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

FIX WILSON YARD, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 08 CH 45023**
	)	
CITY OF CHICAGO, et al.,	)	**Judge Mary Rochford**
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR SECTION 2-619.1 MOTION TO DISMISS COUNTS I & III OF PLAINTIFFS' FIRST AMENDED VERIFIED COMPLAINT

The Tax Increment Allocation Redevelopment Act ("TIF Act"), codified at 65 ILCS 5/11-74.4-1 *et seq.*, was enacted to assist municipalities in eliminating or reducing blighted or nearly-blighted conditions in their neighborhoods by allowing them to allocate an increment of tax revenues to fund redevelopment projects in those neighborhoods. *Id.* § 11-74.4-2(a), (b). If a municipality determines that a geographic area within its jurisdiction meets the statutory criteria for either a "blighted" or "conservation" area, *see id.* § 11-74.4-3(a), (b), the TIF Act permits the municipality to enact ordinances, *inter alia*: (i) declaring that area to be a "redevelopment project area"; (ii) adopting a "redevelopment plan" for the area; and (iii) approving the use of tax increment financing for redevelopment projects in the area. *Id.* § 11-74.4-4. Once such ordinances are approved, an increment of the property taxes collected from the redevelopment project area are used to fund redevelopment projects, consistent with the redevelopment plan, within the redevelopment project area. *Id.* § 11-74.4-8.

Pursuant to the TIF Act, the Chicago City Council enacted an ordinance on June 27, 2001 creating the Wilson Yard Tax Increment Financing Redevelopment Project Area ("Project Area")

and approving a Redevelopment Project and Plan ("Redevelopment Plan") for the Project Area.[1] Am. Compl., Ex. C at 62342-431. The Project Area, located within the City's Uptown neighborhood, consists of 144 acres of land and is generally bounded by Wilson Avenue on the north, Clark Street on the west, Lake Shore Drive on the east, and Montrose Avenue on the south. Am. Compl., ¶ 2 & Ex. C at 62412. In creating the Redevelopment Project Area, the City Council specifically found, based on an Eligibility Study performed by S.B. Friedman & Company in June 2000, that the Redevelopment Project Area qualified as a conservation area as defined under the TIF Act. Am. Compl., Ex. C. at 62345-431. Pursuant to the Redevelopment Plan, numerous projects, funded in part by tax increment allocation financing, have commenced and/or been completed in the Project Area. *See* Declaration of Alderman Helen Shiller, a copy of which is attached hereto as Exhibit 1, ¶¶ 6-8. As described below, the largest of these projects is the Wilson Yard Project, which is being developed by the Holsten Defendants ("Holsten Wilson Yard Project").

On November 30, 2005, the City and the Holsten Defendants, pursuant to the Redevelopment Plan, entered into the Wilson Yard Redevelopment Project Area Redevelopment Agreement ("Redevelopment Agreement") in connection with the Holsten Wilson Yard Project. Am. Compl., Ex. B. The Redevelopment Agreement calls for the redevelopment of the property located at the corner of Broadway Street and Melrose Avenue (the "Subject Property"), which is within the Project Area.[2] Pursuant to the terms of the Redevelopment Agreement, the Holsten Wilson Yard Project

[1] The City Council adopted two additional, related ordinances on June 27, 2001: (1) an ordinance designating the Redevelopment Project Area as a tax increment financing district, *see* Am. Compl., Ex. C at 62432-41; and (2) an ordinance adopting tax increment allocation financing for the Redevelopment Project Area, *see* Am. Compl., Ex. C at 62442-51 (together with the ordinance designating the Redevelopment Project Area, the "TIF Ordinances").

[2] The Subject Property is sometimes referred to as "Wilson Yard," which also happens to be the common name of the Project Area. To avoid confusion, Defendants will refrain from using "Wilson Yard" in referring to either the Subject Property or the Project Area.

will be funded, in part, by tax increment financing from the Project Area, and will be improved by: (i) the demolition and relocation of an Aldi's grocery store and the construction of sixty parking spaces; and (ii) the construction of a mixed commercial and residential facility that will accommodate a Target store, 25,000 square feet of additional commercial space, a senior living facility, an affordable housing building, and approximately 500 dedicated parking spaces. Am. Compl., Ex. B.

The City Council approved the Redevelopment Agreement on September 14, 2005. Am. Compl., Ex. F at 1. The City and the Holsten Defendants amended the Redevelopment Agreement on June 1, 2007 (the "First Amendment"), which was approved by the City Council on May 23, 2007. Am. Compl., ¶ 23 & Ex. D. The Redevelopment Agreement was again amended, with City Council approval, in April 2008 (the "Second Amendment"). Am. Compl., ¶ 24 & Ex. E. On October 8, 2008, the City Council approved a third amendment to the Redevelopment Agreement (the "Third Amendment") (collectively, with the prior two amendments, "Amendments"). Am. Compl., ¶ 25 & Ex. F.

In their Amended Complaint, Plaintiffs claim that the Redevelopment Agreement and the Amendments violate section 11-74.4-4(j) of the TIF Act (Count I) and that various provisions in the Redevelopment Plan are unconstitutionally vague and ambiguous (Count III).[3] For the reasons set forth below, Counts I and III fail as a matter of law and should be dismissed.

[3] Count II is Plaintiffs' challenge to the City Council Finance Committee's approval of the Third Amendment under the Open Meetings Act, 5 ILCS 120/1 *et seq.* The City does not move to dismiss Count II but notes that to the extent Plaintiffs seek to invalidate the Third Amendment through this claim, *see* Am. Compl., ¶ 1, the Court has already ruled that this remedy is unavailable. *See* Memorandum and Order dated May 11, 2009, a copy of which is attached hereto as Exhibit 2 at 8-9.

ARGUMENT

I. Count I Fails and Should Be Dismissed Pursuant to Section 2-615.

In Count I, Plaintiffs allege that the Redevelopment Agreement and the Amendments violate section 11-74.4-4(j) of the TIF Act, which provides in relevant part:

> A municipality may:
>
> . . .
>
> (j) Incur project redevelopment costs and reimburse developers who incur redevelopment project costs authorized by a redevelopment agreement; provided, however, that . . . [N]o municipality shall incur redevelopment costs . . . that are not consistent with the program for accomplishing the objectives of the redevelopment plan as included in that plan and approved by the municipality until the municipality has amended the redevelopment plan as provided elsewhere in this Act.

65 ILCS 5/11-74.4-4(j). The "plan" referenced in this section is, in the present context, the Redevelopment Plan, which is a part of the TIF Ordinances attached as Exhibit C to Plaintiffs' Amended Complaint.

Plaintiffs assert that the Redevelopment Agreement and its Amendments are inconsistent with the Redevelopment Plan, and therefore violate section 11-74.4-4(j), because they:[4]

> 1. fail to "address the alleviation of the alleged conservation factors or provide the residential or market-rate units stated in the Redevelopment Plan;"
>
> 2. increase the budget for the project by $20 million and increase the City Notes by $10 million;

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[4] Count I of Plaintiffs' Amended Complaint is essentially a regurgitation of Count II of Plaintiffs' original complaint, which was dismissed by the Court in its May 11, 2009 ruling, in that it re-asserts the same defects or objections to the Holsten Wilson Yard Project (*e.g.*, reduction in the number of parking spaces, elimination of Kerasotes movie theater). The prior claim (Count II of the original complaint), however, was based on section 5/11-74.4-5(c) of the TIF Act, which permits a municipality to amend its redevelopment plan without holding public meetings only if the amendments do not "substantially change" the redevelopment plan, whereas the current claim (Count I) is based on a different section of the TIF Act, § 11-74.4-4(j), which is set forth above.

> 3. reduce available parking spaces by 200, extend the project's completion date by two years, and "expunged" plans for a Kerasotes movie theater; and
>
> 4. forfeit the City's right to stop payment "by eliminating the construction completion condition."

Am. Compl., ¶¶ 31-32. Count I fails and should be dismissed. First, Plaintiffs fail to meet their burden of pleading specific facts which support the alleged inconsistencies; indeed, Plaintiffs do not even cite the supposed inconsistent portions of the Redevelopment Agreement and its Amendments and the Redevelopment Plan, leaving the Court and Defendants guessing where the inconsistencies lie. This alone is a sufficient basis to dismiss Count I. *Hayes Mech., Inc. v. First Indus., L.P.*, 351 Ill. App. 3d 1, 7 (1st Dist. 2004) (stating that a plaintiff must allege facts, not mere conclusions). Second, as set forth more fully below, none of the four inconsistencies identified by Plaintiffs withstands any scrutiny. Simply put, the Redevelopment Agreement and its Amendments are in no way inconsistent with the Redevelopment Plan.

A. Alleged Failure to Address the Conservation Factors in the Redevelopment Plan or Provide Residential or Market-Rate Units

The Redevelopment Plan identifies the following four "conservation factors" which the Eligibility Study found existed in the Project Area: (i) physical deterioration of buildings; (ii) structures below minimum code standards; (iii) inadequate utilities; and (iv) lack of growth in equalized assessed value. *See* Am. Compl., Ex. C at 62363. The Redevelopment Plan lists 14 "broad objectives" to support "the overall goal of area-wide revitalization of the Wilson Yard R.P.A." *See id.* at 62347. Two of the fourteen "broad objectives" include:

> 5. encourage the improvement of the physical condition along Broadway between Wilson Avenue and Montrose Avenue *including the rehabilitation of commercial buildings, the development*

> *of vacant or underutilized properties*, provision of streetscaping and beautification elements, and removal of driveways and curb cuts where possible and appropriate;
>
> 6. support the preservation and rehabilitation of existing multi-family and affordable housing througho ut the R.P.A. and support the development of new for-sale and rental housing that could include a mixture of market-rate units, and units affordable to moderate-, low-, and very low- income households;

Id. at 62347-8 (emphasis added). Paragraph 5 addresses the "conservation concerns" of "physical deterioration" of buildings and "lack of growth in equalized assessed value" identified in the Project Area by the Eligibility Study; Paragraph 6 addresses the need for affordable housing in the Project Area.

In turn, the Redevelopment Agreement responds to these conservation factors and the objectives of the Redevelopment Plan. For example, under the heading "Phase I Improvements," the Redevelopment Agreement provides that a building "formerly known as the Azusa Building," a commercial building, will be renovated to include "16,000 square feet of restaurants and retail stores." Am. Compl., Ex. B at 7. And under the heading "Phase II Improvements," the Redevelopment Agreement provides that "approximately 78 affordable rental dwelling units for families" will be constructed. *Id.* Finally, under the heading "Phase III Improvements," the Redevelopment Agreement provides that another building will be constructed which will include "approximately 100 affordable rental dwelling units for seniors." *Id.* The last two items are a response to the Redevelopment Plan's objective of providing affordable housing in the Project Area.

Thus, contrary to Plaintiffs' claim, the projects proposed in the Redevelopment Agreement appropriately address, and are consistent with, the objectives and strategies of the Redevelopment Plan as well as the "conservation factors" identified in the Eligibility Study. The Amendments are

Redevelopment Plan. Similarly, they cannot demonstrate that changes to these items, as effected through the Amendments, are inconsistent with the Redevelopment Plan in any way.

D. The Amendments Allegedly Forfeited the City's "Right to Stop Payment by Eliminating the Construction Completion Condition"

It is difficult to understand exactly what Plaintiffs mean by this assertion and, in characteristic fashion, Plaintiffs make no attempt to explain themselves in the Amended Complaint. *See* Am. Compl., ¶¶ 31-32. Plaintiffs appear to be referring to the Third Amendment which eliminated one of the contractual remedies available to the City in the event of a default by the Developer. Section 7.01 of the Third Amendment revises Section 15.02 of the Redevelopment Agreement to provide that "[n]otwithstanding any conflicting provisions herein, in no event shall the City have the right to suspend or terminate payments under City Note(s) issued with respect to the Project." *See* Am. Compl., Ex. F, ¶ 7.01.

Once again, Plaintiffs fail to explain how waiving one of the contractual remedies provided in the Redevelopment Agreement is inconsistent with the Redevelopment Plan or violates section 11-74.4-4(j) of the TIF Act, neither of which even mentions contractual remedies of the municipality. Instead, Plaintiffs leave it to Defendants and the Court to sort out the basis of Plaintiffs' wildly conjectural assertion. To do so, it is necessary to understand the nature of the City Notes issued under the Redevelopment Agreement.

Under the Redevelopment Agreement, the City agreed to issue a series of Notes, which correspond to various stages of the project, to be payable to the holder of the Notes for costs incurred by the Developer in connection with the construction of the Project. By way of example, City Note No. 1 provides: "This Note is issued by the City in the principal amount of advances made from time

to time . . . up to $14,881,508 for the purpose of paying the costs of certain eligible redevelopment costs incurred by Master Developer in connection with the Phase I Improvements of the Project ...." *See* Am Compl., Ex. F, City Note #1 at 4. Further, the Note states that the first payment under the Note shall not occur before May 1, 2013. *Id.* at 3. Thus, starting on May 1, 2013, the City shall become obligated to pay only those "eligible redevelopment costs" already incurred by the developer in connection with constructing the project. Given that the Project commenced in 2007-08, this means that the City shall not be obligated to pay anything until after approximately 5 years of construction work and then shall only be obligated to pay the costs already incurred prior to the 2013 payment date.

The Redevelopment Agreement originally provided that, as one of its contractual remedies, the City could suspend payments under the Notes of the costs already incurred by the Developer if the Developer was guilty of a default under the Redevelopment Agreement, such as failing to continue to perform on the Holsten Wilson Yard Project. *See* Am. Compl., Ex. B, § 15.02 ("the City may suspend or terminate payments of ...the City Notes only as each relates to the phase of the Project with respect to which such default has occurred"). This is the contractual right the Third Amendment eliminated. The change, however, did not affect any of the City's other contractual rights or its equitable rights. For example, and most importantly, the City still retains the right not to make payments under the Notes for costs not incurred by the Developer which are not certified as "eligible costs" by the City. Further, the City retains the equitable right to sue the Developer for specific performance of the Redevelopment Agreement if the Developer is unable or refuses to complete the project.

Plaintiffs' allegation that "there is no condition precedent for the developer before he can

demand payment," Am. Compl., ¶ 32, is completely without foundation. It is quite clear that various provisions in the Redevelopment Agreement provide that, prior to the City becoming obligated on May 1, 2013 to make payments, the Developer must first have incurred the costs and the City must approve or certify that the costs are eligible for reimbursement.[6] None of these provisions were changed by the Third Amendment. Finally, because, as stated earlier, neither the Redevelopment Plan nor section 11-74.4-4(j) address anything remotely close to what remedies for default, if any, must be contained in a redevelopment agreement with a developer, Plaintiffs' claim with respect to the Third Amendment and the elimination of one of the City's contractual remedies under the Redevelopment Agreement must be dismissed.

For the foregoing reasons, all four of Plaintiffs' claims of inconsistencies between the Redevelopment Agreement and its Amendments and the Redevelopment Plan are without merit, and Count I should be dismissed in its entirety.

II. Count III Fails And Should Be Dismissed.

In Count III, Plaintiffs claim that the Redevelopment Plan, which they concede is contained within the TIF Ordinances, is vague and ambiguous in violation of Article I, section 2 of the Illinois Constitution. Am. Compl., ¶¶ 48-50, 65. From the section of the Redevelopment Plan titled "Redevelopment Plan Goals, Objectives and Strategies," Plaintiffs cite the introductory paragraph and Objectives 1, 2, 6, and 11 as containing unconstitutionally vague language.[7] Am. Compl., ¶¶

[6] "Only those expenditures made by a Developer ... evidenced by documentation reasonably satisfactory to DPD [Department of Planning and Development] as satisfying costs covered in the Project Budgets, shall be considered . . . ." Am. Compl., Ex. B, § 4.05(a). Further, "DPD shall retain the right to approve or reject, in its reasonable discretion, the designation of any costs as (i) a TIF-Funded Improvement or (ii) a part of the actual costs of the Project." *Id.* § 5.17(f).

[7] Although Plaintiffs state in Paragraph 49 of their Complaint that the sections they are listing are "mere examples" of the vague and ambiguous provisions, Plaintiffs do not identify in their Complaint any other provisions in the TIF Ordinances that they believe are unconstitutionally vague. Because Illinois law

49, 51. Plaintiffs' claim fails and should be dismissed, however, because, like their previous challenge to the TIF Ordinances, it is barred by the doctrine of laches. Moreover, when the rules of statutory construction are applied to the TIF Ordinances, it is clear that there is no constitutional infirmity.

A. Plaintiffs' Claim Is Barred by the Doctrine of Laches and Should Be Dismissed Pursuant to Section 2-619(a)(9).

Plaintiffs' request in Count III that the Court declare that the TIF Ordinances are unconstitutionally vague is barred by the equitable doctrine of laches. The Illinois Supreme Court has defined laches as "a neglect or omission to assert a right, taken in conjunction with a lapse of time of more or less duration, and other circumstances causing prejudice to an adverse party, as will operate to bar relief in equity." *Sundance Homes, Inc. v. County of DuPage*, 195 Ill.2d 257, 270 (2001) (citation and internal quotation marks omitted). It is an affirmative defense and bars equitable claims when the defendant proves "(1) that there was a lack of due diligence in bringing suit; and (2) plaintiffs' delay resulted in prejudice to defendants." *Lozman v. Putman*, 379 Ill. App. 3d 807, 822 (1st Dist. 2008). Laches will not apply unless a plaintiff has "knowledge of his right, yet fail[s] to assert it in a timely manner." *Sundance Homes*, 195 Ill.2d at 270. "Ordinarily, courts follow statutes of limitation as convenient measures for determining the length of time that ought to operate as a bar to an equitable cause of action." *Meyers v. Kissner*, 149 Ill.2d 1, 12 (1992); *see Sundance Homes*, 195 Ill.2d at 270; *Golden v. McDermott, Will & Emery*, 299 Ill. App. 3d 982, 994 (1st Dist. 1998). Laches can be raised as a bar to suit by either section 2-615 or section 2-619(a)(9) of the

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requires a plaintiff to inform the defendant of the claim it is called upon to meet, *see Lloyd v. County of DuPage*, 303 Ill. App. 3d 544, 552 (2d Dist. 1999), Plaintiffs cannot later claim that there are other unconstitutionally vague words in the TIF Ordinances. *See also* 735 ILCS 5/2-603 (requiring that "all pleadings shall contain a plain and concise statement of the pleader's cause of action").

Illinois Code of Civil Procedure. *See Summers v. Village of Durand*, 267 Ill. App. 3d 767, 771 (2d Dist. 1994).

This Court has already ruled that challenges to the TIF Ordinances are barred by the doctrine of laches. *See* Memorandum and Order dated May 11, 2009, a copy of which is attached hereto as Exhibit 2 at 3-6. In their original complaint in this case, Plaintiffs asked this Court to invalidate the TIF Ordinances, claiming that there was no basis for adopting a Redevelopment Plan under the TIF Act. *See id.* at 2-3. Defendants moved to dismiss that claim, asserting that it was barred by laches, pursuant to both section 2-615 and 2-619(a)(9). *See id.* at 3. This Court found that the first element of laches -- an unreasonable delay in bringing suit -- was apparent from the face of the complaint because it showed that Plaintiffs waited 7 ½ years to challenge the TIF Ordinances, well past the five-year statute of limitations. *See id.* at 4-6. But because the other element of a laches defense -- prejudice to Defendants from Plaintiffs' delay -- was not apparent from the face of the Complaint, the Court denied Defendants' section 2-615 motion to dismiss. *See id.* at 6. The Court did dismiss that claim under section 2-619(a)(9), however, because affidavits submitted by Defendants detailed the prejudice they suffered as a result of Plaintiffs' 7 ½ year delay in challenging the TIF Ordinances. *See id.* at 6.

The Court's rationale for dismissing the previous challenge to the TIF Ordinances under section 2-619(a)(9) applies with equal -- if not greater -- force to Count III, which is also a challenge to the validity of the TIF Ordinances. Am. Compl., ¶¶ 47-65. The TIF Ordinances were enacted on June 27, 2001, Am. Compl., Ex. C, and Plaintiffs' knowledge of their passage is presumed as a matter of law. *See People v. Lander*, 215 Ill.2d 577, 588 (2005). Despite this knowledge, Plaintiffs waited until July 24, 2009 -- over *eight* years after the TIF Ordinances were enacted and well over

the five-year statute of limitations set forth in section 5/13-205 of the Illinois Code of Civil Procedure -- to file their vagueness challenge. Because this Court has already ruled in dismissing Plaintiffs' prior claim that 7 ½ years was an unreasonable delay in bringing suit, eight years is an even more unreasonable delay.[8] Thus, the first element of laches -- unreasonable delay -- is easily satisfied.

So too is the second element of laches -- that Plaintiffs' delay in bringing their claim "caused a change in conditions and caused [defendants] to pursue a course different from that which [they] would otherwise have taken." *Negron v. City of Chicago*, 376 Ill. App. 3d 242, 247 (1st Dist. 2007). In dismissing Plaintiffs' previous claim against the TIF Ordinances, this Court found, based on the Shiller Declaration and the Affidavit of Peter Holsten, a copy of which is attached hereto as Exhibit 3, that Defendants "clearly establish[ed] the existence of prejudice to Defendants in reliance on the validity of the [TIF] Ordinances." Ex. 2 at 6. The Declaration and Affidavit established that as of the date they were submitted (January, 2009), invalidation of the TIF Ordinances would have an enormous prejudicial impact on Defendants. *See id.* at 6. It therefore follows that invalidation of the TIF Ordinances would be equally -- if not more -- prejudicial today.[9] Moreover, Plaintiffs have pleaded no facts in their Complaint demonstrating that any of the prejudice detailed in the Declaration and Affidavit has been eliminated.

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[8] It is curious that Plaintiffs did not bring their claim of unconstitutional vagueness in their prior Complaint given that they must have read the TIF Ordinances before bringing their claim that TIF Ordinances were enacted in contravention of the TIF Act.

[9] In fact, as of the date of this filing, the buildings housing the residential units and the additional 25,000 square feet of retail space in Holsten Wilson Yard Project have been built, and Holsten's construction of the core and shell of the Target store will be complete in December 2009. *See* Supplemental Affidavit of Peter Holsten, Ex. 4 hereto, ¶¶ 3, 4. Moreover, the Holsten Defendants have incurred costs of over $110 million on the Holsten Wilson Yard Project, which represents over 70% of the project's total anticipated cost. *Id.* ¶ 5.

Because Defendants have pursued actions they otherwise would not have taken if Plaintiffs had timely challenged the TIF Ordinances, Plaintiffs' eight year delay in bringing their challenge -- which is three years beyond the applicable statute of limitations -- bars Count III, just as it barred Plaintiffs' previous claim. It should therefore be dismissed pursuant to section 2-619(a)(9).

B. Count III Fails and Should Be Dismissed Pursuant to Section 2-615 Because the TIF Ordinances Are Not Unconstitutionally Vague.

Count III also fails on its face and should be dismissed because Plaintiffs fail to state a claim that the introductory paragraph and Objectives 1, 2, 6, and 11 of the Redevelopment Plan, or any other part of the TIF Ordinances, are unconstitutionally vague. Under Illinois law, a "municipal ordinance is entitled to a presumption of validity and, as the party challenging the ordinances at issue here, [Plaintiffs have] the burden of showing their invalidity." *O'Donnell v. City of Chicago*, 363 Ill. App. 3d 98, 105 (1st Dist. 2005). To overcome the presumption of validity, "it must be established by clear and convincing evidence that the ordinance, as applied to [the challenging party], is arbitrary and unreasonable and has no substantial relation to the public health, safety or welfare." *Id.* (citations and internal quotation marks omitted). "Vagueness challenges to statutes that do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *Russell v. Dep't of Natural Resources*, 183 Ill.2d 434, 442 (1998) (citation and internal quotation marks omitted).

In this instance, the provisions of the TIF Ordinances at issue meet constitutional requirements. The Due Process Clause of the Illinois Constitution requires that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and specify standards to guide enforcement. *Russell*, 183 Ill.2d at 442. Thus, an enactment is unconstitutionally

vague "only if its terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts." *Desnick v. Department of Professional Registration*, 171 Ill.2d 510, 537-38 (internal quotations omitted). The terms of a legislative enactment need only be definite enough to "serve as a guide to those who must comply with" it. *East St. Louis Federation of Teachers, Local 1220 v. East St. Louis Dist. 189 Financial Oversight Panel*, 178 Ill.2d 399, 425 (1997).

Here, the provisions cited by Plaintiffs in their Complaint do not "prohibit" any conduct nor are they "enforced" against the public. As a result, Plaintiffs cannot challenge the TIF Ordinances on this basis. The provisions Plaintiffs rely on set forth the goals and objectives of the City Council in enacting the TIF Ordinances. *See* Am. Compl., Ex C. Thus, to the extent the challenged provisions "guide" anyone, they guide the City Council, which must approve of redevelopment projects in the Redevelopment Project Area, just as it approved the Redevelopment Agreement for the Subject Property. As shown below, the TIF Ordinances properly guide the City Council.

Courts must begin by presuming that all legislative enactments are constitutional. *See, e.g.*, *Opyt's Amoco, Inc. v. Village of South Holland*, 149 Ill.2d 265, 277 (1992). In interpreting an ordinance, words are to be given their plain and ordinary meaning unless otherwise defined, *see Gem Elecs. of Monmouth, Inc. v. Department of Revenue*, 183 Ill.2d 470, 477-78 (1998), and due process does not require "mathematical certainty," *Granite City Division, National Steel Co. v. Illinois Pollution Control Bd.*, 155 Ill.2d 149, 164 (1993), or "impossible levels of specificity." *People v. Bailey*, 167 Ill.2d 210, 229 (1995). An ordinance does not become unconstitutionally vague "merely because one can conjure up a hypothetical which brings the meaning of some terms into question," but must be read in context. *In re R.C.*, 195 Ill.2d 291, 299 (2001).

In this instance, Plaintiffs submit that the introductory paragraph and Objectives 1, 2, 6, and 11 are "so rife with vague, ambiguous, subjective, overly inclusive language that they read more like a description of lofty social ideals than any publically [*sic*]-financed real estate development plan." Am. Compl., ¶ 50. They single out as vague and ambiguous such words and phrases as "direction and mechanisms necessary," "potential negative impacts," "may have," "rental housing that *could* include a mixture," and "coordinate the goals . . .with the goals and objectives *of other* underlying redevelopment plans and planning studies *where appropriate*," "appropriate," "necessary," and "corrective action." *See* Am. Compl., ¶¶ 51, 52 (emphasis in Complaint). But these words and phrases have plain and ordinary meanings, and Plaintiffs fail to identify how those meanings, when read in context, render the TIF Ordinances unconstitutionally vague. Plaintiffs essentially ask this Court to isolate these words from their context and declare them unconstitutional.

More importantly, Plaintiffs misapprehend the very purpose of the Redevelopment Plan, which is to provide broad "overall" objectives and strategies for the revitalization of the Wilson Yard TIF area. The Plan itself contemplates that the details of the projects are to be filled in by the redevelopment agreements negotiated between City agencies and the developers, and then reviewed and approved by City Council. Am. Compl., Ex. C at p. 62381 ("Each project within the Wilson Yard R.P.A. shall be governed by the terms of a written agreement entered into by a designated developer and the City and approved by City Council."). Thus, Plaintiffs miss the point when they contend that Objective 2 is unconstitutionally vague because it provides "for new retail, commercial, light industrial and residential development, and off street parking areas" but does not provide guidance as to what specific development is to receive public financing support. Am. Compl., ¶¶ 49, 53. The fact that Objective 2 describes, in Plaintiffs' words, "virtually every type of real estate

development," Am. Compl., ¶ 53, is of no moment because the Redevelopment Plan only proposes in very general terms the desired uses for TIF Funds so long as the real estate development occurs on "vacant and underutilized sites." The City Council, in listing the various types of development, have identified the various developments that *could* occur, depending upon what the City Council later agrees best meets the Redevelopment Plan for the TIF District, once it is presented with detailed redevelopment agreements. That the City Council did not identify the exact projects or developments that would occur within the TIF District but instead only provided the general parameters for the types of development that could occur does not render the challenged provisions unconstitutionally vague.

This analysis also dooms Plaintiffs' contention that Objective 6 is unconstitutionally vague because it provides for development of a "mixture of market rate units and units affordable to moderate-, low- and very low-income households." Am. Compl., ¶ 55. Again, Objective 6 is not unconstitutional because the City Council did not identify the exact developments that would occur within the TIF District.

In this instance, Plaintiffs have cherry-picked words from the Redevelopment Plan and offered this Court nothing more than unsubstantiated hypotheticals in an effort to create vagueness where none exists. Count III should therefore be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Counts I and III of Plaintiffs' Amended Complaint and grant Defendants such other relief as the Court deems just and appropriate.

Dated: August 24, 2009

Respectfully submitted,

CITY OF CHICAGO &
WILSON YARD DEFENDANTS

Rachel D. Powell

Michael J. Dolesh
William Macy Aguiar
Rachel D. Powell
City of Chicago, Department of Law
30 North LaSalle Street, Suite 1230
Chicago, Illinois 60602
(312) 744-9028 / 4216 / 7864
Attorney No. 90909

Attorneys for Defendant City of Chicago

Thomas E. Johnson / RDP

Thomas E. Johnson
Ann M. Davis
Johnson, Jones, Snelling, Gilbert & Davis
36 S. Wabash Ave, Suite 1310
Chicago, Illinois 60603
(312) 578-8100

Attorneys for Wilson Yard Defendants