	$51,608		All
	822251016	Petri Corporation	141 John	$56,756		All
	822251017	Michael Pittsley	137 John	$36,760		All
	822251018	Michael Pittsley	131 John	$75,077		All
	822251019	William McNew	127 John	$39,636		All
	822251020	William McNew	123 John	$42,442		All
	822251021	Fant Family LLC	117 John	$45,988		All
	822251022	Fant Family LLC	111 John	$65,707		Part
	822251024	Arthur Richoz	221 West Lincoln Highway	$53,098		Part
E. Lincoln Block	822276009	Tom & Jerry's DeKalb		$95,212		
	822276031	Tom & Jerry's DeKalb		$7,930		
West side East Block John	822276001	Harry Hutchins	414 W. Locust	$43,482		Part
	822276002	FIRST NATIONAL BANK TR 1285	412 W. Locust	$42,803		
	822276003	Betty Osgood	148 John	$51,447		Part
	822276004	Joyce Pflaumer	140 John	$49,663		Part
	822276005	Daniel Hart	136 John	$43,474		Part
	822276006	Lisa and Rick Pryor	132 John	$47,069		
	822276007	DeKalb Properties LLC	126 John	$47,573		
	822276008	FIRST NATIONAL BANK TR 1285	120 John	$52,941		
East side Harrison Block (John)	822276011	Rene Hoeve	410 W. Locust	$52,583		
	822276017	Russell Smith	402 W. Locust	$68,200		
	822276018	Harold & Diane Joiner	149 Harrison	$39,950		
	822276026	R & J Enterprises	145 Harrison	$39,718		
	822276027	David & Terri Holderness	139 Harrison	$37,150		
	822276028	Edward Ritter	135 Harrison	$49,218		
	822276029	John Rogers	129 Harrison	$48,047		
	822276030	Nathan Books & David Galica	125 Harrison	$35,907		
Lincoln & Pearl	822276024	Chris Covert	203 W. Lincoln Highway	$58,837		
			Total College, John & Harrison	$2,258,408	$6,775,224	
Note: The following represents most of the porperties that are Floodplain			Subtotal West side of John & College	$1,450,346	$4,351,038	All

Development Strategy

The proposed project would be a mixed use project that would contain a hotel, conference and meeting facilities, one or more restaurants, retail space, office space, apartments and dormitory rooms, supported by a variety of possible amenities including a fitness center, and other recreational and amusement amenities. A conference center hotel is envisioned with 180-230 rooms, including a 40-50,000 square foot meeting and banquet center and full service restaurant. It is expected that the hotel would need to be in the range of 6-10 stories high, and be accompanied by a parking structure of 2 stories to provide parking for the hotel, and that some flood fringe area be devoted to parking for the conference center that could be vacated in the event of the threat of flooding.

Exhibit 5 – Concept Plan for DeKalb 2020 Mixed Use Redevelopment

Graphics Prepared by Land Vision

Other uses for the development of the site include development of commercial, service, retail and office space. Potential uses may include a book store, apparel stores, and NIU merchandise store, convenience store, fast food, casual and formal dining. Some of the space may be occupied for amusements and other games. Some space may be available for health care or medical facilities. Finally, office space may be supplied to those businesses that offer services to students, faculty and staff from the development and neighborhood including banking, insurance and cosmetology services.

The success of the housing component of the mixed use project would partly benefit from the removal of perhaps 100-200 bedrooms of apartment and rooming house occupancy in the neighborhood. Other strategies to reduce student rentals elsewhere in the City or on the University campus may be considered as part of a comprehensive strategy.

The "mixed use" nature would bring more visitors and local traffic and create a destination that would complement the uses of both the adjoining downtown and renovated University administration and academic facilities.

Exhibit 6 – DeKalb 2020 Looking Northwest Toward Campus

Graphics Prepared by Land Vision

Secondary benefits from the project would be the creation of a major hospitality facility that would help draw more traffic and activity to the downtown area.

Development of the site would need to occur in a fashion sensitive to the historic and open space of the adjoining Ellwood Neighborhood and the Altgeld Hall and Lagoon settings of the adjoining University.

Exhibit 7 – DeKalb 2020 Looking Northwest Toward Campus

Graphics Prepared by Land Vision

Following as Exhibit 8 is a variety of Development Scenarios compared with the public cost characteristics of each. The costs of the Project would exceed the Revenue generation of the project as depicted in Exhibit 6 – Development Revenue Scenarios. Private funding is proposed to help offset the costs that need to be publically financed. The development of a TIF District overlapping the existing TIF District is essential to helping address the overall public funding that would be necessary. Private funding of the project would assure the effective use of public and TIF funding of the parking facilities and the development of the adjoining recreational "river walk."

Exhibit 8 – Development Costs and Revenue Scenarios

Budget for College/John/Harrison

	Scenario 1	Scenario 2	Scenario 3	Scenario 4	Scenario 5
# Properties	24	32	41	42	46
Acquisition	$4,351,038	$5,486,394	$6,775,224	$7,162,929	$7,808,160
Demolition	$840,000	$1,120,000	$1,435,000	$1,470,000	$1,610,000
Relocation	$480,000	$640,000	$820,000	$840,000	$920,000
Utilities, Park, Street Improve.	$2,000,000	$2,500,000	$3,000,000	$3,000,000	$3,500,000
Site Preparation	$1,000,000	$1,500,000	$2,000,000	$2,000,000	$2,000,000
Contingency	$1,500,000	$1,750,000	$2,000,000	$2,000,000	$2,000,000
Total	$10,171,038	$12,996,394	$16,030,224	$16,472,929	$17,838,160
Outside Funding:					
Funding from Current TIF	$800,000	$1,300,000	$2,100,000	$2,400,000	$3,000,000
Private Sector Funding	$1,300,000	$1,800,000	$3,800,000	$3,900,000	$4,600,000
Net Costs to be Financed	$8,071,038	$9,896,394	$10,130,224	$10,172,929	$10,238,160
Bond for 20 Years (Est. based on 2X costs)	$16,142,076	$19,792,788	$20,260,448	$20,345,858	$20,476,320
Required Annual Tax Increment to Service Bond	$807,104	$989,639	$1,013,022	$1,017,293	$1,023,816

Exhibit 9 – Development Revenue Scenarios

	Property Tax Increment Development Yield from Four Development Options:	Sales/Hotel Tax Increment Development Yield from Four Development Options:	Utility Tax Increment Development Yield from Four Development Options:	Total Estimated Tax Increments
180 Unit Hotel Conf Center	$650,000	$450,000	$15,000	$1,115,000
230 Unit Hotel Conf Center	$750,000	$500,000	$20,000	$1,270,000
200 Units Housing	$900,000		$20,000	$920,000
25,000 Sq. ft. Retail Center	$350,000	$400,000	$15,000	$765,000
20,000 Sq. Ft. Class A Office	$120,000		$3,000	$123,000
Total Potential Increment				$3,078,000

The Development Scenario #1 in Exhibit 8 involves only the properties in the floodplain west of John Street and south of College Avenue. This scenario is the most difficult, as it would be entirely located in the flood plain and flood fringe and require a narrow, elevated building structure.

Development Scenario #2 would add the properties on the east side of John Street, but the rear yard would be those properties on the west side of Harrison. Those homes would be left out of the redevelopment, and the site outside the flood plain would only be a narrow 150 feet wide, and require significant elevated structures.

Development Scenario #3 includes the acquisition of the entire block of John/Harrison/Locust/Lincoln Highway. A variation of Scenario #2 and #3 is the recommended scenario, and may involve the acquisition of 34-37 properties, depending on the configuration of the facilities – including hotel rooms, parking structure, office, retail and other spaces of the mixed use complex.

Development Scenarios #4 and #5 anticipate incremental addition acquisitions to expand the redevelopment area with either more properties on the east side of Harrison or some additional properties on the "west nose" of the College/Woodley/Augusta block.

The role of the private sector would be the initial assembly of a number of the homes in the redevelopment area. The homes that are the most inexpensive and have the greatest transitions of ownership are those in the John/Harrison/Locust/Lincolnway block. Other properties that are west of Jon should be targeted when they become available as investors seek a more stable opportunity in the current market, or simply wish to exit the local market for estate planning reasons. Acquisition opportunities may also arise if there is a major flooding event that would make liquidation of the property an option for investors.

A management plan for operating the usable properties for a few years may be in order if the units are reasonable habitable.

DeKalb 2020 Collaboration and Conclusion

DeKalb 2020 has the opportunity to create an iconic symbol of "Communiversity" cooperation by bringing together the resources of the City, the University and the private sector to development a hotel, convention center and a "river walk" that will stimulate community pride and create a facility for entertainment.

Additional Steps Contemplated by Prospectus:

- *Private sector leadership for the creation of a non-profit organization and/or "trust" to raise funds, acquire, hold and manage properties*
- *Development of an instrument of intent and participation by the City, the University, the University Foundation, the Private NFP Trust*
- *Preparation of a neighborhood development plan to assess the feasibility of development of the hotel, conference center, and feasibility of construction and redevelopment in the flood plain and flood fringe areas, with design and aesthetics that will produce harmony with the adjoining Ellwood Neighborhood area, and the University's lagoon area, and Downtown DeKalb*
- *TIF Area Study, Boundaries and Creation and Implementation*
- *Hotel Study that will identify the feasibility of the hotel and convention center, and establish a plan for recruitment of a capable operator. A variety of conference center, hotel and parking facility ownership structures many need to be explored. Some parts of the project facilities may need to be a hybrid of City/University ownership so the operations can be successful*
- *Compatibility with the NBT/ShoDeen Square project south of West Lincoln Highway*
- *Cooperation of the University and employment of an engineering consultant to study strategies for creating more flood storage capacity of the lagoon area to compensate flood fringe area displaced by the mixed use development*

From: Bill Nicklas
To: Terry.foegler@gmail.com
CC: Douglas Baker; Ronald Walters
Date: 3/10/2014 7:21 AM
Subject: Fwd: FW: Execution Version - Memorandum of Understanding - College Town Partners, LLC (CH 3_7_14).doc
Attachments: FW: Execution Version - Memorandum of Understanding - College Town Partners, LLC (CH 3_7_14).doc

Good morning, Terry,
I hope you are well. I would appreciate your insight into the topic I want to introduce today--a matter that will have some energy behind it this week at NIU. The attached e-mail correspondence and draft MOU involving the "College Town Partners" working on the John/Harrison and W. Lincoln Highway redevelopment areas in DeKalb were generated by Tim Struthers of Castle Bank. The Nebraska holding company that owns Tim's local bank represents the most significant private interest in the redevelopment areas to date, and is pressing to establish both the legal shell and the financial contributions needed to support some initial action steps (e.g. the acquisition of foreclosed properties; floodplain engineering and mitigation, etc.). NIU has already made it clear to the potential partners that our early contributions should be seen as going toward the engineering and floodplain work. Over time, I would suspect such distinctions will get blurred.

In any case, would you consider reviewing the draft MOU to see if it poses any notable difficulties for NIU and the NIU Foundation going forward?

Best,

Bill

From: "Nicklas, Bill" <bill.nicklas@CITYOFDEKALB.com>
Subject: 145 Fisk LLC
Date: April 1, 2019 at 11:27:53 AM CDT
To: 'Nicholas Cronauer' <nickcron@me.com>, Charles Bulson <cjbulson@yahoo.com>
Cc: "Olson, Dan" <Dan.Olson@CITYOFDEKALB.com>, "Gill, Zac" <Engineering1@cityofdekalb.com>

Dear Nick and Chip,

I received the financial information for “145 Fisk LLC” on Wednesday last week and had a chance to carefully review the information you submitted over the weekend. That information included the worksheet I passed along to you at our meeting on Wednesday, March 13, and your estimated budget for the first three years of operation, following completion of the proposed $7.2 million hotel redevelopment project (see attached).

Based on the financial information you have submitted, and your acknowledgment in our meeting on March 13 that neither of you have ever developed a hotel property in the past, I am duty-bound to inform the Council that in my opinion 145 Fisk LLC does not have the financial capacity or the experience to qualify for the $2.5 million tax increment financing grant that was supported in preliminary fashion by the City Council in December, 2018. I plan to inform the Council of my recommendation this week.

Specifically, my judgment is based upon the following conclusions:

1. No balance sheet for 145 Fisk LLC has been submitted, but your submittal shows no current or long-term assets that can be pledged as collateral. The corporation controls a 24,000 square foot, uninhabitable facility with an estimated market value of only $300,000.
2. 145 Fisk LLC has not secured any sources of income to

complete the project or operate the project upon its completion.

3. 145 Fisk LLC has no working capital and its operations are not generating any capital to pay for current expenses, much less the ongoing professional consulting fees incurred to date in the conceptual planning phase of the project.

4. On the basis of your submittal, it appears that 145 Fisk LLC is relying upon a $2.5 million TIF grant from the City and 100% of the balance of the equity funding from one or more financial institutions. Your submittal offers no working cash from the principals, or pledged private assets, or lines of credit, or other private equity to help finance the project.

5. You do not reveal the real and comparable hotel development upon which you are basing the projected three-year profit and loss prospectus you submitted. Since you have not developed a hotel, your numbers are not rooted in an actual operation, so far as you have revealed. They are so many numbers on a page.

6. As you may know, TIF assistance carries a federal income tax liability. Your submittal shows no indication that 145 Fisk LLC could carry that liability except at the expense of the project's development.

Because my work is performed in the public domain, I am mindful that what I say and do can impact reputations and prospects. I do not want to embarrass either of you on the basis of a public report at an upcoming Council meeting. My recommendation to you is to withdraw your application for TIF assistance.

If you would like to discuss my assessment before I release it to the Council, please contact me at your earliest convenience.

Sincerely,

Bill Nicklas
City Manager

From: "Nicklas, Bill" <bill.nicklas@CITYOFDEKALB.com>
Subject: RE: 145 Fisk LLC
Date: April 3, 2019 at 8:07:16 AM CDT
To: Nicholas Cronauer <nickcron@me.com>, Dean Frieders <dean@frieders.com>
Cc: Charles Bulson <cjbulson@yahoo.com>, "Olson, Dan" <Dan.Olson@CITYOFDEKALB.com>, "Gill, Zac" <Engineering1@cityofdekalb.com>

Good morning,
Perhaps you forgot to delete my name from your email, Nick. Your note was written as if I was not being addressed, or perhaps it was your intent to be openly insulting. Your interpretation of my actions, words, and motivation is mistaken, emotional and ill-considered, and your behavior as an officer of the court is very disappointing. I plan to attend any meeting that is arranged to discuss your project, so I can understand and explain your position and temperament accurately to the Mayor and Council when that is appropriate. Our focus in any meeting will be the facts of either your financials, or your zoning petition and plans, or both.

Sincerely,

Bill Nicklas

From: Nicholas Cronauer <nickcron@me.com>
Sent: Wednesday, April 3, 2019 7:55 AM
To: Dean Frieders <dean@frieders.com>
Cc: Nicklas, Bill <bill.nicklas@CITYOFDEKALB.com>; Charles Bulson <cjbulson@yahoo.com>; Olson, Dan <Dan.Olson@CITYOFDEKALB.com>; Gill, Zac <Engineering1@cityofdekalb.com>
Subject: Re: 145 Fisk LLC

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Daen,

Please get us on planning and zoning calendar ASAP.

Bill was previously blocking it on the schedule and he was refusing to put it on the schedule for reasons unrelated to your summary Dean. I have it all documented to the extent such proof is necessary. We can meet at 10:00 Friday, but it has to be at my office. The whole staff is not necessary. Please confirm P and Z scheduling. Bill also said in a previous meeting that although it is not ethical for him to be present and P and Z meetings, he attended and made his appearance known at the prior 2/6 P and Z hearing where FISK was discussed. Again, I ask that he recuse himself from this process altogether because he has made his intent well known. We have tried to meet with him on our pro forma, he refused to discuss it.

He's a huge liability at this point to the City. If he recuses himself, no need to meet Friday. We have had a great working relationship with the City for the last two years without him and we can continue without him.

On Apr 2, 2019, at 3:11 PM, Dean Frieders <dean@frieders.com> wrote:

Nick,

In order to facilitate everyone's schedules for Friday, we are proposing to meet at City Hall at 10:00am. Please confirm.

With regard to the planning consideration, you are free to proceed to the Planning and Zoning Commission on any schedule you may wish to pursue (subject to our normal review periods and the statutorily required notices). The question of zoning approvals is independent from the question of whether the City will provide a financial incentive. You can certainly pursue the rezoning and/or proceed with the project without requiring the City's financial

incentive. The fundamental question that the City Manager is trying to address is the appropriateness of and/or necessity for a financial incentive.

On the issue of a financial incentive, I believe you may be misunderstanding the Manager's concern, or the City's past practice. The City has received previous requests for incentives for hotel projects, such as a proposed hotel project on the Shodeen site. As a component of that review, the City required the submission of a detailed financial pro forma. That pro forma was reviewed by a third party consultant for completeness, reasonableness and accuracy. The City also required the completion of a hotel need study, a room occupancy study, and a room rate evaluation, to confirm that the financial projections were fully informed. Upon making those requests, the developer promptly responded with very significant and detailed information. From my recollection, those documents were submitted inclusive of confidential and proprietary information, and thus are not available for public review.

I should note that this previous hotel proposal was affiliated with a national hotel chain where the 'flag' was contractually secured and a franchise was available. The proposed developer had experience with previous hotel franchises that were operational and successful, not to mention other commercial development agreements. The corporate entity proposing to undertake the development had significant other assets and was backed by a corporate guaranty from a large real estate developer. The property was owned in fee simple and there was no debt against the property. The site was large, easy to configure with parking and stormwater drainage, and included excellent roadway access.

Despite all of those positive characteristics, the City determined to not proceed forward with an economic incentive for the project, based upon a review of the available information. In the present case, the information being provided is far more limited and the site presents some additional and unique challenges. The Manager is simply working to ensure that the City has an informed

view of the proposal before moving forward with an economic incentive. That is both consistent with the City's past practice in reviewing similar proposals, and a required action in order for the City to make an informed decision on the expenditure of several million dollars of public funds. To that end, it seems that the Manager's questions were relatively clear; if you have any additional information to submit, please kindly do so.

Rest assured that if you wish to go forward with the zoning consideration, that consideration is independent of any economic incentive and you may do so at your convenience. I'd be happy to work with our staff to get that scheduled at an upcoming Planning and Zoning Commission meeting. In order to do so, we would need a complete submission of the required documents. I believe at this point we are missing proposed 'complete' plans and have not received a petition seeking any zoning relief—until those documents are received, we cannot proceed forward with the zoning consideration.

Again, please let us know if you are available to meet Friday at 10am, at City Hall.

Yours Truly,
Dean Frieders

On Apr 2, 2019, at 9:36 AM, Dean Frieders <dean@frieders.com> wrote:

Nick,

I don't believe there is continuing utility in the email exchanges, and suffice it to say that we sharply disagree with your characterizations. I'll speak with Bill and we will try to propose a time for a Friday meeting.

Yours truly,
Dean M. Frieders

On Tue, Apr 2, 2019 at 9:06 AM Nicholas Cronauer <nickcron@me.com> wrote:
Chip and I can meet Friday at my office. Please name the time.

What is unfair is asking that we withdraw the application in order to avoid embarrassment and harm to our reputation. It's even more unfair considering that your quid pro quo are defamatory statements being made to City alderman who will are to vote on this deal.

You personally talked to my banker about me, that is sufficient, and this vague and arbitrary financial vetting process with no set standard, goal, or any mechanism of compliance that you have created on your own is not your job, nor your obligation, nor a requirement of TIF. We aren't putting personal documents in the public realm outlining our finances. If we aren't financially capable, the bank won't offer the commitment. If you truly believed we weren't financially strong enough, you'd let this run its course so that we cannot get the commitment after City approval. It's been clear that you are trying to prevent us from even getting to that point rather than letting the process play out naturally. Once we get approval, we get the formal commitment, and then we can proceed. That is how it works and you know that being a banker.

You did not answer my question about whether you are still blocking the project from going before P & Z; so unless I hear otherwise from you I will assume you are still preventing this from proceeding going before P and Z.

On Apr 1, 2019, at 4:40 PM, Nicklas, Bill <bill.nicklas@CITYOFDEKALB.com> wrote:

Nick,

Your response is surprisingly hostile and more than unfair. You allege an unprofessional motivation which is unfounded and unworthy of your stature as a respected practicing attorney. I am willing to meet with you and your partner at a mutually convenient time this week, and will ask the city attorney to join us. If you have additional financial information which you have withheld, please make that available before our meeting so it can inform our conversation. Thank you.

Bill Nicklas

From: Nicholas Cronauer <nickcron@me.com>
Sent: Monday, April 1, 2019 2:52 PM
To: Nicklas, Bill <bill.nicklas@CITYOFDEKALB.com>
Cc: Charles Bulson <cjbulson@yahoo.com>; Olson, Dan <Dan.Olson@CITYOFDEKALB.com>; Gill, Zac <Engineering1@cityofdekalb.com>
Subject: Re: 145 Fisk LLC

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Bill, respectfully, you know you are being disingenuous. Surely given your banking history you know your points below are not actually true. I am sorry it appears we have to take a detour; but ultimately you control the route we must go.

You called and talked to my banker in order to assuage your unfounded financial wherewithal concerns. You are stopping this project before we can even get any firm commitments. All we need is a loan commitment to proceed, but as you were made aware, commitment and income sources cannot be secured until a formal commitment from the City is finalized, which you have been trying to block.

Given your banking background, you no doubt are aware that 145 Fisk was formed last year solely for purposes of facilitating this project. Funding and expenses are being funded from other sources since 145 Fisk, LLC is simply a holding llc at this point.

We filled out your form per your request and filled it out per its clear terms. We tried to go over the pro forma with you at the meeting, you refused to even look at it.

Please stop tortiously interfering with this project. This has been palpable since your first day dealing with us juxtaposed with your statements at various meetings about this project. Significant personal money has been spent on this project to get to this point by Chip and I. You can check the canceled checks to the City to see what is being used to fun this project.

I have numerous real estate businesses and graduated summa cum laude in accounting. I have multiple ways to carry tax burdens being self-employed with various business, which is irrelevant to the project.

Chip and I are happy to appear at the council meeting and let them know what has been going on behind the scenes since you took over. I don't know what other projects you want to fund, but you made it clear in our meeting that if this project is torpedoed you believe you can reallocate the TIF funds without having to turn it over to the taxing bodies.

We will not withdraw the application nor be intimidated into withdrawing it. We have nothing to hide nor run from for this.

Your specific comments 1-6 aren't accurate, include erroneous assumptions, are disingenuous, or are completly out of context.

Given my work history along with your background, it is my recommendation that you recuse yourself from this project and let it proceed through the proper channels.

Also, pursuant to the open meetings act, make sure you document your conversations with the alderman on this project and provide notice of it; and please don't try to circumvent the open meetings act like an RFP.

Please remember that decisions have consequences if you

continue to refuse to put this before planning and zoning--as you have up to this point--so that the project fails.

I hate that we are getting off on this foot since its opposite of what everyone else has told me, but for whatever reason you've clearly been trying to undermine us since you took over and as you said, once in the public domain, reputations are impacted.

If you want to arrange for a meeting, let me know what works. Otherwise please confirm whether you are still holding up the planning and zoning hearing. Again, I am sorry it has to be this way, but you control entirely the direction that we go from here.

On Apr 1, 2019, at 11:27 AM, Nicklas, Bill <bill.nicklas@CITYOFDEKALB.com> wrote:

Dear Nick and Chip,

I received the financial information for "145 Fisk LLC" on Wednesday last week and had a chance to carefully review the information you submitted over the weekend. That information included the worksheet I passed along to you at our meeting on Wednesday, March 13, and your estimated budget for the first three years of operation, following completion of the proposed $7.2 million hotel redevelopment project (see attached).

Based on the financial information you have submitted, and your acknowledgment in our meeting on March 13 that neither of you have ever developed a hotel property in the past, I am duty-bound to inform the Council that in my opinion 145 Fisk LLC does not have the financial capacity or the experience to qualify for the $2.5 million tax increment financing grant that was supported in preliminary fashion by the City Council in December, 2018. I plan to inform the Council of my recommendation this week.

Specifically, my judgment is based upon the following conclusions:

1. No balance sheet for 145 Fisk LLC has been submitted, but your submittal shows no current or long-term assets that can be pledged as collateral. The corporation controls a 24,000 square foot, uninhabitable facility with an estimated market value of only $300,000.
2. 145 Fisk LLC has not secured any sources of income to complete the project or operate the project upon its completion.
3. 145 Fisk LLC has no working capital and its operations are not generating any capital to pay for current expenses, much less the ongoing professional consulting fees incurred to date in the conceptual planning phase of the project.
4. On the basis of your submittal, it appears that 145 Fisk LLC is relying upon a $2.5 million TIF grant from the City and 100% of the balance of the equity funding from one or more financial institutions. Your submittal offers no working cash from the principals, or pledged private assets, or lines of credit, or other private equity to help finance the project.
5. You do not reveal the real and comparable hotel development upon which you are basing the projected three-year profit and loss prospectus you submitted. Since you have not developed a hotel, your numbers are not rooted in an actual operation, so far as you have revealed. They are so many numbers on a page.
6. As you may know, TIF assistance carries a federal income tax liability. Your submittal shows no indication that 145 Fisk LLC could carry that liability except at the expense of the project's development.

Because my work is performed in the public domain, I am mindful that what I say and do can impact reputations and prospects. I do not want to embarrass either of you on the

basis of a public report at an upcoming Council meeting. My recommendation to you is to withdraw your application for TIF assistance.

If you would like to discuss my assessment before I release it to the Council, please contact me at your earliest convenience.

Sincerely,

Bill Nicklas
City Manager

FORM **NFP 102.10**
ARTICLES OF INCORPORATION
General Not For Profit Corporation Act
File # 69368174
Filing Fee 350
Approved By JXR

FILED
DEC 18 2013
Jesse White
Secretary of State

Article 1.
Corporate Name COLLEGE TOWN PARTNERS NFP

Article 2.
Registered Agent

Registered Office

SYCAMORE IL 60178-3140 DE KALB COUNTY

Article 3.
The first Board of Directors shall be 3 in number their Names and Addresses being as follows
F WILLIAM NICKLAS 395 WIRTZ DRIVE, DEKALB, IL 60115

Article 4. Purpose(s) for which the Corporation is organized:
Charitable

Eleemosynary

Educational

Social

Is this Corporation a Condominium Association as established under the Condominium Property Act? ☐ Yes ☑ No
Is this a Cooperative Housing Corporation as defined in Section 216 of the Internal Revenue Code of 1954? ☐ Yes ☑ No
Is this Corporation a Homeowner's Association which administers a common-interest community as defined in subsection (c) of Section 9-102 of the code of Civil Procedure? ☐ Yes ☑ No

Article 5. Name & Address of Incorporator
The undersigned incorporator hereby declares, under penalties of perjury, that the statements made in the foregoing Articles of Incorporation are true

Name Street

Dated DECEMBER 18 (Month & Day) 2013 (Year) SYCAMORE IL 60178 (City State ZIP)

This document was created electronically at www.cyberdriveillinois.com

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RESOLUTION 2018-166 **PASSED: DECEMBER 18, 2018**

AUTHORIZING A PRELIMINARY DEVELOPMENT INCENTIVE AGREEMENT FOR THE RENOVATION OF THE FORMER ST. MARY'S HOSPITAL AT 145 FISK AVENUE, DEKALB, ILLINOIS, TO A BOUTIQUE HOTEL AND ASSOCIATED COMMERCIAL USES.

WHEREAS, the City of DeKalb is a home-rule municipal corporation with all power and authority derived under the law; and

WHEREAS, the property located at 145 Fisk Avenue ("the Premises"), has a contract purchaser identified as 145 Fisk, LLC or nominee ("Owner"), and

WHEREAS, the City and Owner seek to enter into an agreement for improvements to the Premises; and

WHEREAS, Owner has proposed to commit funds to the completion of improvements on the Premises, subject to the City's commitment to provide economic development funding for this project; and

WHEREAS, the City Council of the City of DeKalb has determined that it is necessary and advantageous and supports the public health, welfare and safety to provide an economic incentive to ensure the revitalization of an otherwise obsolete property;

NOW THEREFORE BE IT RESOLVED BY THE CITY COUNCIL of the City of DeKalb, Illinois:

SECTION 1. The City Council of the City of DeKalb hereby approves of the Development Incentive Agreement in the format attached hereto as Exhibit 1 ("the Agreement"), subject to such amendments as shall be acceptable to the Mayor with the recommendation of the City Manager. Staff is authorized to negotiate and proceed with presentation of Final Development Agreement for consideration of approval at a future date. The City Council approves of the Development Incentive contemplated therein and directs that funding be transferred or ported from TIF District 2 to the Central Area TIF District and allocated to this specified development project. The City Council expressly finds that this Agreement and the project contemplated herein is in accordance with the presently adopted and applicable redevelopment plans and makes this designation of approved project in order to comply with the TIF Act and designate projects for TIF 2 prior to the estimated completion date thereof.

SECTION 2. That the City Clerk of the City of DeKalb is authorized and directed to attest the Mayor's signature.

SECTION 3. Thereafter, City staff are directed to fully comply with the terms of the Agreement, and to undertake the obligations contained therein. Provided that the work performed under the Agreement is performed in accordance with the Agreement, the City Council waives any otherwise applicable requirement for City Council approval of bids or

vendors utilized by Owner and waives any applicable competitive bidding requirement (except to the extent required under the Agreement).

PASSED BY THE CITY COUNCIL of the City of DeKalb, Illinois, at a Special meeting thereof held on the 18th day of December 2018 and approved by me as Mayor on the same day. Passed by a 5-2 roll call vote. Aye: Jacobson, Finucane, Verbic, Faivre, Smith. Nay: Fagan, Noreiko.

ATTEST:

CITY OF DE KALB
DEKALB
STATE OF ILLINOIS

LYNN A. FAZEKAS, City Clerk

JERRY SMITH, Mayor

Prepared By and Return To:
City of DeKalb
ATTN: City Attorney
200 S. Fourth Street
DeKalb, IL 60115

145 FISK AVENUE
PRELIMINARY DEVELOPMENT INCENTIVE AGREEMENT
CITY OF DEKALB

This Preliminary Incentive Agreement (the "Agreement") is made and entered the 1 day of January, 2018 by and among the City of DeKalb, an Illinois municipal corporation located in DeKalb County, Illinois, (the "City"), and 145 Fisk, LLC or nominee (the "Owner"). The City and the Owner are collectively referred to as "Parties" and individually referred to as a "Party."

RECITALS

A. The Owner is the owner or contract purchaser of record of approximately 1.38 contiguous acres of real property at 145 Fisk Avenue, situated with frontage on both Fisk Avenue and Sycamore Road in the City of DeKalb, DeKalb County, Illinois, which property is legally described on Exhibit A attached hereto and incorporated herein by reference as the "Property".

B. The Property is comprised of 1 parcel number (0823103027). Buildings on the Property are in an advanced state of deterioration. Collectively, the Property has declined in value during the preceding thirty years, despite the existence of a Tax Increment Financing District ("TIF District") covering the property for said period. As the Property was utilized for a tax-exempt purpose at the time of initiation of the TIF District, the Property presently has a base valuation (for TIF purposes) of $0. The Owner has acquired the contractual right to purchase the Property and each parcel therein, and proposes to create an assemblage of parcels under common ownership, with the intention of redeveloping the Property as a mixed-use, commercial development in accordance with this Agreement. The Property is proposed to be developed in accordance with the conceptual plans attached hereto as Group Exhibit B ("the Plans"), except as such plans are required to be modified under the terms of this Agreement. The Plans contemplate the renovation of the existing building for a multi-story mixed use facility including a hotel, a conference/gathering/reception area, a restaurant and bar/lounge, and related commercial uses.

C. The Parties acknowledge that in order to permit the redevelopment of the Property in accordance with the Plans, it will be necessary to approve final plans for the Property, and also to rezone the Property to Planned Development-Commercial ("PD-C") zoning. Undertaking that rezoning process requires the completion of certain public hearings, and other conditions precedent to final approvals being granted. However, the proposed development is adequately advanced in planning as to be eligible for consideration of an incentive agreement. Further, the Owner is at a point of incurring substantial professional fees and related costs which are eligible for reimbursement through the development incentive contemplated herein. Because the preliminary analysis of costs on the project has demonstrated that the project has a significant financing gap and would not independently be financeable because of the blight and deterioration of the Property, the Owner has indicated that but-for the provision of the incentive contemplated herein, it would not undertake the project. Accordingly, the Parties have entered into this Agreement so as to provide an incentive for the Owner to complete further preparation of final plans, to incur the expenses associated with rezoning the Property, and otherwise to proceed with the proposed project, subject to the contingencies outlined herein.

D. The City and the Owner thus have negotiated and have voluntarily entered into this Agreement for purposes of enabling the redevelopment of the Property consistent with the Plans and this Agreement, subject to further agreement or amendment as described below.

E. The City acknowledges that the Owner's proposed use of the Property, as set forth in this Agreement, will be compatible with and will further the planning objectives of the City and that the redevelopment of the Property to the City will be of benefit to the City, will permit orderly growth, planning and development of the City, will increase the tax base of the City, and will promote and enhance the general welfare of the City and its residents. The Owner acknowledges that the City is not required to provide the incentive contemplated herein, and that the City's agreement to conditionally approve the incentive in accordance with the provisions of this Agreement, to provide access to public utility services and other City services, and to otherwise perform the City's obligations under this Agreement constitutes valuable, bargained-for consideration that benefits the Owner and the Property.

F. All other and further notices, publications, procedures, public hearings and other matters attendant to the consideration and approval of this Agreement and the conditional approval of an incentive for the Property have been given, made, held and performed by the City as required by the Illinois Municipal Code, and all other applicable statutes, and all applicable ordinances, regulations and procedures of the City.

G. The Corporate Authorities have duly considered all necessary matters to enter into this Agreement and have further duly considered the terms and provisions of this Agreement and have authorized the Mayor to execute, and the City Clerk to attest, this Agreement on behalf of the City.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual covenants and agreements herein made, the Parties hereby agree as follows:

ARTICLE I: INCORPORATION OF RECITALS

The Parties acknowledge that the statements and representations contained in Paragraphs A through G, both inclusive of the foregoing recitals are true and accurate and incorporate such recitals into this Agreement as if fully set forth in this Article I.

ARTICLE II: ZONING OF THE PROPERTY

A. Zoning Contingency:

The Parties acknowledge and agree that the Property, as presently zoned, cannot lawfully be used for the purposes described above nor for the configuration contemplated by the Plans. Accordingly, the Parties agree that it is necessary for them to undertake a process to contemplate the rezoning of the Property consistent with the description in the recitals. The incentive contemplated in this Agreement is and shall be contingent upon the Owner applying for and successfully obtaining rezoning of the Property to a PD-C zoning designation (or other designation acceptable to the Parties), and entering into a

planned development agreement which either incorporates or amends the terms of this Agreement so as to provide for the orderly development of the Property.

The Parties acknowledge that the Owner has the Property under contract and, other than completing the rezoning of the Property and attendant approval of final plans in substantial conformity to the attached Plans, is prepared and committed to undertaking and completing the development of the Property. However, should the Property fail to be rezoned, or should the Parties fail to agree upon the terms of a suitable Planned Development Agreement within one (1) year of the date of approval of this Agreement, this Agreement shall terminate and shall be of no further force or effect (with the Parties acknowledging that this period may be extended in accordance with the requirements of this Agreement). Owner agrees and acknowledges that any costs incurred prior to approval of a planned development agreement as contemplated herein, while they may be eligible for inclusion in the costs subject to reimbursement, are incurred at Owner's sole risk and cost until such point in time as the Property is rezoned and the planned development agreement is approved, and any other conditions or contingencies outlined herein are satisfied in full.

Owner acknowledges all contingencies outlined in this Agreement, and agrees and acknowledges that until all such contingencies are fully satisfied, it has no basis to detrimentally rely upon the representations of the City with respect to the availability of incentive funding. Owner further acknowledges that in evaluating this Agreement and the potential to develop the Property, it has not relied upon any statement or condition not expressly outlined herein.

Notwithstanding the foregoing, the City agrees that, at such point in time that all contingencies outlined herein are satisfied in accordance with the terms of this Agreement, the City shall provide the funding contemplated herein, in accordance with the terms hereof. The intention and legally binding agreement of the Parties is to commit to the payment of the development incentive contemplated herein, subject to conditions that both of the Parties agree are reasonable and commercially customary conditions with respect to the payment of a development incentive. The City agrees and acknowledges that, by virtue of the approval of this Agreement, it shall allocate and dedicate funding towards the costs of the project contemplated herein, and shall reserve such funding for use towards the eligible costs outlined herein.

B. Additional Property:

The Parties acknowledge that, during the course of planning the development of the Property, Owner may elect to, or may be required to, purchase or acquire other parcels of land in the vicinity of the Property, in order to facilitate the orderly development of the Property, to provide access thereto, or to address stormwater detention or other utility related issues. Such acquisitions shall be considered to be a component of this Agreement and eligible components of the costs incentivized hereunder. Should the Parties later agree, by virtue of a final development agreement or otherwise, to include additional properties within the development, then the intent of the Parties is to read this Agreement as including such additional properties within the definition of Property as

contained herein, to subject such additional properties to the zoning and related contingencies described herein, and otherwise to treat such additional properties as a component of the Property, notwithstanding that Owner has not, at time of approval of this Agreement, acquired such other properties.

ARTICLE III: DEVELOPMENT AND MAINTENANCE OF THE PROPERTY:

A. Further Agreement Required:

The Parties acknowledge that under the terms of development agreements customarily utilized by the City, the Owner will be required to commit to developing the Property in accordance with applicable zoning and development standards (except as modified by the PUD zoning the Property is anticipated to utilize), to install and/or connect to such utility connections as shall be required for the Property, to construct such road improvements, traffic control devices or access points as shall be necessary to access the Property, to pay such fees as shall be applicable to the development of the Property, to commit to the future maintenance of the Property, to consent to the creation of a backup special service area for the Property, to agree to indemnify, defend, hold harmless and insure the City and specified related parties, and with regard to the commercial and hotel operations, agree to certain operational standards requiring the Owner to consent to the licensure of the Property, provision of public safety camera access, consent to inspections of the Property and related conditions. The Owner will also be required to agree to provisions relating to the orderly development and construction of the Property, provision of financial security for public and private improvements, site control regulations, review and permitting processes and related matters. The Owner agrees and acknowledges that it has familiarized itself with the City's customary requirements as they have been applied to previous development projects and acknowledges that such requirements shall be incorporated into a final development agreement for the Property at the time of rezoning of the Property, with Owner's acceptance of such terms being required in order to satisfy the contingency described in Article II(A) above.

ARTICLE IV: PROJECT STAGING:

The Parties acknowledge that the construction of the project upon the Property shall be staged. The Parties further acknowledge that the timeline contained in this Agreement may be extended by the City Council from time to time without requiring an amendment of this Agreement.

1) The Owner shall submit preliminary (or proposed final) plans, a suitable traffic study, engineering documents and related documents and any required petitions or applications or rezoning or other required approvals, and shall initiate the rezoning of the Property, within one-hundred twenty (120) days of the date of approval of this Agreement. Such plans shall include detail regarding the conceptual floorplans, proposed architectural elevations, site layout and setbacks, utility connections and stormwater management, traffic flow, proposed uses and such additional information as shall be required by the Community Development Director.

2) The Owner shall immediately collaborate with City staff with regard to the identification of any additional properties which are required to be acquired for the orderly development of the Property pursuant to Article II(B) above, and shall expeditiously proceed to purchase or secure options to purchase such parcels.
3) The Parties acknowledge that portions of the additional properties (if any) may remain in use pending completion of the renovation/construction on the Property, and pending the date on which termination of such occupancy is required to terminate in order to complete the orderly development of the project contemplated herein (and in no instance later than the date of first issuance of a temporary or final certificate of occupancy for any portion of the Property, after redevelopment as contemplated herein).
4) The Owner shall proceed to expeditiously undertake any required revisions to plans and proposals so as to enable the Property to proceed to public hearing on the consideration of rezoning to a Planned Unit Development, Commercial (PUD-C) zoning designation with a positive staff recommendation, and thereafter to be considered for approval by the City Council with a corresponding PUD-C development agreement.
5) Before or contemporaneously with the approval of preliminary (or final) plans, Owner shall consult with the Chief Building Official of the City regarding proposed architectural plans for the renovation of the Property.
6) Upon approval of the final plans by the City Council, Owner shall expeditiously generate and submit final architectural plans, seek and apply for building permits and shall undertake construction or renovation of the buildings on the Property in accordance with the approved final plans.
7) Owner shall substantially complete construction on the Property within twelve (12) months of the date of approval of the final plans by City Council, with the twelve (12) month time period starting on the date whereby all building permits are issued (or any extension to such period as may be authorized pursuant to the terms of this Agreement).
8) Pending completion of the construction, and at all times prior to and subsequent to the approval of final plans by the City Council, Owner shall maintain the existing facilities on the Property in a condition that complies with applicable Property Maintenance Codes.

ARTICLE V: DEVELOPMENT INCENTIVE:

A. Necessity of Incentive:

The Parties acknowledge that the Property has been blighted and vacant for more than 25 years, and has had a deleterious impact on adjacent property values and uses, notwithstanding the existence of a TIF District intended to improve property valuation. The Parties further acknowledge that the buildings comprising the Property are blighted within the statutory definitions contemplated by the Tax Increment Financing Allocation Act ("TIF Act"), and that the Owner is proposing to undertake a project that will incur substantial TIF-eligible expenses. The Parties further acknowledge that the Project is anticipated to generate substantial new revenues for the City and for other affected taxing districts and public entities, along with substantial new opportunities for commerce in the

City's downtown and other areas. Further, the Parties acknowledge that but for the provision of the incentive described herein, the Developer would be unable to undertake the project contemplated herein, as based upon extensive study of the proposed project and its costs, and the Parties have mutually concluded that this project would not be economically feasible and the Owner would not acquire the properties, would not remediate unsafe buildings, and would not undertake the project. Accordingly, the Parties agree and acknowledge that the Development Incentive as described herein is necessary in order to induce this project to occur, and satisfies all requirements applicable to such an incentive.

B. Development Incentive Defined:

The Owner commits that it shall invest not less than Seven Million One Hundred Thousand Dollars ($7,100,000) in the completion of the project as defined herein ("Project Completion Costs"), and shall proceed to construct all phases of the project (after obtaining required approvals and satisfying contingencies outlined herein) in a good and workmanlike manner. Following such approvals and contingencies, the City shall provide a total Development Incentive of Two Million Five Hundred Thousand Dollars ($2,500,000), payable through one or more phases as described herein ("the Development Incentive"). In the event that Owner fails to incur the minimum Project Completion Costs of $7,100,000, then the Development Incentive shall be reduced pro-rata, in proportion to the reduction in Project Completion Costs (i.e. a 10% reduction in Project Completion Costs below the minimum threshold defined herein shall cause a 10% reduction in the Development Incentive). All provisions of this Article V are contingent upon the Owner obtaining final approval of its plans, rezoning the Property, lender financing, and executing a planned development agreement as described above. The total Development Incentive shall be an amount not to exceed the lesser of: 1) $2,500,000; 2) the sum of all TIF Eligible Costs as defined herein; or, 3) the amount which is equivalent to thirty-five and three-tenths percent (35.3%) of the Project Completion Costs, as defined herein.

C. Definition of Eligible Costs:

1. Project Completion Costs, as described above, shall include all costs relating to the planning, purchase, demolition, remediation, restoration or construction of the project on the Property inclusive of the buildings on the Property, and such other costs as shall be included within the definition of Project Completion Costs as contemplated within the planned development agreement. It shall include: all costs of property acquisition and closing costs, including costs necessary to buyout of and/or relocation of existing tenancies, without the expenditure of which by Owner this project could not move forward as described and contemplated herein; demolition, environmental remediation and site restoration costs; professional design and engineering fees; costs of utility service, installation or relocation, including without limitation underground storm water pipes, sanitary runs or pipes, relocation of electric services and equipment, grease traps; interim financing and construction bridge loan interest costs; legal and other professional fees; management fees not to exceed a percentage of total actual project costs in accordance with the TIF Act and the

final planned development agreement; costs associated with processing lien waivers and payment of project expenses; contractor, subcontractor and materialmen costs; mobilization, site-heating, temporary utility or other construction related costs; permit fees, tap-on, connection or recapture fees; delivery expenses; costs of permanent fixtures, furnishings and equipment; costs of furniture for the fully furnished hotel units; costs of constructing any public improvements that are directly associated with the completion of the project (e.g. rights of way, roadways, sidewalks, driveway aprons, lighting); and other costs that are directly related to the construction on the Property and the improvements contemplated by the approved final plans.

2. TIF Eligible Costs shall include those costs which are eligible for reimbursement under the TIF Act to the fullest extent of the law, including but not limited to site assembly and acquisition costs, demolition and remediation costs, costs associated with providing public utilities to the Property, professional fees associated with the design, architecture, and/or engineering of the Property, costs associated with making permanent physical improvements to existing structures on the Property, and any other TIF eligible costs, whatsoever. TIF Eligible Costs shall only include costs incurred after the date of approval of this Agreement. Such costs shall be eligible for inclusion within the TIF Eligible Costs without regard to whether they are incurred before or after the contingencies contemplated herein are satisfied, and without regard to whether they are incurred before or after the property is rezoned and/or subjected to the requirements of a planned development agreement (provided that the contingencies are in fact satisfied prior to payment).
3. For any cost to be included as a Project Completion Cost or TIF Eligible Cost, said cost must be documented in accordance with the Project Cost Documentation requirements that the City customarily utilizes, which shall be appended to the planned development agreement for the Property, if approved.

D. Payment of Development Incentive:

The timing and phasing of payments of the Development Incentive shall be as established in the planned development agreement for the Property, approved at the time of rezoning of the Property if all contingencies contemplated herein are satisfied.

E. Forgiveness of Development Incentive:

The Development Incentive described herein is intended to be repaid as a forgivable incentive, payable through the generation of revenues from the development of the Property after the date of final plan approval. Forgiveness is anticipated to be calculated based upon revenues generated by the redevelopment of the Property following issuance of a final certificate of occupancy, including: 1) new property tax increment generated, on an annual basis, as compared to the base equalized assessed valuation of the property in the last full year preceding redevelopment thereof (i.e. $32,893 as the tax year 2017 valuation); 2) sales tax generated by the Property; 3) restaurant and bar tax generated by the Property; and, 4) hotel-motel tax generated by the Property. The Forgiveness Period shall be for a period of thirty (30) years, commencing upon the last date of payment of any portion of the Development Incentive, and concluding on the date

which is the thirtieth anniversary of said date. Notwithstanding the foregoing, all revenues which count towards the forgiveness of the development incentive as provided herein, which are generated on or after the date of issuance of a final certificate of occupancy for the buildings on the Property, shall be credited against the Development Incentive, even if such revenues accrue prior to the start of the thirty-year forgiveness period. The total of new revenue credits as calculated under the preceding Sections V(E)(1), (2), (3), and 4 shall collectively comprise the Incentive Repayment. If, upon conclusion of the Forgiveness Period, the Incentive Repayment has failed to equal the total of the Development Incentive paid under this Agreement, then the remaining balance shall not be forgiven and shall be a debt due and owing to the City requiring repayment within one hundred twenty (120) days of Owner's receipt of written notice of same from the City. The City may, at such point, enforce its right of repayment by virtue of a contract action seeking damages for violation of this Agreement (if Owner refuses to pay upon demand), may initiate an action for foreclosure of the City's mortgage(s), or may pursue such other legal or equitable remedies as may exist.

F. Limitation of Liability:

The Parties acknowledge that the City's liability to pay the Development Incentive shall be expressly limited to funds available to the City in the City's Special Tax Allocation Fund, which Fund has as its sole source of revenue incremental taxes collected in the City's TIF Districts. Should the City not have adequate funding within the Special Tax Allocation Fund for any reason, the City shall not be obligated to make payments of the Development Incentive hereunder, without regard to whether Owner has satisfied the contingencies contemplated herein. However, the City has no reason to believe it does not have adequate funding within the Special Tax Allocation Fund for any reason or that it will not have adequate funding within the Special Tax Allocation Fund for any reason arising in the foreseeable future.

Owner may not compel any exercise of taxing authority by the City to make payments provided for hereunder. The provisions of this Agreement do not constitute indebtedness or a loan of credit of either Party within the meaning of any constitutional or statutory provision, except to the extent required to permit enforcement of the City's rights under the corporate undertaking, promissory note and mortgage required herein. To the extent required by law, for each year during the term of this Agreement, the City hereby agrees that it will budget for and appropriate funds necessary to satisfy its obligations hereunder. Such appropriation shall be a part of City's annual budget adopted in accordance with the Illinois Municipal Code and applicable provisions of City Code. The City shall make any appropriation necessary for the year that the Agreement is entered into by means of a budget amendment, if any is necessary. All references to provisions in the Illinois Municipal Code are to provisions as in effect now and as hereafter amended.

G. Need for Present Development Incentive Commitment:

The Parties agree and acknowledge that, in order for Owner to secure commercial financing to render the redevelopment of the Property possible, Owner is required to secure the City's commitment to utilize a development incentive as contemplated herein. The Parties further acknowledge Owner's intention to initiate and work diligently towards

completion of the redevelopment project contemplated herein within calendar year (and City fiscal years ("FY")) 2019. In order to secure commercial financing, the Owner is required to demonstrate the funding and availability of the Development Incentive, and in order to make that demonstration, the City is obligated to allocate presently available funds to this project, to budget and appropriate said funds within FY2019 for this project and this Property, and otherwise to comply with this Agreement. Such actions are required in order to enable Owner to proceed with the plans contemplated herein which are required to satisfy the contingencies of this Agreement.

The City agrees that, for FY2019, it shall budget an adequate sum to cover the incentive contemplated herein. Immediately upon approval of the plans and a planned development agreement for the Property and the satisfaction of the contingencies outlined herein (and any conditions precedent identified in the planned development agreement), the City agrees that it shall transfer such budgeted funds from the Special Tax Allocation Fund to a commercial escrow account for the purpose of providing funding to pay TIF Eligible Costs as defined above. The transfer of funds to such commercial escrow and the payment of any funds from the escrow shall be subject to the implementation of restrictions acceptable to the City with regard to project and TIF eligibility demonstration and documentation in accordance with the City's usual and customary practices for development projects of this nature. Such requirements shall be documented in the planned development agreement for the Property. The Parties agree and acknowledge that the City's commitment to budgeting funds in FY2019 and transferring funds to a commercial escrow account as contemplated herein is necessary in order to enable the financing of the Property and the project contemplated herein, and thus necessary to eliminate the blight contained on the Property.

The City acknowledges that the Property is within the Central Area Tax Increment Financing District, commonly referred to as TIF 1. The financial projections for TIF 1 for FY2019 presently show TIF 1 lacking adequate funding in order to cover the costs associated with the project and the redevelopment of the Property. Accordingly, the City agrees that it shall commit funding from the adjacent Tax Increment Financing District 2 ("TIF 2") to funding of the project and redevelopment of the Property, and shall port and transfer such funds from TIF 2 to TIF 1, for retention in the TIF 1 Special Tax Allocation Fund and for ultimate transfer to the commercial escrow, pending satisfaction of the contingencies contemplated herein.

ARTICLE VI. MUTUAL ASSISTANCE:

The Parties shall do all things necessary or appropriate to carry out the terms and provisions of this Agreement; to aid and assist each other in carrying out the terms and objectives of this Agreement and the intentions of the Parties as reflected by said terms, including, without limitation, the giving of such notices, the holding of such public hearings, the enactment by the City of such resolutions and ordinances and the taking of such other actions as may be necessary to enable the Parties' compliance with the terms and provisions of this Agreement and as may be necessary to give effect to the terms and objectives of this Agreement.

ARTICLE VII: REMEDIES:

A. Failure to Construct:

1. This Agreement contains specific timelines for the rezoning and development of the Property. Those timelines may be extended by the City Council, with agreement of the Owner, from time to time by resolution, without requiring an amendment of this Agreement, for good cause shown by Owner, in the Council's discretion.
2. In the event the Owner fails to obtain approval of the final plans or if the City determines that the final plans are not acceptable, then the City may terminate this Agreement upon provision of written notice to Owner.

B. Breach Generally:

Upon a breach of this Agreement, any of the Parties, solely in the venue as provided hereinafter, by an action or proceedings at law or in equity, may secure the specific performance of the covenants and agreements herein contained, may be awarded damages for failure of performance or both. No action taken by any party hereto pursuant to the provisions of this Article or pursuant to the provisions of any other Article of this Agreement shall be deemed to constitute an election of remedies and all remedies set forth in this Agreement shall be cumulative and nonexclusive of any other remedy either set forth herein or available to any party at law or in equity.

In the event of a material breach of this Agreement, the Parties agree that the Party alleged to be in breach shall have forty-five (45) days after written notice of said breach to correct the same prior to the non-breaching Party's seeking of any remedy provided for herein (provided, however, that said forty-five (45) day period shall be extended if the defaulting Party has initiated the cure of said default and is diligently proceeding to cure the same).

If any of the Parties shall fail to perform any of its obligations hereunder, and the Party affected by such default shall have given written notice of such default to the defaulting party, and such defaulting Party shall have failed to cure such default within forty-five (45) days of such default notice (provided, however, that said forty-five (45) day period shall be extended if the defaulting party has initiated the cure of said default and is diligently proceeding to cure the same), then, in addition to any and all other remedies that may be available, either in law or equity, the Party affected by such default shall have the right (but not the obligation) to take such action as in its reasonable discretion and judgment shall be necessary to cure such default.

The failure of the Parties to insist upon the strict and prompt performance of the terms, covenants, agreements, and conditions herein contained, or any of them, upon any other party imposed, shall not constitute or be construed as a waiver or relinquishment of any party's' rights thereafter to enforce any such term, covenant, agreement or condition, but the same shall continue in full force and effect.

If the performance of any covenant to be performed hereunder by any Party is delayed as a result of circumstances which are beyond the reasonable control of such Party (which circumstances may include acts of God, war, acts of civil disobedience, weather, terrorist acts of a direct or indirect nature, material shortages, flooding, strikes or similar acts), the time for such performance shall be extended by the amount of time of such delay.

ARTICLE VIII: TERM:

The Parties acknowledge that this Agreement has been negotiated in furtherance of the redevelopment of the Property. This Agreement shall have a term of two (2) years from the date of approval by the City Council and should the contingencies contemplated herein not be satisfied within two (2) years, this Agreement shall terminate without requirement of further notice (unless such period is extended in accordance with the terms hereof). Notwithstanding the foregoing, the Parties agree and acknowledge that it is their intention to extend the term of this Agreement by an amendment hereto in the form of the planned unit development agreement contemplated herein upon Owner's satisfaction of all contingencies described above, which amended agreement shall have a term of not less than fifty (50) years.

ARTICLE IX: MISCELLANEOUS:

A. Amendment:

This Agreement, and the exhibits attached hereto, may be amended only by mutual consent of the City and Owner of an affected Parcel, by adoption of an ordinance by the City approving said amendment as provided by law, and by the execution of said amendment by the City and Owner.

B. Severability:

If any provision, covenant, agreement or portion of this Agreement or its application to any person, entity or property is held invalid, such invalidity shall not affect the application or validity of any other provisions, covenants, agreements and portions of this Agreement, and to that end, all provisions, covenants, agreements and portions of the Agreement are declared to be severable. If for any reason the zoning of the Property is ruled invalid, in whole or in part, the Corporate Authorities, as soon as possible, shall take such actions (including the holding of such public hearings and the adoption of such ordinances and resolutions) as may be necessary to give effect to the spirit and intent of this Agreement and the objectives of the Parties, as disclosed by this Agreement.

C. Entire Agreement:

This Agreement sets forth all agreements, undertakings and covenants between and among the Parties. This Agreement supersedes all prior agreements, negotiations and understandings, written and oral, and is a full integration of the entire agreement of the Parties. In the event of any conflict between two or more components of this Agreement providing standards, guidelines or requirements for Owner to act upon in or

around the Property, construction or related activities for the Property, the more restrictive provision shall apply unless the City agrees otherwise.

D. Successors and Assigns:

1. This Agreement shall inure to the benefit of, and be binding upon the Owner and its successors, grantees, lessees, and assigns, and upon the City and successor corporate authorities of the City and successor municipalities, and shall constitute a covenant running with the land.
2. This Agreement shall not be assigned without the City's express, written approval as memorialized via a resolution of the City Council. This Agreement may be assigned with the City's consent, pursuant to a written amendment to this Agreement. Such amendment shall provide for the transfer of obligations to the successor owner/assignee, and may also provide for any proposed changes in use of the Property or the scope of the redevelopment project.
3. Except as provided in the preceding subsection, the Owner shall not be authorized to engage in any sale, encumbrance, hypothecation or assignment of the Property or the rights conveyed under this Agreement, prior to the date upon which all final certificates of occupancy on the Property are issued, and all of the improvements described in the final plans (once approved) have been constructed. Transfers among or between family members related by blood or marriage, or between trusts, corporations, partnerships or limited liability companies which are entirely owned or controlled by family members related by blood or marriage, shall not be construed as sale or assignment under this subsection.

E. Notices:

Any notice required or permitted by the provisions of this Agreement shall be in writing and sent by certified mail, return receipt requested, or personally delivered, to the Parties at the following addresses, or at such other addresses as the Parties may, by notice, designate:

City Clerk

City of DeKalb
200 South 4th Street
DeKalb, IL 60115
Telephone: 815-748-2095

With copies to:

City Manager
City of DeKalb
200 South Fourth Street
DeKalb, IL 60115
Telephone: 815-748-2090

City Attorney
City of DeKalb
200 South 4th Street
DeKalb, IL 60115
Telephone: 815-748-2093

If to the Owner:	145 Fisk, LLC or nominee 1101 DeKalb Avenue, Suite 2 Sycamore, IL 60178
With a Copy To:	C. Nicholas Cronauer 1101 DeKalb Ave., Suite 2 Sycamore, IL 60178

Notices shall be deemed given on the third (3rd) business day following deposit in the U.S. Mail, if given by certified mail as aforesaid, and upon receipt, if personally delivered.

F. Time of Essence:

Time is of the essence of this Agreement and of each and every provision hereof.

G. Indemnification:

The Owner covenants and agrees to pay, at its expense, any and all damages, expenses, liabilities and losses resulting from this Agreement, the construction and development activities of the Owner, or its agents, contractors and subcontractors, and to defend and indemnify and save the City and its officers, elected and appointed agents, employees, engineers and attorneys (collectively, the "Indemnifieds") harmless of, from and against such damages, expenses, liabilities and losses as a direct and proximate result of Owner's unlawful actions in furtherance of the terms hereof and the construction activities contemplated hereby, except to the extent such damages, expenses, liabilities and losses arise by reason of the negligence or willful or wanton act or omission of the Indemnifieds.

H. Exhibits:

The following Exhibits referred to herein and attached to this Agreement are hereby made a part of this Agreement:

Exhibit A:	**Legal Description of the Property**
Group Exhibit B:	**Concept Plans**

I. Venue:

Jurisdiction and venue for any dispute arising out of relating to the terms of this Agreement, the zoning or restrictions imposed hereunder, the development of the Property or otherwise relating to the relationship of the Parties or contents hereof shall have its jurisdiction and venue exclusively fixed in the Twenty-Third Judicial Circuit, DeKalb County, Illinois, and the parties expressly and intentionally waive the right to pursue claims in any other jurisdiction or venue including but not limited to a knowing, voluntary waiver of the right to pursue any claim in federal court.

J. Survival of Provisions:

The provisions of this Agreement relating to the remedies upon default and/or the recovery of any portion of the Development Incentive (through legal action, foreclosure, deed in lieu or other process) shall survive any termination of this Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the date first above written and, by so executing, each of the Parties warrants that it possesses full right and authority to enter into this Agreement.

CITY:

CITY OF DEKALB, an Illinois Municipal corporation

By: _____ Attest: _____
Jerry Smith, Mayor — Lynn A. Fazekas, City Clerk

CITY OF DE KALB STATE OF ILLINOIS DEKALB

OWNER:

By: _____, agent _____ Attest: _____
(Signature) (Signature)

Printed Name: C. Nicholas Coonamer Printed Name: Michelle Jureczek

OFFICIAL SEAL
MICHELLE JURECZEK
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:02/06/21

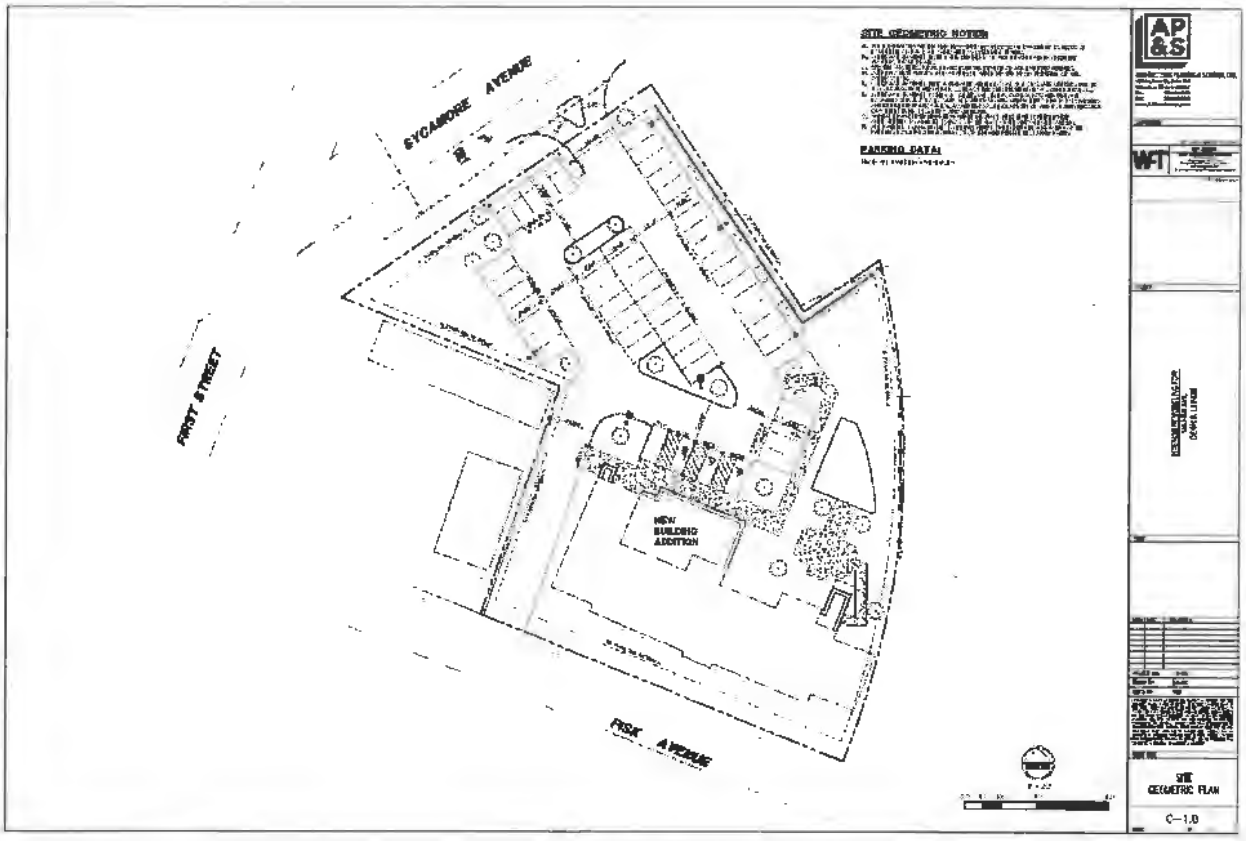
Exhibit A: Legal Description of the Property

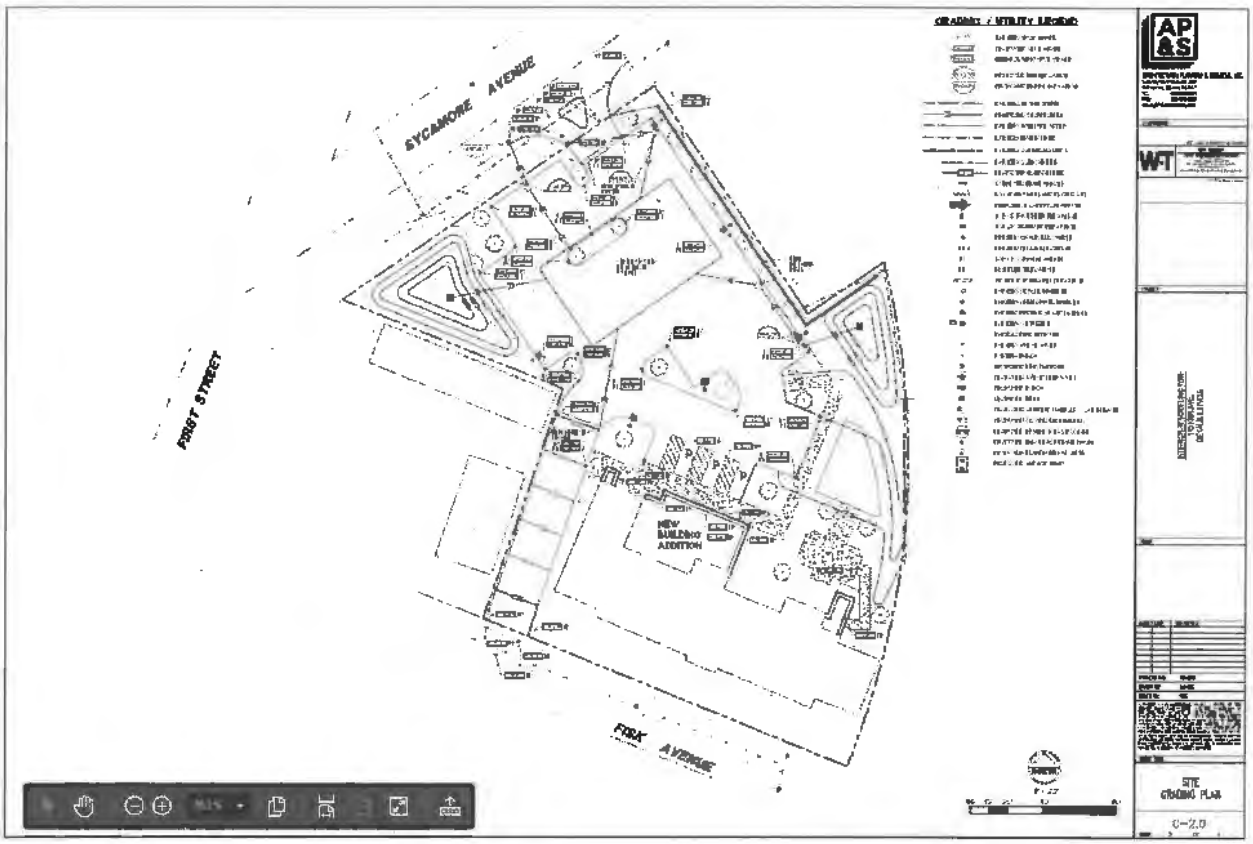
The Property is Legally Described as:

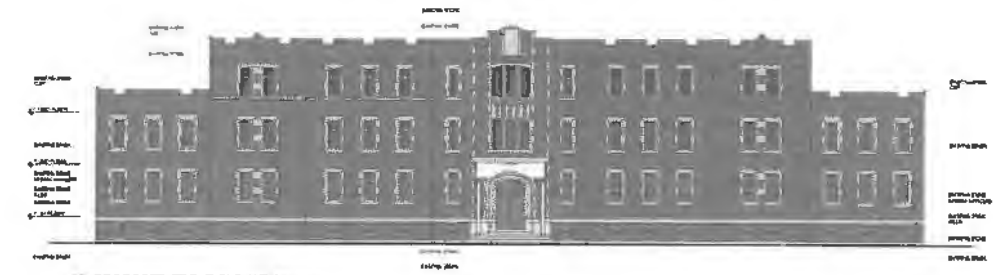
LOTS "A" AND "B" AS SHOWN ON THE PLAT OF SURVEY OF A PART OF SECTION 23, TOWNSHIP 40 NORTH, RANGE 4 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN DEKALB COUNTY, ILLINOIS, MADE BY W.M. HAY, SURVEYOR, FOR J.A. SOLON, OWNER AND RECORDED JANUARY 11, 1924, IN PLAT BOOK "D", PAGE 88, (EXCEPTING THEREFROM THE FOLLOWING: THAT PART OF SAID LOT "B" DESCRIBED AS FOLLOWS: BEGINNING AT THE SOUTHEASTERLY CORNER OF SAID LOT "B" ON THE NORTHERLY RIGHT OF WAY LINE OF FISK AVENUE (FORMERLY NORTH AVENUE); THENCE NORTHEASTERLY ALONG THE EASTERLY LINE OF SAID LOT "B", A DISTANCE OF 132. FEET; THENCE NORTHWESTERLY PARALLEL WITH THE SOUTHERLY LINE OF SAID LOT "B", A DISTANCE OF 130.2 FEET TO THE NORTHWESTERLY LINE OF SAID LOT "B"; THENCE SOUTHWESTERLY ALONG THE NORTHWESTERLY LINE OF SAID LOT "B", A DISTANCE OF 60.4 FEET TO AN ANGLE POINT IN THE BOUNDARY LINE OF SAID LOT "B"; THENCE SOUTHWESTERLY ALONG THE WESTERLY LINE OF SAID LOT "B", A DISTANCE OF 81.6 FEET TO THE SOUTHWESTERLY CORNER OF SAID LOT "B"; THENCE SOUTHEASTERLY ALONG THE SOUTHERLY LINE OF SAID LOT "B", A DISTANCE OF 170.5 FEET TO THE POINT OF BEGINNING), ALL SITUATED IN DEKALB COUNTY, ILLINOIS.

Commonly known as: 145 Fisk Avenue, DeKalb, IL
PIN: 08-23-103-027

Group Exhibit B: Plans




SYCAMORE AVENUE
FIRST STREET
NEW BUILDING ADDITION
FISK AVENUE
SITE GRADING PLAN
C-2.0



1 PROPOSED FRONT ELEVATION
SCALE: NONE

2 PROPOSED REAR ELEVATION
SCALE: NONE

ARCHITECTURAL PLANNING & SERVICES, LTD.	145 FISK AVE. DEKALB, ILLINOIS	123 W. Franklin, Suite 203 Wheaton, Illinois 60187 T 630-668-0366 F 630-668-3022 www.apsarchitects.com

BURNS CRONAUER BROWN LLP
Attorneys & Counselors at Law
WWW.BCB-LLP.COM
T 815.895.8585 F 815.895.4070
1101 DEKALB AVENUE, SUITE 2 SYCAMORE, IL 60178

April 24, 2019

Via Certified Mail

CITY OF DEKALB
c/o Dean Frieders
200 S. 4th Street,
DeKalb, IL 60115

RE: 19 CV 50093; Your Duty to Preserve and Cure Default

Dean, you are being contacted for two reasons. First, as you are aware, a lawsuit exists against your client's City Manager. This letter is to formally alert you so that you do not allow evidence to be **destroyed or transferred** without our written consent. F. William Nicklas' outbox emails miraculously disappeared while he was at NIU despite State record preservation laws, so please take proper action to back up all his emails and correspondence (even personal and private prior to and after him becoming DeKalb City Manager) and his municipal emails. Second, let this email address your inquiry about the pending application for 145 Fisk, LLC.

This letter is also to respectfully demand the immediate preservation of anything that might be evidence in this case. Please be advised that Electronically Stored Information ("ESI") has been determined to be relevant in this matter and you are being given notice that you are hereby required to preserve such ESI as described herein. This preservation notice and the description of potentially relevant ESI shall in no way constitute the entirety of the ESI you are obligated to preserve, only a minimum requirement based on yoru client's current understanding of your computer systems as well as computer systems in general. These computer systems may be owned or maintained by you, your employees, third parties or contractors. Any ESI you deem potentially relevant in addition to any noted herein shall be preserved.

You have a duty to preserve evidence for discovery and a failure to do so may subject you to court-ruled sanctions or a lawsuit. Further, if you fail to properly secure and preserve the important pieces of evidence listed below, it could give rise to a legal presumption that the evidence was intentionally destroyed. Specifically, you are instructed that the following tangible and intangible items, documents, and data are deemed relevant to these claims and should not be destroyed, modified, altered, repaired, transferred, or changed in any manner absent consent of the parties because it may constitute evidence in this case or lead to other evidence in this case. Your duty to preserve evidence extends to all evidence, even if not listed below. Illinois Courts may sanction or discipline parties for the spoliation of evidence. Spoliation of evidence can also be an independent tort lawsuit. *See Argueta v. Baltimore and Ohio Chicago Term. R.R. Co.*, 224 Ill App 3d 11 (1st Dist., 1991), *appeal denied* 144 Ill 2d 631 (1992) (use of metallurgist's report at trial barred); *American Family Ins. v. Village Pontiac-GMC, Inc.,* 223 Ill App 3d 624 (2d. 1992) (summary judgment awarded for failure to preserve evidence). *Accord Boyd v Travellers Ins Co.*, 166 Ill.2d 188, (1995); *Shimanovsky v. General Motors Corp.*, 181 Ill.2d 112, (1998); *Rodgers v. St. Mary's Hospital*, 149 Ill.2d 302, (1992); *Willett v Cesna Aircraft Company*, 851 N.E.2d 626 (2006); *Jones v. O'Brien Tire & Battery Service Centers, Inc.,* 312 Ill. Dec. 698 (2007).

The items you are required to preserve include, but are not limited to the following:

BURNS CRONAUER BROWN LLP
Attorneys & Counselors at Law
WWW.BCB-LLP.COM
T 815.895.8585 F 815.895.4070
1101 DEKALB AVENUE, SUITE 2 SYCAMORE, IL 60178

1. **Network Databases and Computers.** All data, audit logs, and printouts from electronic devices, including any information contained in any "cloud", hard drive, SSD drive, shadow drives for the past three (3) years, wherever it may be stored, to specifically include any similar information generated by equipment involved in the transmission of information and sent elsewhere by satellite, wireless, or other means. We request that you put any vendor which hosts or stores this data for you on notice of the duty to immediately preserve this data.

2. **DATA Collection Systems/Electronic System Information (ESI).** All History, Messaging, tracking device information, cell-phone systems, and any other similar data capturing systems for three (3) years, wherever it may be stored, specifically to include any similar information generated by equipment involved in the network, towers, wi-fi and databases and sent elsewhere by satellite, wireless, or other means. We request that you preserve any data retrieved in data mining operations initiated as a result of this case or and prior FOIA request. We request that you put any vendor which hosts or stores this data for you on notice of the duty to immediately preserve this data.

3. **Electronic evidence.** We specifically request that you preserve electronic data related to the Mayor (personal and official), City Council (personal and official), Planning and Zoning (personal and official), planning staff, TIF, Shodeen, John Pappas, Safe Passage, McCabes project, and F. William Nicklas' personal and official data. This request includes active data, replicant data, residual data, shadow and metadata. This extends to not only current data, but archives, back-ups, disaster recovery tapes, hard-drives, disks, voicemails, recordings and any other medium (USB, etc.). Preserve all systems that make data readable, including passwords, encryption keys, software, log-in information, etc.

4. **All communications** about all TIF requests, meetings, agendas, related FOIAs, FOIA MATRIXs or Email Logs, City Manager selection and recruitment, bidding and Requests for Pricing.

5. **You must comply** with your document retention/destruction policy and state record retention laws. To the extent your policy will cause any information or data to be destroyed and not retained, demand is hereby made to preserve such imminent destruction. Halt any process or systems that may destroy potentially relevant data and log all persons performing any data retention or destruction.

If your business practices, or its agents or vendors involve the routine destruction, deletion, recycling, purging, thinning, or mutation of such materials (including automatic email and file deletion programs), you should sequester or remove such material from this business process. In order to assure that your obligation to preserve data, documents and things is met, please immediately forward a copy of this letter to all persons and entities with custodial responsibility for those items.

BURNS CRONAUER BROWN LLP
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1101 DEKALB AVENUE, SUITE 2 SYCAMORE, IL 60178

Failure to preserve and retain the items identified in this notice may constitute spoliation of evidence and could result in claims for damages, as well as evidentiary, criminal, or monetary sanctions.

In order to demonstrate compliance with your duty to preserve ESI, you must maintain a log of all alterations or deletions of data made to any ESI location, device or file indicating when the change was made, specifics of the content of the change, the reason for the change and who made the change. Any and all physical devices, hard drives, computer systems and other sources of ESI that contain relevant or potentially relevant data shall be listed on a chain of custody document indicating the location of the item, the custodian of the item and any unique identifying information for the item such as a model and serial number. Compliance with this preservation request extends to all possible custodians, including employees, vendors, third parties, contractors and others who may be in possession of relevant or potentially relevant ESI, whether listed in this document or not. You shall forward a copy of this request to any such parties immediately.

Lastly, and in response to your emails from April 23, 2019 inquiring about the pending application, Your emails permitting progression **after** the City Council unlawfully and prematurely repudiated the agreement during its April 22, 2019 meeting fails to reconcile with the legal doctrine of frustration of purpose. Pursuant to Article VII of the agreement, the City has repudiated the agreement and is in breach of the agreement. You have forty-five (45) days to cure. It has also failed to provide 145 Fisk, LLC with notice of any alleged default or its forty-five (45) days to cure any alleged default if you believe one existed prior to repudiation.

To the extent you or your client believe that a default occurred (it didn't), notice of default and an opportunity to cure within forty-five (45) days were never provided to 145 Fisk, LLC. The contract was repudiated (prematurely) during the City Council meeting on April 22, 2019 and was repudiated without notice and forty-five (45) days to cure any alleged defaults. It is clear the repudiation was based entirely upon F. William Nicklas' malfeasance. You have not given a straight answer to the question about whether proceeding with the pending application after repudiation will revive the TIF incentive and therefore serve as a cure to the April 22, 2019 default. You have purposefully been coy on the subject, so if you are asking 145 Fisk, LLC to proceed with the application without the TIF incentive being revived and the default cured, then permitting application without the incentive be provided upon its completion would constitute conversion of funds and breach of your client's duty of good faith and fair dealing. Demand is hereby made for your client to cure the default within the next forty-five (45) days. The agreement is clear that the development only makes sense with the incentive being provided; hence, the frustration of purpose. The continued anticipated repudiation of the agreement by your client relieves any obligation to proceed with the pending application without assurances of the incentive being pledged. Please let me know if your client intends to cure.

In the meantime, if you have any questions, please do not hesitate to contact us.

Thank you & very truly yours,

PARTNERS
RUSSELL E. BURNS CHARLES E. CRONAUER BRETT E. BROWN
NICHOLAS CRONAUER* PETER R. GRUBER
*Licensed to practice in Utah

City of DeKalb
opportunity • innovation

DeKalb Municipal Building
Council Chambers, Second Floor
200 South Fourth Street
DeKalb, Illinois 60115

AGENDA

Meeting of the DeKalb TIF Joint Review Board
April 26, 2019
2:00 p.m.

A. Call to Order

B. Roll Call: City of DeKalb - Bill Nicklas
DeKalb Community Unit School District #428 - Jamie Craven
DeKalb County - Gary Hanson
DeKalb County Forest Preserve - Terry Hannan
DeKalb Park District - Amy Doll
DeKalb Public Library - Emily Faulkner
DeKalb Township - Jennifer Jeep Johnson
DeKalb Township Road and Bridge District - Craig Smith
Kishwaukee College #523 – Bob Johnson
Kishwaukee Water Reclamation District - Mark Eddington
Public Member - Tim Hayes

C. Approval of Minutes
- Minutes of the Joint Review Board Meeting of January 25, 2019;
- Minutes of the Joint Review Board Meeting of February 1, 2019;
- Minutes of the Joint Review Board Meeting of February 15, 2019.

D. Public Participation.

E. Presentation of First Quarter FY2019 TIF Financials.

F. Discussion of TIF #1 Projects.

G. Action Regarding TIF #I Increment in 2022.

H. Next Meeting: July 26, 2019.

I. Adjournment.

City of DeKalb
opportunity · innovation

200 South Fourth Street
DeKalb, Illinois 60115
815.748.2000 • cityofdekalb.com

TO: DeKalb Community Unit School District #428--Jamie Craven*
DeKalb County--Gary Hanson*
DeKalb County Forest Preserve--Terry Hannan
DeKalb Park District--Amy Doll*
DeKalb Public Library--Emily Faulkner
DeKalb Township--Jennifer Jeep Johnson*
DeKalb Township Road and Bridge District--Craig Smith
Kishwaukee College--Bob Johnson*
Kishwaukee Water Reclamation District--Mark Eddington
Public Member--Tim Hayes*

FROM: Bill Nicklas
City Manager*

DATE: April 23, 2019

RE: Background Notes for April 26, 2019 Agenda

* Indicates voting membership

The following notes may be of use to the Joint Review Board as it considers the published Agenda.

A. Approval of Minutes.
The minutes from the three special JRB meetings held in the January-February time period are presented for the Board's review and approval.

B. Public Participation.
Members of the public are invited to speak for up to three (3) minutes on any topic on the Agenda. Speakers are required to fill out a Speaker Request Form before the meeting and should present it to either the Deputy Clerk or the Chair before the meeting begins. The meeting will also be televised for the convenience of those who cannot attend the afternoon meeting.

C. Presentation of the First Quarter, FY2019 TIF Financials.
The Board will have the opportunity to review the following reports drawn from the City's budget module:

a) A "snapshot" Revenue and Expenditure Report for the City's TIF program in the first quarter (January/February/March).
b) A more elaborate General Ledger breakdown of the Revenue and Expenditure Report for the City's TIF program in the first quarter. The breakdown of expenditures is as follows:
    - $425 for Sikich audit services (not the forensic audit)
    - $55 to the DeKalb County Clerk for recording fees
    - $141.98 for publication of legal notices
    - $198,734 in transfers to the TIF Debt Fund for debt service (Series 2010A Bond)
    - $16,666 in administrative transfers to the General Fund in January and February. The FY2019 Budget that the Council approved on December 18, 2019 included $100,000 (vs. $800,000 in previous years) for the reimbursement of staff expenses, or $8,333 per month.
    - Total: $216,021.98*

    n.b.: There is an entry for "Final Payment---Phase 2 of Cornerstone." This was charged against the FY2018 TIF #1 Budget.

c) A "Footnotes Report" that details the FY2019 TIF Budget without displaying 2019 activity. This might be a helpful reference tool. If the TIF Budget is revised at any point, a revised "Footnote" report will be shared with the Board.

D. Discussion of FY2019 TIF Projects.

1. Specific Projects

a. Egyptian Theater (upgrades and expansion). On March 11 the DeKalb City Council unanimously approved a final development incentive agreement with the Egyptian Theatre in the amount of $2.5 million. The Theatre had presented detailed redevelopment plans and had given a report on its fundraising and reserves that provided adequate assurance for the Council to proceed with the forgivable loan, which constituted approximately 62.5% of the estimated project cost of $4 million.

b. Hometown Restaurant (upgrades and expansion). On March 25, the Council unanimously approved a final development agreement in the amount of $150,000 with the owner of the properties at 241-249 E. Lincoln Highway. The owner provided information regarding the private funding for the total remodeling project cost of $558,935 that led the Council to approve the forgivable loan, which constituted roughly 27% of the overall project cost.

c. 145 Fisk Avenue (redevelopment). At the City Council meeting on April 22, the Council voted 8-0 to terminate its preliminary development agreement with 145 Fisk, LLC. The agreement was entered on December 18, 2018 with the expectation that within 120 days, or by April 17, the principals of 145 Fisk LLC would provide the necessary financials and development plans to justify a permanent commitment to the allocation of $2.5 million in TIF funds for the proposed redevelopment project.

On April 22, the Council found that the spare financial documents presented on March 28 were barren of any assurance that the LLC could afford ongoing preliminary planning and engineering fees, let alone the substantial undertaking they had portrayed to the Planning and Zoning Commission on February 6. In addition, the Council found that insufficient project details had been submitted to progress from a conceptual stage to a formal development hearing. Specifically, a traffic impact study had been promised but not completed; no final site plan or engineering plans addressing the many details in the City's development ordinances had been submitted; a storm water management report examining the site's runoff had not been submitted; detailed floor plans delineating the square footage for the primary hotel use and associated uses (e.g. food service, bar, etc.) had not been presented; and variances or exceptions from the City's development ordinances that were earlier identified by the LLC had not been submitted in writing.

The Council determined that--on the basis of all known documents--there was no reasonable or informed basis upon which the project could be considered viable, and that a public investment of $2.5 million in TIF funds was unjustified and an unreasonable risk of public monies.

d. The former Mooney Property (redevelopment). On March 22 John Pappas and Heartland Real Estate Holdings entered a 90-day purchase and sale agreement for the former Mooney Properties at 204 N. Fourth Street and 423/420 Oak Street. The three (3) month due diligence period allows the potential buyer to determine if it is advantageous to proceed to a closing and the redevelopment of the property. Mr. Pappas presented the Community Development department with a conceptual development plan that proposes to raze the former dealership, mitigate known environmental problems, and construct two (2) 56,000 square foot buildings with a mix of commercial retail and residential uses. Each building will have 10,000 square feet of commercial retail space on the ground floor and thirty-eight (38) one- and two-bedroom executive suites on the upper floors. Each building would also include hospitality rooms, a fitness center, and outdoor terraces. The concept plan is scheduled for Planning and Zoning Commission review on May 22.

Estimated Project costs: $13,875,000
TIF request: $3,000,000 (21.6%)
Time to Completion: 2.5 years

e. The Shodeen Property (redevelopment). Shodeen Incorporated has fee simple title to the large project area on West Lincoln Highway. A development plan for "University Park Commons" was reviewed by the DeKalb City Council in February and March, 2016 and featured a full-service business-class hotel with a national franchise flag that was vetted by a reputable third-party industry expert. The estimated redevelopment costs at the time were approximately $20.9 million and a total TIF commitment of $8.8 million was discussed. Some discussion with Shodeen representatives has occurred since the first of this year but no development plan or incentive initiative is under review.

f. McCabes (renovation). The City and the owners have had discussion with a Chicago-based retailer interested in acquiring a downtown building to install a substantial brewing operation and related pub. The interested purchaser has presented a rehabilitation budget of about $1.3 million, not including the purchase price. Of the raw categories of rehabilitation cost shared with the city staff, about one-half might potentially qualify for TIF assistance. No formal request for assistance has been received and no staff assurances have been extended.

g. The House (renovation). The City and the owner of the House have had discussions with the same Chicago-based retailer referenced in Item f, above.

h. Safe Passage (redevelopment). Safe Passage has a contract to purchase the former DeKalb Clinic on Franklin Street and has presented conceptual plans that involve the razing of the former clinic and the construction of a new Safe Passage facility featuring shelter services, offices, training space, counseling space, etc. The redevelopment will need to wrestle with whether or not the significant neighborhood sanitary sewer main that presently runs beneath the former clinic can and should be re-routed.

i. Architectural Improvement Program. So far in 2019, a total of $15,750 have been spent from the $50,000 FY2019 budget for two facade improvement projects. Three other projects are under consideration and would commit the balance of this TIF program, if approved by the Council.

2. **Project Funding**.

After discussion with the DeKalb County Clerk in March, it was determined that TIF #3 will collect increment from taxes levied in 2019 (rather than 2018) but these initial incremental funds will be payable in 2020. As the Joint Review Board will see in the attached financials, the FY2019 TIF budget contemplates a fiscal year-end reserve deficit of $116,679 or the exhaustion of all TIF #1 resources, including the preliminary TIF #2 project commitments of $5,150,000 that were "ported" from TIF #2 to TIF #1 in December, 2018. The declared TIF #2 surplus of $5,658,294.68 from 2018 has been distributed to JRB member taxing bodies and is included in this deficit calculation. An

additional TIF #2 surplus of $1,768,357.90 will be surplused when the incremental tax revenue is received by the City in 2019. If all current TIF #1 obligations including debt service, committed project costs, and routine service costs are fulfilled in FY2019, there is literally no TIF money available for any of the projects listed above until FY2020 incremental TIF revenues are received.

This is not a predicament that could have been known or anticipated by the JRB, given the spare financial information available to the JRB until the end of 2018. Now that we know it, how do we explain that the City is "open for business" with respect to TIF incentives? The only project resources that are presently available and not already committed are the funds previously committed to the 145 Fisk project, which had been in the TIF #2 reserve prior to December 18, 2018.

At the time that the JRB considered the closing of TIF #2, the legal guidance was that if any of the preliminary project commitments for the Egyptian ($2.5 million), Hometown Restaurant ($150,000), and 145 Fisk ($2.5 million) failed to receive final Council approval, the respective funds would be surplused to the other taxing bodies in line with the provisions of the TIF Act. Further review of the relevant TIF Act provisions (Section 8) indicates that prior to the conclusion of a TIF the City needs to

- Pay all redevelopment project costs;
- Retire all obligations;
- Distribute the final surplus;
- And close the final TIF books.

In short, there is no automatic end to a TIF at the close of a fiscal year. The City has been diligently proceeding to meet and retire its obligations but does not control all the variables noted above. Recent case law (*Devyn v City of Bloomington*) suggests the Court is aware that completion dates can be "estimated" but not necessarily final until reasonable efforts to satisfy the aforementioned conditions are successful.

For the JRB's consideration, the City proposes to "surplus" the TIF #2 incremental funds (about $1.768 million) not yet received in 2019, as originally discussed several months ago. In addition, the City proposes that the "Project" monies previously committed in preliminary fashion to the 145 Fisk project be dedicated toward several pending projects in FY2019, as follows:

a) The preliminary dedication of **$2,075,000** to the Mooney redevelopment project in FY2019, subject to JRB review and Council approval, for the purpose of funding the following costs:
   - Environmental remediation: $300,000
   - Demolition: $400,000
   - Footing removal: $100,000
   - Gas and Electrical Infrastructure: $250,000
   - Storm and Sanitary Sewer Infrastructure: $300,000
   - Engineering & Surveying: $75,000
   - Structural & Architectural Design: $250,000
   - City Sidewalks: $150,000

- Land Acquisition: $250,000

Subject to Council approval, an additional $925,000 would be committed from FY2020 and FY2021 TIF #3 funds ($462,500 per building), and payable only upon the issuance of a certificate of occupancy.

b) The preliminary dedication of **$300,000** for the demolition of the former DeKalb Clinic on Franklin Street as well as sanitary sewer relocation, subject to JRB review and Council approval.

c) The transfer of **$125,000** to the TIF #1 reserve to offset the projected FY2019 deficit of $116,679.

Total project budget for 2019 (a, b, and c above): $2.5 million.

JRB consideration is recommended.

E. Action Regarding TIF #1 Increment in 2022.
At the special JRB meeting on February 15, JRB representatives expressed interest in continuing discussion with their respective boards about the proposal to end TIF #1 in 2021 instead of 2022, yielding an estimated surplus of $7.3 million to be distributed in pro rata fashion, in lieu of an intergovernmental agreement (IGA) behind a TIF #3 surplus agreement. This Agenda item will afford an opportunity for updates from the JRB representatives. If the consensus remains in favor of the shorter term for TIF #1, then the City staff will present the proposal to the DeKalb City Council at the next regular Council meeting.

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User: Raymond.Munch
DB: Dekalb

REVENUE AND EXPENDITURE REPORT FOR CITY OF DEKALB
PERIOD ENDING 03/31/2019

*NOTE: Available Balance / Pct Budget Used does not reflect amounts encumbered.

GL NUMBER	DESCRIPTION	2019 AMENDED BUDGET	YTD BALANCE 03/31/2019	ACTIVITY FOR MONTH 03/31/2019	AVAILABLE BALANCE	% BDGT USED
Fund 260 - TIF FUND #1 (CENTRAL AREA)						
Revenues						
Dept 00-00 - GENERAL						
260-00-00-30300	PROPERTY TAX - TIF	7,289,311.00	0.00	0.00	7,289,311.00	0.00
260-00-00-37100	INVESTMENT INTEREST	200,000.00	45,038.44	0.00	154,961.56	22.52
260-00-00-37500	GAIN/LOSS ON INVESTMENTS	0.00	0.00	0.00	0.00	0.00
260-00-00-38200	REFUNDS / REIMBURSEMENTS	0.00	0.00	0.00	0.00	0.00
260-00-00-39261	TRANSFER FROM TIF #2 FUND	0.00	0.00	0.00	0.00	0.00
Total Dept 00-00 - GENERAL		7,489,311.00	45,038.44	0.00	7,444,272.56	0.60
TOTAL REVENUES		7,489,311.00	45,038.44	0.00	7,444,272.56	0.60
Expenditures						
Dept 00-00 - GENERAL						
260-00-00-61300	MAINTENANCE-BUILDINGS	0.00	0.00	0.00	0.00	0.00
260-00-00-61450	MAINTENANCE-SIDEWALKS	0.00	0.00	0.00	0.00	0.00
260-00-00-62100	FINANCIAL SERVICES	123,543.00	425.00	0.00	123,118.00	0.34
260-00-00-62300	ARCHITECT / ENGINEERING SERVICES	10,000.00	0.00	0.00	10,000.00	0.00
260-00-00-63650	LAND ACQUISITION SERVICES	5,000.00	0.00	0.00	5,000.00	0.00
260-00-00-63700	DEVELOPMENTAL SERVICES	50,000.00	0.00	0.00	50,000.00	0.00
260-00-00-63750	DEMOLITION SERVICES	50,000.00	0.00	0.00	50,000.00	0.00
260-00-00-63800	CONTRACTED SERVICES	42,500.00	0.00	0.00	42,500.00	0.00
260-00-00-65100	FREIGHT & POSTAGE	250.00	0.00	0.00	250.00	0.00
260-00-00-65200	MARKETING ADS & PUBLIC INFO	5,000.00	0.00	0.00	5,000.00	0.00
260-00-00-65300	LEGAL EXPENSES & NOTICES	50,000.00	141.98	141.98	49,858.02	0.28
260-00-00-66100	DUES & SUBSCRIPTIONS	850.00	0.00	0.00	850.00	0.00
260-00-00-66200	CONFERENCES/TRAINING	1,500.00	0.00	0.00	1,500.00	0.00
260-00-00-66300	TRAVEL EXPENSES	0.00	0.00	0.00	0.00	0.00
260-00-00-68600	TIF SURPLUS DISTRIBUTION	3,644,656.00	0.00	0.00	3,644,656.00	0.00
260-00-00-69199	PRIV PROP REHAB / REDEVELOP	6,823,794.00	55.00	0.00	6,823,739.00	0.00
260-00-00-81000	LAND ACQUISITION	0.00	0.00	0.00	0.00	0.00
260-00-00-82000	BUILDINGS & IMPROVEMENTS	20,000.00	0.00	0.00	20,000.00	0.00
260-00-00-83000	STREET IMPROVEMENTS	0.00	0.00	0.00	0.00	0.00
260-00-00-83050	STREET MAINTENANCE	0.00	0.00	0.00	0.00	0.00
260-00-00-83200	STORM SEWER IMPROVEMENTS	0.00	0.00	0.00	0.00	0.00
260-00-00-83300	PARKING LOT IMPROVEMENTS	0.00	0.00	0.00	0.00	0.00
260-00-00-83900	OTHER CAPITAL IMPROVEMENTS	62,500.00	0.00	0.00	62,500.00	0.00
260-00-00-83999	SIGNALS & INTERSECTIONS	0.00	0.00	0.00	0.00	0.00
260-00-00-91100	TRANSFER TO GENERAL FUND	100,000.00	16,666.00	0.00	83,334.00	16.67
260-00-00-91261	TRANSFER TO TIF #2 FUND	0.00	0.00	0.00	0.00	0.00
260-00-00-91375	TRANSFER TO TIF DEBT SERVICE FUND	1,192,400.00	198,734.00	0.00	993,666.00	16.67
Total Dept 00-00 - GENERAL		12,181,993.00	216,021.98	141.98	11,965,971.02	1.77
TOTAL EXPENDITURES		12,181,993.00	216,021.98	141.98	11,965,971.02	1.77
Fund 260 - TIF FUND #1 (CENTRAL AREA):						
TOTAL REVENUES		7,489,311.00	45,038.44	0.00	7,444,272.56	0.60
TOTAL EXPENDITURES		12,181,993.00	216,021.98	141.98	11,965,971.02	1.77
NET OF REVENUES & EXPENDITURES		(4,692,682.00)	(170,983.54)	(141.98)	(4,521,698.46)	3.64

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User: Raymond.Munch
DB: Dekalb

REVENUE AND EXPENDITURE REPORT FOR CITY OF DEKALB
PERIOD ENDING 03/31/2019

*NOTE: Available Balance / Pct Budget Used does not reflect amounts encumbered.

GL NUMBER	DESCRIPTION	2019 AMENDED BUDGET	YTD BALANCE 03/31/2019	ACTIVITY FOR MONTH 03/31/2019	AVAILABLE BALANCE	% BDGT USED
Fund 261 - TIF FUND #2						
Revenues						
Dept 00-00 - GENERAL						
261-00-00-30300	PROPERTY TAX - TIF	1,521,644.00	0.00	0.00	1,521,644.00	0.00
261-00-00-37100	INVESTMENT INTEREST	5,000.00	0.00	0.00	5,000.00	0.00
261-00-00-39260	TRANSFER FROM TIF #1 FUND	0.00	0.00	0.00	0.00	0.00
Total Dept 00-00 - GENERAL		1,526,644.00	0.00	0.00	1,526,644.00	0.00
TOTAL REVENUES		1,526,644.00	0.00	0.00	1,526,644.00	0.00
Expenditures						
Dept 00-00 - GENERAL						
261-00-00-61420	MAINTENANCE-STREETS	0.00	0.00	0.00	0.00	0.00
261-00-00-61450	MAINTENANCE-SIDEWALKS	0.00	0.00	0.00	0.00	0.00
261-00-00-62100	FINANCIAL SERVICES	100,700.00	170.00	0.00	100,530.00	0.17
261-00-00-62300	ARCHITECT / ENGINEERING SERVICES	0.00	0.00	0.00	0.00	0.00
261-00-00-65100	LEGAL EXPENSES & NOTICES	10,000.00	0.00	0.00	10,000.00	0.00
261-00-00-68100	ECONOMIC DEVELOPMENT INCENTIVE	0.00	0.00	0.00	0.00	0.00
261-00-00-68600	TIF SURPLUS DISTRIBUTION	0.00	0.00	0.00	0.00	0.00
261-00-00-69199	PRIV PROP REHAB / REDEVELOP	147,910.00	55.00	0.00	147,855.00	0.04
261-00-00-81000	LAND ACQUISITION	0.00	0.00	0.00	0.00	0.00
261-00-00-82000	BUILDINGS & IMPROVEMENTS	0.00	0.00	0.00	0.00	0.00
261-00-00-83000	STREET IMPROVEMENTS	0.00	0.00	0.00	0.00	0.00
261-00-00-83050	STREET MAINTENANCE	0.00	0.00	0.00	0.00	0.00
261-00-00-83200	STORM SEWER IMPROVEMENTS	0.00	0.00	0.00	0.00	0.00
261-00-00-83900	OTHER CAPITAL IMPROVEMENTS	0.00	0.00	0.00	0.00	0.00
261-00-00-91100	TRANSFER TO GENERAL FUND	0.00	0.00	0.00	0.00	0.00
261-00-00-91260	TRANSFER TO TIF #1 FUND	0.00	0.00	0.00	0.00	0.00
Total Dept 00-00 - GENERAL		258,610.00	225.00	0.00	258,385.00	0.09
TOTAL EXPENDITURES		258,610.00	225.00	0.00	258,385.00	0.09
Fund 261 - TIF FUND #2:						
TOTAL REVENUES		1,526,644.00	0.00	0.00	1,526,644.00	0.00
TOTAL EXPENDITURES		258,610.00	225.00	0.00	258,385.00	0.09
NET OF REVENUES & EXPENDITURES		1,268,034.00	(225.00)	0.00	1,268,259.00	0.02
TOTAL REVENUES - ALL FUNDS		9,015,955.00	45,038.44	0.00	8,970,916.56	0.50
TOTAL EXPENDITURES - ALL FUNDS		12,440,603.00	216,246.98	141.98	12,224,356.02	1.74
NET OF REVENUES & EXPENDITURES		(3,424,648.00)	(171,208.54)	(141.98)	(3,253,439.46)	5.00

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User: Raymond.Munch
DB: Dekalb

REVENUE AND EXPENDITURE REPORT FOR CITY OF DEKALB
Balances as of 03/31/2019

Fund 260 - TIF FUND #1 (CENTRAL AREA)

Account	Description	2019 Amended Budget		YEAR-TO-DATE THRU 03/31/19		Available Balance	% Used
Revenues							
Department 00-00: GENERAL							
30300	PROPERTY TAX - TIF	7,289,311.00		0.00		7,289,311.00	0.00
37100	INVESTMENT INTEREST						
01/31/2019 GJ	INTEREST JAN 2019		26403	27,908.65	JE# 1395		
01/31/2019 GJ	INTEREST JAN 2019		26403	349.04	JE# 1395		
02/28/2019 GJ	INTEREST FEB 2019		28844	16,534.10	JE# 1435		
02/28/2019 GJ	INTEREST FEB 2019		28844	246.65	JE# 1435		
37100	INVESTMENT INTEREST	200,000.00		45,038.44		154,961.56	22.52
37500	GAIN/LOSS ON INVESTMENTS	0.00		0.00		0.00	100.00
38200	REFUNDS / REIMBURSEMENTS	0.00		0.00		0.00	100.00
39261	TRANSFER FROM TIF #2 FUND	0.00		0.00		0.00	100.00
Total - Dept 00-00		7,489,311.00		45,038.44		7,444,272.56	0.60
Total Revenues		7,489,311.00		45,038.44		7,444,272.56	0.60
Expenditures							
Department 00-00: GENERAL							
61300	MAINTENANCE-BUILDINGS	0.00		0.00		0.00	100.00
61450	MAINTENANCE-SIDEWALKS	0.00		0.00		0.00	100.00
62100	FINANCIAL SERVICES						
02/25/2019 AP	FY18 AUDIT FEES THRU 01/31/19		28363	425.00	Inv #: '372870' Vendor '000943'		
62100	FINANCIAL SERVICES	123,543.00		425.00		123,118.00	0.34
62300	ARCHITECT / ENGINEERING SERVICE	10,000.00		0.00		10,000.00	0.00
63650	LAND ACQUISITION SERVICES	5,000.00		0.00		5,000.00	0.00
63700	DEVELOPMENTAL SERVICES	50,000.00		0.00		50,000.00	0.00
63750	DEMOLITION SERVICES	50,000.00		0.00		50,000.00	0.00
63800	CONTRACTED SERVICES	42,500.00		0.00		42,500.00	0.00
65100	FREIGHT & POSTAGE	250.00		0.00		250.00	0.00
65200	MARKETING ADS & PUBLIC INFO	5,000.00		0.00		5,000.00	0.00
65300	LEGAL EXPENSES & NOTICES						
03/20/2019 AP	PALMER CT LEGAL NOTICE-EGYPTIAN THEATRE		32727	141.98	Inv #: '1629383' Vendor '000933'		
65300	LEGAL EXPENSES & NOTICES	50,000.00		141.98		49,858.02	0.28
66100	DUES & SUBSCRIPTIONS	850.00		0.00		850.00	0.00

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REVENUE AND EXPENDITURE REPORT FOR CITY OF DEKALB
Balances as of 03/31/2019

Fund 260 - TIF FUND #1 (CENTRAL AREA)

Account	Description	2019 Amended Budget		YEAR-TO-DATE THRU 03/31/19		Available Balance	% Used
Expenditures							
Department 00-00: GENERAL							
66200	CONFERENCES/TRAINING	1,500.00		0.00		1,500.00	0.00
66300	TRAVEL EXPENSES	0.00		0.00		0.00	100.00
68600	TIF SURPLUS DISTRIBUTION	3,644,656.00		0.00		3,644,656.00	0.00
69199	PRIV PROP REHAB / REDEVELOP						
02/05/2019 AP	RECORDING FEE-904 PLEASANT ST		28236	55.00	Inv #: '904 PLEASANT' Vendor '000274'		
02/13/2019 AP	FINAL PAYMENT -- PHASE 2 OF CORNERSTONE		23106	350,098.00	Inv #: 'FINAL' Vendor '000235'		
02/28/2019 GJ	FINAL PAYMENT-CORNERSTONE PHASE 2		29289	(350,098.00)	JE# 1459		
69199	PRIV PROP REHAB / REDEVELOP	6,823,794.00		55.00		6,823,739.00	0.00
81000	LAND ACQUISITION	0.00		0.00		0.00	100.00
82000	BUILDINGS & IMPROVEMENTS	20,000.00		0.00		20,000.00	0.00
83000	STREET IMPROVEMENTS	0.00		0.00		0.00	100.00
83050	STREET MAINTENANCE	0.00		0.00		0.00	100.00
83200	STORM SEWER IMPROVEMENTS	0.00		0.00		0.00	100.00
83300	PARKING LOT IMPROVEMENTS	0.00		0.00		0.00	100.00
83900	OTHER CAPITAL IMPROVEMENTS	62,500.00		0.00		62,500.00	0.00
83999	SIGNALS & INTERSECTIONS	0.00		0.00		0.00	100.00
91100	TRANSFER TO GENERAL FUND						
01/31/2019 GJ	FY2019 BUDGET TRANSFERS		29277	8,333.00	JE# 1440		
02/25/2019 GJ	FY2019 BUDGET TRANSFERS		27633	8,333.00	JE# 1401		
91100	TRANSFER TO GENERAL FUND	100,000.00		16,666.00		83,334.00	16.67
91261	TRANSFER TO TIF #2 FUND	0.00		0.00		0.00	100.00
91375	TRANSFER TO TIF DEBT SERVICE FUND						
01/31/2019 GJ	FY2019 BUDGET TRANSFERS		29277	99,367.00	JE# 1440		
02/25/2019 GJ	FY2019 BUDGET TRANSFERS		27633	99,367.00	JE# 1401		
91375	TRANSFER TO TIF DEBT SERVICE FU	1,192,400.00		198,734.00		993,666.00	16.67
Total - Dept 00-00		12,181,993.00		216,021.98		11,965,971.02	1.77
Total Expenditures		12,181,993.00		216,021.98		11,965,971.02	1.77
NET OF REVENUES AND EXPENDITURES		(4,692,682.00)		(170,983.54)		(4,521,698.46)	

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REVENUE AND EXPENDITURE REPORT FOR CITY OF DEKALB
Balances as of 03/31/2019

Fund 261 - TIF FUND #2

Account	Description	2019 Amended Budget		YEAR-TO-DATE THRU 03/31/19	Available Balance	% Used
Revenues						
Department 00-00: GENERAL						
30300	PROPERTY TAX - TIF	1,521,644.00		0.00	1,521,644.00	0.00
37100	INVESTMENT INTEREST	5,000.00		0.00	5,000.00	0.00
39260	TRANSFER FROM TIF #1 FUND	0.00		0.00	0.00	100.00
Total - Dept 00-00		1,526,644.00		0.00	1,526,644.00	0.00
Total Revenues		1,526,644.00		0.00	1,526,644.00	0.00
Expenditures						
Department 00-00: GENERAL						
61420	MAINTENANCE-STREETS	0.00		0.00	0.00	100.00
61450	MAINTENANCE-SIDEWALKS	0.00		0.00	0.00	100.00
62100	FINANCIAL SERVICES					
02/25/2019	AP FY18 AUDIT FEES THRU 01/31/19		28363	170.00	Inv #: '372870' Vendor '000943'	
62100	FINANCIAL SERVICES	100,700.00		170.00	100,530.00	0.17
62300	ARCHITECT / ENGINEERING SERVICE	0.00		0.00	0.00	100.00
65100	LEGAL EXPENSES & NOTICES	10,000.00		0.00	10,000.00	0.00
68100	ECONOMIC DEVELOPMENT INCENTIVE	0.00		0.00	0.00	100.00
68600	TIF SURPLUS DISTRIBUTION	0.00		0.00	0.00	100.00
69199	PRIV PROP REHAB / REDEVELOP					
02/05/2019	AP RECORDING FEE-704 S 4TH ST		28237	55.00	Inv #: '704 S 4TH' Vendor '000274'	
69199	PRIV PROP REHAB / REDEVELOP	147,910.00		55.00	147,855.00	0.04
81000	LAND ACQUISITION	0.00		0.00	0.00	100.00
82000	BUILDINGS & IMPROVEMENTS	0.00		0.00	0.00	100.00
83000	STREET IMPROVEMENTS	0.00		0.00	0.00	100.00
83050	STREET MAINTENANCE	0.00		0.00	0.00	100.00
83200	STORM SEWER IMPROVEMENTS	0.00		0.00	0.00	100.00
83900	OTHER CAPITAL IMPROVEMENTS	0.00		0.00	0.00	100.00
91100	TRANSFER TO GENERAL FUND	0.00		0.00	0.00	100.00
91260	TRANSFER TO TIF #1 FUND	0.00		0.00	0.00	100.00

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REVENUE AND EXPENDITURE REPORT FOR CITY OF DEKALB
Balances as of 03/31/2019

Fund 261 - TIF FUND #2

Account Description	2019 Amended Budget	YEAR-TO-DATE THRU 03/31/19	Available Balance	% Used
Expenditures				
Department 00-00: GENERAL				
Total - Dept 00-00	258,610.00	225.00	258,385.00	0.09
Total Expenditures	258,610.00	225.00	258,385.00	0.09
NET OF REVENUES AND EXPENDITURES	1,268,034.00	(225.00)	1,268,259.00	
TOTAL REVENUES - ALL FUNDS	9,015,955.00	45,038.44	8,970,916.56	0.50
TOTAL EXPENDITURES - ALL FUNDS	12,440,603.00	216,246.98	12,224,356.02	1.74
NET OF REVENUES AND EXPENDITURES	(3,424,648.00)	(171,208.54)	(3,253,439.46)	

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FOOTNOTES REPORT FOR CITY OF DEKALB

NOTE	2019 COUNCIL APPROVED BUDGET
260-00-00-30300 PROPERTY TAX - TIF	
PROPERTY TAX LEVY	7,289,311.00
Totals for GL# 260-00-00-30300-PROPERTY TAX - TIF	7,289,311.00
260-00-00-37100 INVESTMENT INTEREST	
INVESTMENT INTEREST	200,000.00
Totals for GL# 260-00-00-37100-INVESTMENT INTEREST	200,000.00
260-00-00-39261 TRANSFER FROM TIF #2 FUND	
TRANSFER FROM TIF #2	
Totals for GL# 260-00-00-39261-TRANSFER FROM TIF #2 FUND	
260-00-00-62100 FINANCIAL SERVICES	
ANNUAL AUDIT	1,723.00
TIF COMPLIANCE AUDIT	8,320.00
3RD PARTY FINANCIAL REVIEW	13,500.00
TIF FORENSIC AUDIT	100,000.00
Totals for GL# 260-00-00-62100-FINANCIAL SERVICES	123,543.00
260-00-00-62300 ARCHITECT / ENGINEERING SERVICES	
MISC ENGINEERING SERVICES	10,000.00
Totals for GL# 260-00-00-62300-ARCHITECT / ENGINEERING SERVICES	10,000.00
260-00-00-63650 LAND ACQUISITION SERVICES	
DOWNTOWN PROJECTS	5,000.00
Totals for GL# 260-00-00-63650-LAND ACQUISITION SERVICES	5,000.00
260-00-00-63700 DEVELOPMENTAL SERVICES	
RETAIL MARKETING/RECRUITMENT	50,000.00
Totals for GL# 260-00-00-63700-DEVELOPMENTAL SERVICES	50,000.00
260-00-00-63750 DEMOLITION SERVICES	
MISCELLANEOUS DEMOLITION	50,000.00
Totals for GL# 260-00-00-63750-DEMOLITION SERVICES	50,000.00
260-00-00-63800 CONTRACTED SERVICES	
RR LEASE	6,500.00
TIF STUDY	
ADJUSTMENT-PER JASON	36,000.00
Totals for GL# 260-00-00-63800-CONTRACTED SERVICES	42,500.00
260-00-00-65100 FREIGHT & POSTAGE	
GENERAL	250.00
Totals for GL# 260-00-00-65100-FREIGHT & POSTAGE	250.00
260-00-00-65200 MARKETING ADS & PUBLIC INFO	
GENERAL MARKETING	
AIRPORT MARKETING	
MARKETING WITHIN AIRPORTS	
GENERAL	5,000.00
Totals for GL# 260-00-00-65200-MARKETING ADS & PUBLIC INFO	5,000.00
260-00-00-65300 LEGAL EXPENSES & NOTICES	
LEGAL NOTICES	
TIF ATTORNEY LEGAL FEES	50,000.00

NOTE	2019 COUNCIL APPROVED BUDGET
Totals for GL# 260-00-00-65300-LEGAL EXPENSES & NOTICES	50,000.00
260-00-00-66100 DUES & SUBSCRIPTIONS	
ITIA DUES	850.00
Totals for GL# 260-00-00-66100-DUES & SUBSCRIPTIONS	850.00
260-00-00-66200 CONFERENCES/TRAINING	
ITIA ANNUAL CONFERENCES	1,500.00
Totals for GL# 260-00-00-66200-CONFERENCES/TRAINING	1,500.00
260-00-00-66300 TRAVEL EXPENSES	
ITIA Annual Conference	
Move back to training	
Totals for GL# 260-00-00-66300-TRAVEL EXPENSES	
260-00-00-68600 TIF SURPLUS DISTRIBUTION	
BUDGET ADJUSTMENT: PER JASON M.	3,644,656.00
Totals for GL# 260-00-00-68600-TIF SURPLUS DISTRIBUTION	3,644,656.00
260-00-00-69199 PRIV PROP REHAB / REDEVELOP	
ARCHITECTURAL IMPROVEMENT PROGRAM	50,000.00
EGYPTIAN THEATRE ANNUAL BUILDING IMP.	100,000.00
CORNERSTONE PHASE 2	
PLAZA DEKALB PHASE 2	950,000.00
2890 PLEASANT STREET WIN AVIATION	235,000.00
LOVELLS	168,794.00
EGYPTIAN THEATRE EXPANSION AND HVAC	2,500,000.00
230 E. LINCOLN HIGHWAY	
211 N. FIRST	120,000.00
NEIGHBORHOOD REINVESTMENT PROGRAM	50,000.00
145 FISK AVE	2,500,000.00
CBD REDEVELOPMENT	
241 & 249 E LINCOLN HWY	150,000.00
Totals for GL# 260-00-00-69199-PRIV PROP REHAB / REDEVELOP	6,823,794.00
260-00-00-82000 BUILDINGS & IMPROVEMENTS	
BUDGET ADJUSTMENT - PER JASON	20,000.00
Totals for GL# 260-00-00-82000-BUILDINGS & IMPROVEMENTS	20,000.00
260-00-00-83050 STREET MAINTENANCE	
STREET MAINTENANCE	
Totals for GL# 260-00-00-83050-STREET MAINTENANCE	
260-00-00-83300 PARKING LOT IMPROVEMENTS	
Lot 7 Haish Parking Lot Imp	
Totals for GL# 260-00-00-83300-PARKING LOT IMPROVEMENTS	
260-00-00-83900 OTHER CAPITAL IMPROVEMENTS	
AIRPORT TIP LOCAL MATCH	62,500.00
AIRPORT CRACKFILLING & RUNWAY REPAIR	
PAPI	
CBD FIBER AND CAMERAS	
Totals for GL# 260-00-00-83900-OTHER CAPITAL IMPROVEMENTS	62,500.00
260-00-00-91100 TRANSFER TO GENERAL FUND	
ANNUAL GENERAL FUND TRANSFER	100,000.00

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FOOTNOTES REPORT FOR CITY OF DEKALB

NOTE	2019 COUNCIL APPROVED BUDGET
Totals for GL# 260-00-00-91100-TRANSFER TO GENERAL FUND	100,000.00
260-00-00-91375 TRANSFER TO TIF DEBT SERVICE FUND	
2010A BOND PRINCIPAL	1,060,000.00
2010A BOND INTEREST	132,400.00
Totals for GL# 260-00-00-91375-TRANSFER TO TIF DEBT SERVICE FUND	1,192,400.00
261-00-00-30300 PROPERTY TAX - TIF	
PROPERTY TAX LEVY	1,521,644.00
Totals for GL# 261-00-00-30300-PROPERTY TAX - TIF	1,521,644.00
261-00-00-37100 INVESTMENT INTEREST	
INVESTMENT INTEREST	5,000.00
Totals for GL# 261-00-00-37100-INVESTMENT INTEREST	5,000.00
261-00-00-62100 FINANCIAL SERVICES	
ANNUAL AUDIT	700.00
BARB CITY AUDIT	
FORENSIC AUDIT	100,000.00
Totals for GL# 261-00-00-62100-FINANCIAL SERVICES	100,700.00
261-00-00-65100 LEGAL EXPENSES & NOTICES	
TIF ATTORNEY EXPENSES	10,000.00
Totals for GL# 261-00-00-65100-LEGAL EXPENSES & NOTICES	10,000.00
261-00-00-69199 PRIV PROP REHAB / REDEVELOP	
BARB CITY MANOR	
HOUSING REHAB	
NEIGHBORHOOD REINVESTMENT PROGRAMS	
BUDGET ADJUSTMENT-PER JASON	147,910.00
Totals for GL# 261-00-00-69199-PRIV PROP REHAB / REDEVELOP	147,910.00
261-00-00-82000 BUILDINGS & IMPROVEMENTS	
CITY HALL BUILDING IMPROVEMENTS	
CITY HALL BUILDING RENOVATION/CONST	
CITY HALL SECURITY SYSTEM	
Totals for GL# 261-00-00-82000-BUILDINGS & IMPROVEMENTS	
261-00-00-83000 STREET IMPROVEMENTS	
LOCAL STREETS PROJECTS	
Totals for GL# 261-00-00-83000-STREET IMPROVEMENTS	
261-00-00-91100 TRANSFER TO GENERAL FUND	
ANNUAL GENERAL FUND TRANSFER	
Totals for GL# 261-00-00-91100-TRANSFER TO GENERAL FUND	
261-00-00-91260 TRANSFER TO TIF #1 FUND	
REVERSE TRANSFER	
Totals for GL# 261-00-00-91260-TRANSFER TO TIF #1 FUND	

Fund Balance Projections

CITY OF DEKALB

PRELIMINARY FUND BALANCE SUMMARY

	FUND NAME	PROJECTED 12/31/2018	FY 2019 BUDGET REVENUES	FY 2019 BUDGET EXPENSES	12/31/2019
	100 - General Fund	**7,227,951**	37,856,172	36,952,172	**8,131,951**
	200 - Transportation Fund	**287,633**	11,291,333	10,544,859	**1,034,107**
	210 - Motor Fuel Tax Fund	**3,007,622**	1,161,757	1,540,000	**2,629,379**
	223 - Special Service Area #3	**2,468**	1,010	1,500	**1,978**
	224 - Special Service Area #4	**715**	5,510	4,500	**1,725**
	226 - Special Service Area #6	**0**	18,010	18,000	**10**
	234 - Special Service Area #14	**3,644**	2,510	3,000	**3,154**
	260 - TIF District #1	**4,576,003**	7,489,311	12,181,993	**(116,679)**
	261 - TIF District #2	**518,348**	1,526,644	258,610	**1,786,382**
	280 - CDBG Fund	**0**	979,230	979,230	**0**
	285 - Housing Rehab Fund	**53,960**	1,050	54,924	**86**
	290 - Foreign Fire Insurance Tax	**68,510**	48,000	46,472	**70,038**
	300 - Debt Service Fund	**(2,657)**	1,892,827	1,885,829	**4,341**
	375 - TIF Debt Service Fund	**0**	1,192,400	1,192,400	**0**
	400 - Capital Projects Fund	**404,098**	614,719	800,000	**218,817**
	420 - Capital Equipment Replacement Fund	**205,488**	392,397	147,161	**450,724**
*	600 - Water Fund	**35,961**	7,086,443	6,181,856	**940,548**
**	610 - Water Construction Fund	**1,161,588**	20,000	0	**1,181,588**
*	620 - Water Capital Fund	**1,138,526**	850,000	1,911,977	**76,549**
*	650 - Airport Fund	**3,652**	1,233,535	1,217,629	**19,558**
	680 - Refuse & Recycling Fund	**112,086**	2,009,674	1,988,452	**133,308**
	700 - Worker's Comp / Liability Insurance Fund	**1,152,693**	898,159	1,050,852	**1,000,000**
	710 - Health Insurance Fund	**432,507**	6,298,226	6,670,950	**59,783**
	830 - Police Pension Fund	**37,228,293**	5,709,437	3,882,858	**39,054,872**
	850 - Fire Pension Fund	**31,837,859**	6,532,588	3,798,304	**34,572,143**
**	900 - DeKalb Library	**2,383,415**	2,854,004	2,833,804	**2,403,615**
		102,043,057	97,964,946	96,147,332	**103,860,671**

* ***Cash & Cash Equivalents***

** ***Restricted Dollars***

The City has a Fund Balance Policy, within its Financial Policies for the City, policy #01-02. This policy was established to assist staff in creating a solid foundation for the financial management of the City. These policies are reviewed annually during the budget process with the City Council.

MINUTES
JOINT REVIEW BOARD MEETING
JANUARY 25, 2019

The Joint Review Board of the City of DeKalb, Illinois convened on January 25, 2019 in the City of DeKalb Council Chambers of the DeKalb Municipal Building, 200 S. Fourth Street, DeKalb, Illinois.

A. CALL TO ORDER

City of DeKalb City Manager Bill Nicklas called the meeting to order at 2:03 p.m.

B. ROLL CALL

City of DeKalb Executive Assistant Ruth Scott called the roll and the following members of the Joint Review Board (JRB) were present:

Bill Nicklas – City of DeKalb
Jamie Craven – DeKalb Community Unit School District #428
Gary Hanson – DeKalb County
Amy Doll – DeKalb Park District
Jennifer Jeep Johnson – DeKalb Township
Craig Smith – DeKalb Township Road and Bridge District
Bob Johnson – Kishwaukee Community College #523
Mark Eddington – Kishwaukee Water Reclamation District
Public Member – Seated at this meeting (see below)

Representatives from the DeKalb Public Library and the DeKalb County Forest Preserve were not present.

C. RE-ELECTION OF PUBLIC MEMBER TIM HAYS (BARB CITY BAGELS)

MOTION

Mr. Smith moved to approve the re-election of Public Member Tim Hays, owner of Barb City Bagels; seconded by Mrs. Jeep Johnson.

VOTE

Motion carried by a majority voice vote of those present.

D. ELECTION OF A CHAIRPERSON

MOTION

Mrs. Jeep Johnson moved to elect DeKalb Community Unit School District #429 Superintendent Jamie Craven as Chairperson of the Joint Review Board; seconded by Mr. Hanson.

VOTE

Motion carried by a majority voice vote of those present.

E. PUBLIC PARTICIPATION

Mark Charvat questioned the composition of the JRB.

Mr. Nicklas noted that the official members of the JRB are the City of DeKalb, DeKalb Township, DeKalb Community Unit School District #428, DeKalb County, the DeKalb Park District, Kishwaukee College and a Pubic Member. However, in the interest of including entities affected by actions of the JRB, all taxing bodies are being given the opportunity of being represented at each meeting.

Discussion ensued regarding the residency of the former Public Member.

Mr. Charvat expressed that he is thrilled that the JRB is meeting on a more frequent basis. He also noted that members of the JRB should ensure they have all the information available regarding TIF District 3 prior to moving it through.

Bessie Chronopoulos noted that the TIF Act is vague. She also noted that the JRB should be meeting on a more frequent basis.

There was brief discussion regarding citizen participation.

F. STATUS OF THE FORENSIC AUDIT

State's Attorney Amato stated that a Request for Proposals (RFP) is being put together and should go out at the end of January, with responses due in February. He indicated that the audit was expected to start some time in March.

G. STATUS OF THE TIF #2 SURPLUS DISTRIBUTION

Mr. Nicklas spoke to this item and reviewed documents with the JRB as follows:

- November 9, 2018: Assumes Approval of 2018 IGA (Intergovernmental Agreement) and Creation of TIF 3.
- January 25, 2019: current Estimates for TIF 1 and TIF 2.
- Current Surplus Distribution by Taxing Districts and 2018 IGA Surplus Distribution by Taxing District.

Discussion ensued regarding the information provided on the documents, as well as the proposed rehab and redevelopment projects.

H. PRINCIPLES AND STRUCTURE TO ASSURE PUBLIC ACCOUNTABILITY, FISCAL ACCOUNTABILITY, AND PUBLIC TRANSPARENCY

Mr. Nicklas referenced and spoke to a document titled City Manager's Directive: January 16, 2019, Tracking Internal TIF Expenditures for FY2019 (included with the agenda packet), which was provided to staff as a directive for accounting for TIF expenditures.

Mr. Nicklas also referenced and spoke to the proposed Chapter 37 "Tax Increment Financing Regulations (included with the agenda packet).

Discussion ensued.

There was brief discussion regarding the role of the JRB as an advisory committee to the City Council. There was consensus from the JRB that, while they want to know about projects being supported by TIF funding, they do not want to be in the position of recommending or not recommending projects.

Further discussion ensued and it was the consensus of the JRB to continue discussion regarding this item at the next meeting, which will be held on February 1, 2019.

MOTION

Mr. Smith moved to postpone this item until the next meeting of the JRB (February 1, 2019); seconded by Mrs. Jeep Johnson.

VOTE

Motion carried by a majority voice vote of those present.

There was brief discussion regarding the composition of the JRB.

I. NEXT MEETING

As noted above, the next meeting of the JRB is scheduled for February 1, 2019 at 2:00 p.m.

J. ADJOURNMENT

MOTION

Ms. Doll moved to adjourn the meeting; seconded by Ms. Jeep Johnson.

VOTE

Motion carried by a majority voice vote of those present and the meeting was adjourned at 3:04 p.m.

_____

RUTH A. SCOTT, Executive Assistant

MINUTES
JOINT REVIEW BOARD MEETING
FEBRUARY 1, 2019

The Joint Review Board of the City of DeKalb, Illinois convened on February 1, 2019 in the City of DeKalb Council Chambers, located in the DeKalb Municipal Building, 200 S. Fourth Street, DeKalb, Illinois.

A. CALL TO ORDER

Chair Craven called the meeting to order at 2:00 p.m.

B. ROLL CALL

City of DeKalb Executive Assistant Ruth Scott called the roll and the following members of the Joint Review Board (JRB) were present:

Bill Nicklas – City of DeKalb
Jamie Craven – DeKalb Community Unit School District #428
Gary Hanson – DeKalb County
Amy Doll – DeKalb Park District
Jennifer Jeep Johnson – DeKalb Township
Craig Smith – DeKalb Township Road and Bridge District
Bob Johnson – Kishwaukee Community College #523
Mark Eddington – Kishwaukee Water Reclamation District
Tim Hays – Public Member

Representatives from the DeKalb Public Library and the DeKalb County Forest Preserve were not present.

C. APPROVAL OF MINUTES

MOTION

Mr. Hanson moved to approve the following minutes of the JRB; seconded by Mr. Hays:

1. Minutes of the JRB Meeting of August 7, 2019.

2. Minutes of the JRB Meeting of September 4, 2019.

3. Minutes of the JRB Meeting of November 9, 2019.

VOTE

Motion carried by a majority voice vote of those present.

D. PUBLIC PARTICIPATION

Mayor Smith noted this would be the last meeting of Economic Development Planner Jason Michnick. He acknowledged Mr. Michnick's participation with TIF over the past years and wished him well.

Steve Kapitan shared his history regarding TIF issues within DeKalb.

E. PRINCIPLES AND STRUCTURE OF THE JRB TO ASSURE PUBLIC ACCOUNTABILITY, FISCAL ACCOUNTABILITY, AND PUBLIC TRANSPARENCY.

Mr. Nicklas provided an overview of the proposed Chapter 37 "Tax Increment Financing Regulations". Discussion regarding this item included the frequency of JRB meetings, the timeline for providing JRB members with financial reports, broadcasting JRB meetings, project performance, administrative expenses, infrastructure expenses, and return on investment.

F. INTERGOVERNMENTAL AGREEMENT BETWEEN TAXING DISTRICTS RELATED TO PROPOSED CENTRAL BUSINESS DISTRICT TIF (TIF #3)

Mr. Nicklas spoke to this item, referencing background information provided in the agenda packet that included options for TIF 3 that he wanted the JRB to weigh in on. Those options included Option 1 – TIF Surplus Alternative; Option 2 – TIF Surplus of 30% in Years 4-7 and 50% in Year 8 and the remaining years; and Option 3 – City Shares 50% of Annual Increment According to Each Taxing Body's Share of the Tax Bill after $1 million in annual increment is attained.

Discussion ensued. Concluding the discussion, it was decided that more time would be needed to further review the options and this item would be brought back for further discussion at a later date.

G. NEXT MEETING

It was the consensus of the JRB to hold the next meeting on February 15, 2019 at 2:00 p.m.

H. ADJOURNMENT

MOTION

Mr. Johnson moved to adjourn the meeting; seconded by Mr. Smith.

VOTE

Motion carried by a majority voice vote of those present and the meeting was adjourned at 3:20 p.m.

_____

RUTH A. SCOTT, Executive Assistant

MINUTES
JOINT REVIEW BOARD MEETING
FEBRUARY 15, 2019

The Joint Review Board of the City of DeKalb, Illinois convened on February 15, 2019 in the City of DeKalb Council Chambers, located in the DeKalb Municipal Building, 200 S. Fourth Street, DeKalb, Illinois.

A. CALL TO ORDER

Chair Craven called the meeting to order at 2:00 p.m.

B. ROLL CALL

City of DeKalb Executive Assistant Ruth Scott called the roll and the following members of the Joint Review Board (JRB) were present:

Bill Nicklas – City of DeKalb
Jamie Craven – DeKalb Community Unit School District #428
Gary Hanson – DeKalb County
Amy Doll – DeKalb Park District
Emily Faulkner – DeKalb Public Library
Terry Hannan – DeKalb County Forest Preserve
Jennifer Jeep Johnson – DeKalb Township
Craig Smith – DeKalb Township Road and Bridge District
Bob Johnson – Kishwaukee Community College #523
Mark Eddington – Kishwaukee Water Reclamation District
Tim Hays – Public Member

C. PUBLIC PARTICIPATION

There was none.

D. CONTINUED DISCUSSION OF JOINT REVIEW BOARD COMPOSITION

There was discussion regarding members of the JRB that have voting authority and those that don't.

Ms. Faulkner stated that the DeKalb Public Library Board (DPLB) has suggested it wouldn't be appropriate for her to come to all JRB meetings since the DPLB isn't a voting member. Mr. Nicklas indicated that the DPLB definitely has a voice.

Mr. Craven asked for discussion regarding the options provided for this item, which included Option 1 – Having the JRB meet annually as required by the state; or Option 2 – Convene only the official JRB quarterly. Discussion ensued.

Mr. Johnson noted Kishwaukee College's preference for Option 1.

Brief discussion ensued, with majority consensus to move forward with Option 1.

MOTION

Ms. Doll moved for the approval of Option 1; seconded by Mr. Hanson.

VOTE

Motion carried by a majority voice vote of those present.

E. CONTINUED DISCUSSION OF TIF-SURPLUS OPTIONS INVOLVING TIF 1 AND TIF 3.

Discussion ensued regarding TIF Surplus Options for TIF 1 and TIF 3, which is continued from the February 1, 2019 JRB meeting.

Mr. Craven stated the school board gave consensus to move forward with the recommendation for the City to end TIF 1 early (FY2021) and wouldn't pursue a surplus agreement in TIF 3. District representatives present also indicated the preference of their boards, with a majority indicating the same as the school board.

A roll call vote of the districts present indicated consensus to move forward with the preferred option as noted above. Each representative will consult with their respective board and confirm direction at the next meeting.

F. NEXT MEETING

Following brief discussion, it was decided the JRB would meet on the fourth Friday during the months of January, April, July and October at 1:00 p.m.

MOTION

Mr. Johnson moved to accept the proposed JRB meeting schedule; seconded by Ms. Doll.

VOTE

Motioned carried by a majority voice vote of those present.

Mr. Nicklas provided a brief status of the forensic audit, indicating the Request for Proposals has been released.

Mr. Nicklas also thanked everyone for their work, time, good will and dedication to find common ground.

G. ADJOURNMENT

MOTION

Mrs. Jeep Johnson moved to adjourn the meeting; seconded by Ms. Doll.

VOTE

Motioned carried by a majority voice vote of those present and the meeting adjourned at 2:21 p.m.

_____

RUTH A. SCOTT, Executive Assistant

Comptroller's Handbook A-CRE

Safety and Soundness

Capital Adequacy (C) | **Asset Quality (A)** | Management (M) | Earnings (E) | Liquidity (L) | Sensitivity to Market Risk (S) | Other Activities (O)

Commercial Real Estate Lending

Version 1.0, August 2013

Version 1.1, January 27, 2017

Office of the Comptroller of the Currency
Washington, DC 20219

- requirements for takeout commitments.
- loan covenant requirements.

Loan Administration

Banks should establish real estate loan administration procedures, including

- documentation standards such as requirements for receipt, frequency, verification and maintenance of financial statements and other information provided by the borrower.
- types and frequency of collateral valuations.
- loan closing and disbursements controls.
- payment processing.
- escrow administration.
- collateral administration.
- loan payoffs.
- delinquency and collections.
- deed-in-lieu of foreclosure.
- claims processing.
- seeking satisfaction from a financial guarantor or insurance.
- servicing and loan participation guidelines.

LTV Limits

Each bank should establish its own internal LTV limits which should not exceed the SLTV guidelines shown in the following table.

SLTV Limits by Loan Category

Loan category	SLTV limit (less than or equal to)
Raw land	65%
Land development or improved lots	75%
Construction	
Commercial, multifamily,[a] and other nonresidential	80%
One- to four-family residential	85%
Improved property—commercial, multifamily, and other nonresidential	85%
Owner-occupied one- to four-family and home equity	90%[b]

[a] Multifamily construction includes condominiums and cooperatives.

[b] An LTV limit has not been established for permanent mortgage or home equity loans on owner-occupied, one- to four-family residential property; however, for any such loan with an LTV ratio that equals or exceeds 90 percent at origination, the bank should require appropriate credit enhancement in the form of either mortgage insurance or readily marketable collateral.

In establishing internal LTV limits, the bank should carefully consider the bank-specific and market factors listed in the “Loan Portfolio Management Considerations” section of this booklet, as well as any other relevant risk factors, such as the particular subcategory or type

of loan. If the bank identifies greater risk for a particular subcategory of loans within an overall category, the internal LTV limit for that subcategory may be lower than the limit established for the overall category.

The LTV ratio is only one of several important credit factors to be considered when underwriting a real estate loan. Other credit factors to be taken into account are discussed in the "Underwriting Standards" section of this booklet. Because of these other factors, the establishment of these supervisory limits should not be interpreted to mean that loans underwritten to these limits are automatically considered sound.

LTV is calculated by dividing the loan amount by the market value of the property securing the loan plus the amount of any readily marketable collateral and other acceptable collateral[6] that secures the loan. The total amount of all senior liens on or interests in such property should be included.

Standby letters of credit secured by the property that are issued to governmental authorities to ensure the completion of certain improvements, the cost of which are to be funded by the loan, need not be included in the loan amount for the purpose of calculating the SLTV. When the cost of the improvements is to be funded from other sources, however, the standby letter of credit should be included.

The value used in calculating the SLTV can be as-is, the prospective market value as completed ("as-completed") or prospective market value as stabilized ("as-stabilized"). An as-is value would be appropriate for calculating the SLTV for raw land or stabilized properties. For an owner-occupied building or a property to be constructed that is preleased, the as-completed value should generally be used. An as-stabilized value would be appropriate for an existing property that is not stabilized or a property to be constructed that is not preleased to stabilized levels. For a further discussion of as-completed and as-stabilized values, see the "prospective market value" entry in this booklet's glossary.

The following sections provide additional guidance in determining the appropriate SLTV.

Applying SLTV Limits to Loans Financing Various Stages of Development

SLTV limits should be applied to the underlying property that collateralizes the loan. For loans that fund multiple stages of the same real estate project (for example, a loan for land acquisition, land development, and construction of an office building), the appropriate LTV limit for the completed project is the limit applicable to the final stage of the project funded by the loan. Total disbursements for each element of the development, however, are subject to its particular SLTV limits. This can be illustrated by considering the various development stages.

[6] "Other acceptable collateral" means any collateral in which the lender has a perfected security interest that has a quantifiable value and is accepted by the lender in accordance with safe and sound lending practices. Other acceptable collateral should be appropriately discounted by the lender consistent with the lender's usual practices for making loans secured by such collateral. Other acceptable collateral includes unconditional irrevocable standby letters of credit for the benefit of the lender.

From: N ck as Bill
To: Jerry Krus nski
Subject: RE: Enterpr se Zone Board
Date: Thursday August 8 2019 7:30 33 AM

Probably so. My next mo e is to pri ately feel out the school superintendent and county administrator who represent the biggest taxtakers to see if we could get their support e en if the Enterprs e Zone expans on is unworkable. I will be discreet.

-----Original Message-----
From Jerry Krusinski <jerryk@krusinski.com>
Sent Thursday August 8 2019 7 05 AM
To Nicklas Bill <bill.nicklas@CITYOFDEKALB.com>
Subject Enterprise Zone Board

[NOTICE This message originated outside of the City Of DeKalb mail system -- DO NOT CLICK on links or open attachments unless you are sure the content is safe.]

Bill if you are going to call a special meeting would it be appropriate to include the spec building [redacted] project? Gi e me a call if you would like to consider.

Sent from my iPhone
Jerry R. Krusinski CEO
Krusinski Construction Company
2107 Swift Dri e
Oak Brook IL 60523
(630) 573-7700 (Office)
https //gcc01.safelinks.protection.outlook.com ?
url=http%3A%2F%2Fwww.krusinski.com&amp data=02%7C01%7Cbill.nicklas% 0cityofdekalb.com%7Ccb9ee9b73369 2d8cb0008d71bf8b08e%7Ca9789d26cd32 e02bc16b0caac833a90%7C0%7C1%7C6370086272 2281328&amp sdata=MAs%2BdXWVwGwc p6tLsr XO TAgAqXEa%2F z9kKdcodgc%3D&amp reser ed=0

This email has been scanned for email related hreats and deli ered safely by Mimecas .
For more information please isit https //gcc01.safelinks protection outlook.com/?
url=http%3A%2F%2Fwww.mimecast.com&amp data=02%7C01%7Cbill.nicklas% 0ci yofdekalb.com%7Ccb9ee9b73369 2d8cb0008d71bf8b08e%7Ca9789d26cd32 e02bc16b0caac833a90%7C0%7C1%7C6370086272 2281328&amp sdata=PQ nfCxVFCd8YkB 2B ArRxmj35bgK8KV8t203glhV8%3D&amp reser ed=0

From: Nicklas, Bill
To: Jerry Krusinski
Subject: RE: Drop you a note.
Date: Friday, January 25, 2019 5:30:04 PM

Thank you for your kind note, Jerry. I'll look forward to that opportunity.

From: Jerry Krusinski <jerryk@krusinski.com>
Sent: Friday, January 25, 2019 2:38 PM
To: Nicklas, Bill <bill.nicklas@CITYOFDEKALB.com>
Subject: Drop you a note.

[**NOTICE:** This message originated outside of the City Of DeKalb mail system -- **DO NOT CLICK** on **links** or open **attachments** unless you are sure the content is safe.]

Bill,

I wanted to drop you a note and congratulate you on your new position. More appropriate, thank you for taking the leadership and moving the City forward in the future.

We appreciate the past partnership and effort when we are in pursuit of new business residents at the ChicagoWest site and look forward to successfully attracting a great user in the future. When things settle down with your new responsibilities, lets plan on grabbing a cup of coffee and exploring a few thoughts on business development for the area.

All the best, Jerry

Jerry R. Krusinski
CEO

Krusinski Construction Company
2107 Swift Drive
Oak Brook, IL 60523
(630) 573-7700 (Office)
(630) 573-7780 (Fax)
http://www.krusinski.com

City of DeKalb
opportunity · innovation

200 South Fourth Street
DeKalb, Illinois 60115
815.748.2000 • cityofdekalb.com

DATE: July 5, 2018

TO: Honorable Mayor Jerry Smith
City Council

FROM: Molly Talkington, Interim City Manager
Jo Ellen Charlton, Community Development Director
Jason Michnick, Economic Development Planner

SUBJECT: Concept Plan for the Redevelopment of the Property Located at 145 Fisk Avenue.

I. Summary

A group of individuals has approached the City with an interest in securing a Tax Increment Financing (TIF) incentive to assist in the redevelopment of the former St. Mary's Hospital, located at 145 Fisk Avenue. The primary developer for this project, and current contract purchaser of the property, is Nicholas Cronauer (Developer). The Developer is proposing to convert the building into a small boutique hotel with commercial amenities.

The historic structure has been vacant for a number of years. Past investors have had the intent to convert the structure into luxury condos or apartments but were unable to complete the project due to economic circumstances. A significant amount of interior demolition has already taken place and the building could be classified as a shell. Although the building is not functional in its current condition, the Developer and contractors that have toured the building have stated it has "good bones" and has great potential to be rehabilitated.

In an effort to reduce financial risk on this project, the Developer has requested to bring a concept plan forward to Council prior to closing on the property and investing in planning documents that would be required for the rezoning process. Therefore, this project is being presented to Council for discussion only and no action would be taken at this time. Should Council determine there is consensus to support this project and the incentive, staff would work with the Developer to streamline an approval process for consideration of an incentive and any required zoning approvals that allows the Developer to start construction as soon as possible.

II. Background

Originally constructed in 1922, St. Mary's hospital was in operation for 43 years before closing its doors in 1965. After the hospital closed, the building was converted into a girl's dormitory that was operated by the Sisters of Mercy for a short period of time. In 1970, the building was abandoned again and sat vacant until 1973 when it was sold to the DeKalb Community Unit School District 428 (D428). It then served as the administrative building until 1992 when D428 moved their operations to their current location on South Fourth Street.

The current owner of the property, Midwest Estate Development LLC, purchased the building with the intent of converting the building into luxury lofts. Due to economic circumstances, the current owner was never able to get the project off the ground. The property was then listed for sale. It is currently under contract, contingent on the Developer securing a TIF incentive to assist in their proposed redevelopment.

The Developer first approached the City in 2017 with a similar concept for converting the old hospital into a mixed-use building with luxury residential units and commercial space in the basement. At the time, the City was just beginning to discuss its future investment strategies with the use of TIF. As Council discussed the types of projects that were most desirable and focusing on any potential return on investment, the Developers began to reevaluate their proposed concept. After multiple conversations with staff, the Developers determined that converting the building into a boutique hotel would result in a larger return on investment for the City and likely gain greater support for a TIF incentive.

A final room count for the boutique hotel would not be known until final architectural plans have been developed. For the purpose of analysis, it has been assumed that the facility would have a total of 40 rooms. It is also assumed that there would be additional commercial space available for an entertainment/restaurant concept, flexible workspace and offices that could be leased, and outdoor dining and event spaces that would be an addition to the existing floorplan.

The Developer has worked with a local property manager to secure potential tenants for the commercial spaces. Included in the concept plan are letters of intent that have been signed by various businesses that would agree to operate out of the building, should the project come to fruition. The proposed businesses include a restaurant and craft distillery, an advertising firm, an interior designer, and an industrial wares dealer.

Although final construction plans have not been produced, the Developer has worked with a local designer to create some conceptual renderings of what could be possible. Photos of the building in its current condition and conceptual renderings have been included as Exhibit 1. Ultimately, the final design and layout of the facility would be determined after engineers and architects evaluate the existing condition and determine what is possible.

The intent would be to utilize the basement for a mix of commercial, including a restaurant, and amenities for hotel guests. The remaining three floors would be used as a mix of

office and hotel rooms. The Developer is also interested in utilizing the rooftops as outdoor lounge space and constructing various greenhouses on the premises that could be used for both event space and potentially growing food that is used in the restaurant. Given the proximity of the property to the Ellwood House, the Developer believes there is a potential synergy between venues, especially for weddings.

III. Community Groups/Interested Parties Contacted

The project is being presented to Council during the July 9, 2018, Regular meeting as a concept only. Feedback provided by Council to the Developer in no way constitutes a guarantee for future support of the project. Should there be consensus from Council that the project is desirable and would receive future support for a TIF incentive, the Developer would complete an application to have the property rezoned. The project would then be reviewed at a Planning and Zoning Commission (PZC) meeting, with the public being provided an opportunity to make comment on the merits for rezoning.

The PZC would then make a formal recommendation to Council to support or deny the application for rezoning. The project would then be presented at a Regular meeting of City Council as an Ordinance approving both the rezoning and incentive agreement, thus, giving the public multiple opportunities to make comments on the merits of both rezoning and a TIF incentive.

IV. Legal Impact

The project is being presented to Council as a concept and no vote would take place regarding rezoning or an incentive agreement. Should Council provide clear consensus that the project is desirable, and the incentive is warranted, staff would work with the Developer to draft an agreement that is mutually agreeable.

V. Financial Impact

The estimated cost to renovate and rehabilitate the property at 145 Fisk Avenue is approximately $6.25 million, and the Developer is requesting a TIF support in the amount of $2 million. This constitutes an incentive of roughly 32% of project costs. As with other development incentive agreements, if approved, the incentive would be crafted to not exceed the lesser of $2 million, the sum which is 32% of actual project costs incurred, or the amount of TIF-eligible expense incurred. Only TIF funding would be utilized in support of this incentive, and the incentive would be funded by a transfer from TIF 2 to TIF 1. The property has been vacant for a substantial number of years, drawing periodic squatters and continuing deterioration. The total Equalized Assessed Value of the property for the 2017 tax year was $32,893, with a total tax bill of $4,097. Based on the revenue generated from the property, an argument could be made that in its current state, the building has a negative economic impact on the surrounding area.

In an effort to estimate the potential return on investment if the project was constructed, the assumption of 40 total hotel rooms with 5,000 square feet of additional commercial space was used.

A comparison of other hotels and motels with more than 40 rooms in both DeKalb and Sycamore was used to predict the potential property tax revenue from the proposed project. Given the large range of total property tax bills for all comparables, the metric of property tax per room was used. This was calculated by dividing the total 2017 tax bill by the number of rooms at each hotel/motel. The chart below is the breakdown of all hotels used for comparison.

Hotel	Address	2017 Tax Bill	Number of Rooms	Property Tax per Room
Hampton Inn	663 Annie Glidden Rd	$205,079	80	$2,563
Baymont Inn	1314 W Lincoln Highway	$43,757	53	$826
Super 8	800 Fairview Dr	$40,279	44	$915
Holiday Inn Express	1935 Dekalb Ave	$75,453	69	$1,094
Red Roof Inn	1212 W Lincoln Highway	$39,670	95	$418
Country Inn & Suites	1450 Peace Rd	$72,458	73	$993
Quality Inn	1475 Peace Rd	$52,148	58	$899

The average property tax per room of all the comparable hotels and motels is $1,101.04. This average was used to provide a lower end of a forecast range. The upper end of the forecast used the average of the three hotels that charge the highest rate per night. This average is $1,549.86. Based on these two averages, an estimate for property tax generated by the hotel portion of the project is between $44,041 and $61,994 annually.

There would be additional commercial space including offices, restaurant, and event space that would also generate property tax revenue. Depending on the type of space, different assessed values are applied on a per square foot basis, with a restaurant generally being the highest value. Without having projected figures for space utilization, it is difficult to predict the additional property tax that would be generated from these spaces. Once a final concept plan has been submitted to the City, an estimate could be provided at a later date.

In addition to property tax being generated by this project, there would also be Hotel/Motel Tax, Sales Tax, and Restaurant/Bar Tax. Using a 65% occupancy rate and an average room rate of $119 per night, it is estimated that the hotel portion of the project would generate approximately $80,000 annually. Using a figure of $150 per square foot in retail sales for the 5,000 square feet of commercial space, the sales tax generated would be an additional $20,625 annually.

Based on these estimates, the total tax generated from the project could range from approximately $145,000 to $185,000+ annually. Using these figures, the recapture period for a $2 million incentive would be between 10 and 14 years, without adjusting for inflation.

Again, without knowing the final breakdown of commercial space uses, it is difficult to predict the amount of tax that could be generated. The estimates provided in this summary should be considered highly approximated and generalized.

VI. Options

Council will not be voting to support or deny this project and the requested incentive during the July 9, 2018, Regular City Council meeting.

VII. Recommendation

It is recommended that Council discuss the merits of the proposed project to determine if it meets the goals and objectives of the City's TIF investment strategy.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

145 FISK, LLC, Plaintiff, v. F. William Nicklas, individually, & the City of DeKalb, Defendants,	)	Case No.: 19 CV 50093

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff, 145 Fisk, LLC, hereby appeals to the United States Court of Appeals for the Seventh Circuit from Honorable Philip G. Reinhard's final judgments entered on April 27-28, 2020, bearing Docket Numbers 64-65, including all prior interlocutory rulings.

Respectfully submitted this 26 day of May, 2020.

/s/ C. Nicholas Cronauer
One of its Attorneys

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Attorneys for Plaintiff
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ATTORNEYS FOR PLAINTIFF