Appeal No. 19-2308

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PROTECT OUR PARKS, INC., CHARLOTTE ADELMAN, MARIA VALENCIA, JEREMIAH JUREVIS,
Plaintiffs-Appellants,

v.

THE CITY OF CHICAGO AND THE CHICAGO PARK DISTRICT,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
Hon. John Robert Blakey
No. 18-cv-3424

OPENING BRIEF OF PLAINTIFFS-APPELLANTS PROTECT OUR PARKS, INC. AND MARIA VALENCIA

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ORAL ARGUMENT REQUESTED

Disclosure Statement

(1) The full name of every party that the attorney represents in the case:

Protect Our Parks, Inc. and Maria Valencia

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

For the appeal in this Court: Richard A. Epstein and Rachlis Duff & Peel, LLC (Michael Rachlis);

In the District Court: Roth Fioretti, LLC (Mark Roth, Robert Fioretti, Kenneth Hurst)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any:

None

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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I. Jurisdictional Statement

Subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331:

Plaintiffs' complaint raises federal questions under 42 U.S.C. § 1983, 28 U.S.C. § 1343, and the First, Fifth, and Fourteenth Amendments of the United States Constitution.

Appellate jurisdiction exists pursuant to 28 U.S.C. § 1291. On July 10, 2019, Plaintiffs timely filed notice of appeal (Doc. No. 151) from the Court's entry of a final judgment on June 11, 2019 granting summary judgment to Defendants City of Chicago and Chicago Park District's (collectively "the City" or "Defendants").

II. Statement Of The Issues

1. Did the City fail to discharge its duties to its citizens with respect to Chicago public lands under the public trust doctrine when it:

   a. Failed to perform due diligence in the decision to transfer 19.3 acres of public trust land under a "use agreement" to a private party, the Obama Foundation, for less than its fair value,

b. Delegated all critical siting and development authority to the Obama Foundation, while not independently conducting review of alternative sites and considering costs and benefits to the public,

c. Agreed to incur hundreds of millions in costs to close major public thoroughfares, in addition to other costs and liabilities, to provide the Obama Foundation access to and through Jackson Park?

2. Did the City's actions and omissions connected to the transfer of public trust property without diligence or fair value violate the Fourteenth Amendment and/or the Fifth Amendment (Takings Clause) to the United States Constitution?

3. Did the City's actions and omissions in transferring land from the Park District to the City, so that it could then be transferred to the Foundation, violate applicable statutes and ordinances?

III. Introduction

This matter challenges the actions and omissions by which the Chicago Park District ("Park District") transferred essential Jackson Park land to the City, which in turn transferred that land to the Barack Obama Foundation ("Foundation") as the new site for its Obama Library (later Obama Presidential Center ("OPC")). That transaction completely delegated site selection, design and indisputable public trust land to a private party. Ignoring this and multiple other conflicts, the City permitted the Foundation unlimited discretion in transforming a unique and historic site long a part of the fabric of the South Side of the City to its own devices. The abdication of authority – and the power of the purse, the lack of diligence and process and the deprivation of property – required a heightened level of scrutiny which the District Court failed to apply. These interconnected transactions demand a heightened level of judicial scrutiny to examine the diligence of the public fiduciaries and whether those fiduciaries obtained fair value from the transaction, which the District Court ignored. By refusing to adopt any needed scrutiny, the District Court erred in

granting summary judgment to the City, at a minimum with respect to Plaintiffs' public trust, due process and *ultra vires* claims. That decision must be reversed.

IV. Statement Of The Case

A. Jackson Park.

Jackson Park is one of the most historically famous urban parks in the nation. Over a century ago, Frederick Law Olmsted — perhaps this country's most famous and revered landscape architect – designed Jackson Park. Olmstead's ingenious and resplendent design remains largely intact to this day. [*See* A.324-325 (aerial maps); Dkt. 136-2 at 58-63 of 163 (historic maps)] Significantly, the Park's historic character was publicly recognized in 1972 by placing the site on the federal National Register of Historic Places. [Dkt. 139, ¶15] The Park's roadways, including Cornell Drive and the Midway Plaisance, likewise remain important thoroughfares whose special vistas allow everyone to see and appreciate the Park and its environs, while offering crucial surface transportation links to the urban area enveloping

the Park. [Dkt. 136, ¶ 7; Dkt. 136-2, pp. 58-62, 68-71, 78, 122-23 of 163]]

From its 1869 dedication until 2018, Jackson Park was held in public trust by the Park District and its predecessor the South Park Commission. The Illinois General Assembly deeded the real estate comprising Jackson Park to what would become the Park District subject to restrictions in perpetuity on the purposes for which the property may be used. Thus the demised property "shall be held, managed and controlled by [the Commissioners] and their successors as a public park, for the recreation, health and benefit of the public, and free to all persons forever." [Dkt. 139, ¶17]

B. The Obama Foundation Searches For A Location For The Obama Presidential Library.

In March 2014, the Foundation began searching for a future site for an Obama Presidential Library. [A.106] The University of Chicago proposed sites in Washington Park and Jackson Park (as well as South Shore). The University offered existing University-owned land and, if necessary, acquiring additional lands. [A.087-088] The University of Illinois at Chicago ("UIC") proposed a site

in North Lawndale. [A.083-084]

The Foundation ranked the Washington Park site as its first choice for the Library [A.094; A.097, lines 8-16]; Jackson Park second [A.094; A.098, lines 6-10]; and the North Lawndale site third [A.086; A.096, line 20–A.097, line 7]. The Foundation preferred the University of Chicago proposal, because its support would enable it to receive a $30 million pledge from the University for seed funding. [A.082] The Foundation's analysis did not discuss potential negative impacts on the proposed locations or surrounding communities.

The University of Chicago commissioned Anderson Economic Group ("AEG") to prepare an economic impact analysis, which also ranked Washington Park over Jackson Park. The Washington Park site "would most amenably accommodate new businesses and investment that might come into the area due to the presence of a presidential library." [Dkt.129-1 at CITY_007881] In contrast, AEG concluded: "There is not a current base of industry in place that would serve the demand of visitors to Jackson Park within half a mile of the proposed location. There is some room for

growth, but a lot of the nearby land is taken up by public parks or large institutions and developments." [*Id.* at CITY_007882-83] A 2016 report by Deloitte for the Chicago Community Trust did not identify Jackson Park as the best location for the Library. [Dkt.128-5 at OF2379, OF2381]

No report considered or suggested means to address negative aspects of choosing Jackson Park, such as road closings, disrupted traffic patterns, the mass destruction of old-growth trees, and the impact of the new construction on the visual and operational integrity of Jackson Park. None considered the site's physical ability to accommodate the proposed Library. Nor did these reports compare the pros and cons of the Jackson Park with sites located in or near Washington Park (or other locations). [A.102, lines 20-23; A.103, lines 15-19; A.104, lines 13-22]

C. The Chicago City Council Passes Its 2015 Ordinance, Authorizing The Construction Of The Presidential Library, Simultaneously Delegating All Decision-Making To The Foundation.

After the Foundation communicated to the City the results of the Foundation's study , the City Council passed an ordinance ("the 2015 Ordinance") that reflected the Foundation's plan for a

presidential library, a museum, and "the Foundation's executive and administrative offices, and other ancillary facilities, such as parking and landscaped open space." [A.106] The 2015 Ordinance [A. 105-23] specified that the City would consider sites submitted by the University of Chicago and UIC (those being the Washington Park, Jackson Park, and North Lawndale locations). [A.106-110] The 2015 Ordinance notes the Foundation "expressed concern" over the City's "lack of control over the proposed park sites" (even though owned by the Park District), leading ultimately to the transfer of ownership of Jackson Park to the City. [A.107] But the City explicitly delegated *the entire selection process and choice* of final location to the Foundation and its namesake:

> WHEREAS, While the City Council is **confident** in the quality and thoroughness of both UIC's and UChicago's proposals, ***the City defers to the sound judgment of the President and his Foundation as to the ultimate location of the Presidential Library.*** [A.109] (Emphasis supplied)

At no point did the 2015 Ordinance address any conflicts between the Foundation and the City as a whole. But it did conclude:

> It is anticipated that the City and the Foundation will enter into a long-term ground lease that will allow the Foundation to develop, construct and operate the Presidential Center, and that the Foundation will enter into a use agreement, sublease or other agreement with NARA [National Archives and Records Administration] to operate the Library and Museum. [*Id.*]

D. The Foundation And The Former President Select Jackson Park As The Site For The Presidential Center.

On July 29, 2016, without any further input or analysis from the City, the former President and the Foundation selected Jackson Park as the site for the Obama Presidential Center ("OPC"). [A.126] The design plans unveiled in May 2017 and modified in January 2018, called for an expanded campus of four buildings, a large parking lot, and no Presidential Library. [A.129-31] Presidential records were to be handled by NARA at a different location, but not housed at the OPC. [*See* A.154] The centerpiece Museum Building, a 235-foot white structure, would tower above the Museum of Science and Industry located just to its northeast, and every other structure in or near Jackson Park. [A.129-130] The complex would occupy 19.3 acres [Dkt. 124, ¶6], and require road closures, a widening of Lake Shore Drive and

Stony Island Avenue, and clear cutting of at least 350 ancient trees. [A.135]

The Museum building would house the Foundation office on two of its floors, using other floors for a mix of permanent exhibits about the Obama administration and galleries for temporary exhibits. [A.130]

One of the buildings would be occupied by a Chicago Public Library branch, far removed from local residents and not under the authority of NARA. [A.131] The Forum Building would house collaborative and creative spaces. [*Id.*]

The athletic space would be used for basketball, other sports, and other non-athletic events. [*Id.*] Originally, a parking facility was designed to be above ground in an adjacent public park, but after public objections (*not* from the City), an underground parking facility for more than 400 vehicles was situated on the central OPC campus. [A.136]

E. The Chicago Plan Commission Unanimously Approves The Foundation's Applications In One Day.

Having selected the site in early 2018, the Foundation submitted applications to the Chicago Plan Commission seeking:

(i) approvals under the Lakefront Protection Ordinance, and (ii) rezoning to allow the OPC to proceed as a Planned Development. [Dkt. 124, ¶13; Dkt. 126-3, 126-4] The Chicago Department of Transportation submitted a companion application seeking approval under the Lakefront Protection Ordinance for all the related road removals and realignments; the Park District also sought approval to relocate the Jackson Park track and field to make way for the OPC construction. [Dkt. 126-5 at CITY 008031-33]

These applications raised many complex issues and generated significant public interest and controversy. The Chicago Plan Commission devoted one public hearing, on May 17, 2018, to reviewing all applications. [Dkt. 126-5 (transcript of proceedings)] City officials gave a quick summary, followed by Foundation presentations, and brief remarks by Aldermen. Public comment was tightly controlled. [See, Dkt. 126-5 at CITY_008034-36].

The Plan Commission unanimously approved all applications the same day. [Dkt. 124, ¶15] To address all issues pertaining to the Lakefront Protection Ordinance, the Plan

Commission adopted *in toto* the report presented by the City's Department of Planning and Development ("DPD Study"). [*Id.*]

Less than a week later, on May 22, 2018, the City Council's Zoning Committee approved the necessary zoning amendments, again without significant public input or notice. The next day, the City Council, in a vote of 47 to 1, approved the recommendations of the Plan Commission and the Zoning Committee. [Dkt. 124, ¶¶17-18]

F. Protect Our Parks Files Suit.

Plaintiff, Protect Our Parks, Inc. ("POP") and other individuals filed suit in the District Court seeking to reverse the City's decision to place the OPC in Jackson Park. [Dkt. 1] The POP lawsuit stressed the unilateral nature of the City's decision, without due diligence and meaningful public input. It identified three causes of action stemming from the transfer of Jackson Park to the Foundation by the Park District through the City. That transfer (1) violated the Due Process and Takings Clauses of the United States Constitution; (2) violated the Public Trust Doctrine; (3) engaged in *ultra vires* behavior by taking actions beyond the

power of the City, by circumventing the Park District prohibitions on transfers of park property to private entities. The complaint also (4) sought a declaratory judgment action on the inapplicability of the Illinois Museum Act; (5) attacked an amendment to the Illinois Museum Act as prohibited special legislation; and (6) charged that the City's actions violated the First Amendment. [*Id.*]

G. The City Delays.

In July 2018 Defendants moved to stay their answer and discovery to accommodate the City, which was developing a new OPC ordinance to "remedy" any defects under the then-current law, arguing that "the City cannot acquire the proposed site from the Park District, much less authorize the Foundation to operate on it. There is therefore no need to rush into adjudication of the issues at this point." [Dkt. 19, ¶3] Further, Defendants argued ongoing federal reviews starting in December 2018 blocked any work on the Jackson Park site. [*Id.*, ¶8] Notwithstanding these assurances, in September 2018 the Park District began work on the track and field portion of the OPC project by cutting trees

[Dkt. 23, ¶4], which was discontinued after being brought to the Court's attention. The Court also lifted its stay on discovery, also setting a date for an answer. [Dkt. 26] The Plaintiffs issued subpoenas to the University of Chicago and later sought written discovery from the City. [Dkts. 37, 39]

On October 22, 2018, the City answered the complaint [Dkt. 38], but generally refused to respond to discovery. [*See* Dkt. 98 at 6 (discussing response to Plaintiffs' First Request to Produce)]

H. On October 31, 2018, The City Council Passes The 2018 Ordinance With Significant Differences From The 2015 Ordinance, To Meet Foundation Demands.

The 2018 Ordinance [A.149-262] authorized the Park District to transfer to the City ownership of 19.3 acres, including portions of Cornell Drive and the Midway Plaisance. The 2018 Ordinance did not refer to the ground lease contemplated in the 2015 Ordinance, or an agreement with NARA to operate a presidential library, but substituted instead a "Use Agreement" [A.166] to transfer those 19.3 acres for a term of 99 years from the City to the Foundation. [A.174, § 2.1(a)-(c)] The Use Agreement gave the Foundation the right to construct and install buildings,

and the sole right to use, occupy, maintain and operate the building [A.174-75, § 2.1; 2.2], and provided the Foundation with all naming rights and revenues from the operations of the subject property. [A.182, 185, §§ 6.1, 6.9, 6.11]

The Use Agreement also committed the City to indemnify for various environmental remediation of the entire campus, including the main Museum Building and the underground parking garage, both to be constructed on marshy areas. [A.252-254] Extensive caissons far underground are needed to protect the oversized tower from the rising water table of Lake Michigan. Recent preliminary estimates (the only ones produced by the City are from *2015*), for these environmental liabilities range anywhere from $3.7 to $8.7 million dollars. [Dkt. 139, ¶34; A.267]

The 2018 Ordinance makes no mention and provides no analysis of the other sites referred to in the 2015 Ordinance. The City admits it made no independent review of the costs or benefits of locating the OPC in Jackson Park. [A.101, line 24 - A.102, line 19] Instead, the 2018 Ordinance recites a new set of "extensive benefits" and "purported enhancements" and "improvements"

including large scale road closures, none of which were mentioned or identified in the 2015 Ordinance. [A.153-154; A.156-157] These were being implemented to relocate the new museum to an even more prominent space right on the Midway Plaisance: "***the Foundation has proposed shifting the boundaries of the Original Site to the North and east to incorporate portions of the Midway Plaisance and Cornell Drive****, and CDOT has proposed closing these and additional road segments with the park.*" [A.154] (Emphasis added) The costs associated with road closures are at least $175 million [Dkt. 139, ¶ 33], but there are other costs associated with the project totaling over $10 million [*Id.*, ¶¶ 35-37]

I. The District Court Denies (In Part) Motions To Dismiss And Allows Limited Discovery.

After passage of the 2018 Ordinance, the City moved to dismiss the complaint for want of subject matter jurisdiction under Rule 12(b)(1). It also filed a Rule 12(c) motion to dismiss, or, alternatively, to convert the 12(c) motion to one for summary judgment. The Defendants further moved to stay discovery. After briefing and a hearing, on February 19, 2019, the District Court determined that POP and individual Plaintiffs had standing to

pursue their public trust and related causes of action, except for their First Amendment claim [A.063-066], which it dismissed, largely based on the action being unripe. [A.067-072] The Rule 12(c) motion was converted to one for summary judgment, and a schedule set for that motion.

Over the City's objections, the District Court ordered a limited discovery period of forty-five days, with a cut-off date of April 19, 2019. The District Court also granted Plaintiffs request for a 30(b)(6) deposition of a representative of the City limited to subjects including "the factual attributes of the OPC and OPC site, including any advantages or disadvantages of the OPC or OPC site, or any alternative design/operating provisions of the OPC, or any alternate sites, provided such center alternatives or alternate sites were actually considered during the design or site selection process, as set forth in the produced documents." [Dkt. 110] The City continued to resist discovery (although producing some limited information [*see* Dkt. 98 at 3, 6-19, 12-14]) and also delayed its 30(b)(6) deposition until April 11, 2019 (one week prior to the close of discovery). [A.095]

J. Summary Judgment Motions.

The Defendants' argued [Dkt. 122-129, 141] that the City's legislative actions could not be challenged on any constitutional or statutory ground because Jackson Park was not situated on previously submerged Lake Michigan waters, and due to benefits the City called "undisputed of facts." [Dkt. 124] Those "facts" were lifted largely from the 2018 Ordinance and from the DPD Study provided to the Chicago Plan Commission [*id.*, ¶¶ 13-20, 38-50], and included alleged "enhancements to the Park" such as additional parkland [*id.*, ¶45], and "improved" traffic flow from construction. [*Id.*, ¶46] The City also claimed that the Jackson Park location for the OPC followed a historical pattern of constructing museums in the park. [*Id.*, ¶49] The City further asserted its deal with the Foundation did not involve a "lease" but a "use" agreement. [Dkt. 98 at 100 (2/14/19 Tr., 36:1-9)]

Defendants also opposed Plaintiffs' motion for summary judgment. [Dkt. 139]

Plaintiffs filed their own motion [Dkts. 112, 114-120, 143] and opposed Defendants' motion for summary judgment. [Dkts.

136-137] Plaintiffs disputed the Defendants' factual assertions relying, in part, on admissions from the City's 30(b)(6) deposition and other documentary evidence. Plaintiffs claimed that the City's motion for summary judgment should be denied because of, *inter alia*, the City's:

(1) decision to delegate site selection to private parties (the Foundation and former President) for their benefit [A.109];

(2) failure to evaluate the merits of alternative sites [A.104, lines 13-17];

(3) failure to identify any educational or economic benefits of placing the OPC in Jackson Park (or at other locations) [Dkt. 112, ¶¶ 13, 14, 18, 20, 22, 23, 28-31];

(4) failure to scrutinize the "use" agreement, a disguised lease that transfers 19.3 acres in Jackson Park from the City to the Foundation for $10.00 for 99 years, but was orchestrated and styled as such to avoid prohibitions against transfers under local ordinances and scrutiny under the public trust doctrine [A.174, § 2.2; A.175 ; Dkt. 136, ¶¶ 2-3 on pp. 32 and 33 of 43];

(4) decision to assume the full costs of the change in road configurations -- a minimum of $175,000,000 including $92 million alone for closing of Cornell Drive, along with other substantial costs [A.266; Dkt. 139, ¶¶ 33, 35-37];

(5) failure to support its claim that the planned closures of Cornell Drive and other Jackson Park roads would act as improvements, and not disrupt or delay traffic[1] [*see*, e.g., Dkt. 126-5 at page 40];

(6) authorizing the OPC to effectively destroy Jackson Park's integrity and cultural landscape, including critical elements of the Olmsted roadway system [Dkt. 136, ¶¶ 38-39; A.315-316] as well as the Women's Garden (also known as the Perennial Garden), an important element of the Park designed by a female landscape architect [A.317 ("A new garden will replace the historic Perennial Garden/Women's Garden, built in 1936.")];

(7) padding its figures of new parkland created by treating

[1] The testimony refers to (as does the Plan Commission Ordinance) a traffic report from Sam Schwartz which was not submitted to the district court, but is located on the City of Chicago's website. https://www.chicago.gov/content/dam/city/depts/dcd/supp_info/jackson/CDOT-Traffic-Impact-Study.pdf

existing parkland (including Cornell Drive and the east end of the Midway Plaisance) as newly created parkland [Dkt. 136, ¶45; Dkt. 136-2 at 58, 62, 68-71, 78, 122-23 of 163];

(8) labelling as "enhancements" to Jackson Park devastating physical alterations of critical aspects of Olmsted's design and other park landmarks [Dkt. 136, ¶¶ 38-48; Dkt. 136-2; 136-4].

K. The Court Grants Defendants' Motion For Summary Judgment.

On June 11, 2019 the Court granted Defendants' motion for summary judgment [A.001-052] relying upon the City's statement of facts including certain maps submitted by the City to establish that Jackson Park did not sit on submerged land. [Dkts. 124-5, 125-1] It therefore analyzed the Plaintiffs' claim under "the level of scrutiny applied to never-submerged lands" [*id.* at A.024], which required the Court to ask *only* "whether sufficient legislative intent exists" for the project." [*Id.*] The Court then held any constitutional analysis unnecessary because the Illinois Park District Aquarium and Museum Act, 70 ILCS 1290/1, *et seq.*,

("Museum Act") provides "sufficient legislative intent . . . to permit diverting a portion of Jackson Park for the OPC."

It further found that if constitutional scrutiny was required, the transaction was appropriate because:

> the OPC surely provides a multitude of benefits to the public. It will offer a range of cultural, artistic, and recreational opportunities—including an educational museum, branch of the Chicago Public Library, and space for large-scale athletic events—as well as provide increased access to other areas of Jackson Park and the Museum of Science and Industry. [*See* Dkt. 124 ¶¶ 25–30, 39–47].

Its recitation of net benefits did not refer to the costs of road closures, traffic dislocations, the cutting of old growth trees or damages to the viewshed corridor. The District Court approved the 99-year Use Agreement because it "does not transfer ownership of the OPC site, nor does it lease the site to the Foundation." [A.012]

L. Two Federal Agencies Determined That The Proposed OPC Will Severely And Adversely Impact Jackson Park In Its Entirety.

The 2018 Ordinance recognized that the National Park Service and the Federal Highway Administration were conducting

various statutory reviews, proceedings which, until finished, precluded construction of the OPC. [A.160; *see also* Dkt. 19, ¶8]

Approximately six weeks after the Court's June 11, 2019 Opinion, those agencies issued a report, titled "Assessment of Effects" (available at https://www.chicago.gov/city/en/depts/dcd/supp_info/jackson-park-improvements.html) (subject to judicial notice).[2] It was prepared under well-established criteria and procedures set out in the National Historic Preservation Act of 1966, the purpose of the assessment was to determine whether the "undertaking" – the OPC – would create adverse effects on both Jackson Park and the Midway Plaisance pursuant to 36 CFR 880.5(a). [A.294-320]

The AOE found that the OPC project created adverse effects on numerous and critical elements of Jackson Park. The adverse effects include but are not limited to the height and location of the OPC, the closure of various roads, the clear cutting of old age trees, and the destruction of the viewshed and distinctive

[2] *See Rowe v. Gibson,* 798 F.3d 622, 628-629 (7th Cir. 2015). Appellants rely upon judicial notice principles for other materials that are included in this brief which are publicly available.

ambience of the original Olmsted design for Jackson Park. [A.309-310]

Based on the information contained in the AOE report, on August 7, 2019, Plaintiffs filed a Rule 60 motion, seeking an indicative ruling pursuant to Rule 62.1, to vacate the Court's June 11, 2019 Judgment and related rulings pursuant to Rule 60(b)(2), 60(b)(5), 60(b)(6) and Rule 62.1. [A.321-323] A response by the City was filed on August 15, 2019. [Dkt. 159] That motion remains pending. This status was also previously brought to the attention of this Court. [Appeal Dkt. 17]

IV. Summary Of Argument

One time-honored expression frames this entire case: a public office is a public trust. Much can be learned by taking this expression literally, for the creation of a trust necessarily imposes fiduciary duties on all types of trustees, both public and private, for their beneficiaries. As discussed in Argument Section A, fiduciary duties have been uniformly held to include: a duty to follow instructions and to remain within authority; a duty of

loyalty and good faith; a duty of care; a duty to exercise discretion; a duty to account; and a duty of impartiality.

As discussed in Argument Sections A and B, these fiduciary duties undergird the public trust doctrine, which is designed to "police the legislature's disposition of public lands." *Lake Michigan Fed'n, v. U.S. Army Corps of Engineers,* 742 F. Supp. 441, 446 (N.D. Ill. 1990). Accordingly, from the earliest times, trustees had to comply with certain procedural requisites, commonly called due diligence, to ensure that their decisions are based on reliable and unbiased information, obtained when necessary from independent sources. To make sure trustees meet their obligations, these transactions cannot be tainted by self-dealing, favoritism or conflicts of interests, whose presence calls always for a higher level of judicial scrutiny.

The City requested, and the District Court supplied, a toothless public trust doctrine that imposes no visible procedural or substantive constraints on public officials. Both maintain that, "there is 'only' one question for a court: whether sufficient

legislative intent exists for the project," thereby denying that *any* fiduciary obligations attach to never-submerged lands.

As discussed in Argument Section B, the District Court applied the wrong standard. Under the *Illinois Central* decision (discussed *infra*), transfers of *currently* submerged land to private interests are often disallowed in order to protect the public's interest in navigation and to prevent improper wealth transfers to private parties. Once alienated, the navigation servitude drops out of the picture, so that the public trust analysis is governed by *Paepcke v. Public Bldg. Comm'n of Chicago,* 263 N.E.2d 11 (Ill. 1970). *Paepcke* first conferred standing on all citizens who have an undivided interest in public trust land, while rejecting a "toothless" standard that denies any prospect for substantive relief. *Paepcke* only stands for the narrow proposition that the public trust doctrine does not forbid a repurposing of public lands from a park to a school, solely because that transfer does not preserve that land in its pristine condition. That is not the issue in this case.

Contrary to the District Court's erroneous analysis, transfers from *public* to *private* parties are resolved under its common law predecessors to *Paepcke*, which provide a two-tier standard of review for government, business and charitable organizations. The basic business judgment rule governs absent any conflict of interest or self-dealing. Where there are conflicts or self-dealing, a higher level of scrutiny applies under which the City must show that fair value was paid for property transferred.

As set forth in Section C, applying the two-part analysis requires a reversal of the District Court's decision. Each and every one of the duties embodied by the public trust has been manifestly violated by the City's transfer of control over key segments of Jackson Park to the Foundation for constructing the OPC. The OPC serves *no* official public function, and, under the 2018 ordinance, it will house *no* presidential library. Throughout this entire process, the City's primary, indeed sole, loyalty was to the former President personally and his Foundation. At no time did the City Council or former Mayor Rahm Emanuel—White House Chief of staff in 2009-2010 in the Obama Administration—

ever question, let alone resist, the demands from the Foundation or the former president. No city officials ever exercised due care and independence in choosing a location and design of the OPC; instead collectively they delegated that decision entirely to the Foundation and the former President. No city officials ran any studies about the costs that the OPC would pose to the design, use and aesthetics of Jackson Park and surrounding areas. Nor did any city official ever examine alternative sites to determine what was actually best for the City and its constituents in accordance with the mandate of the 2015 Ordinance. The City's reliance upon conclusory claims of "improvements" and "enhancements," ignores the hundreds of millions of taxpayer dollars earmarked to dismantle Jackson Park, clear cut old-growth trees, and create traffic snarls in the fleeting pursuit of some unidentified benefit.

The substitution of a 99-year "use agreement" for a 99-year lease is a conveyancing dodge with no substance. *See Friends of the Parks v. Chicago Park District,* 160 F. Supp.3d 1060, 1065 (N.D. Ill 2016) (*Lucas*). Here, the Foundation paid $10 for valuable rights in a deal approved through an improper delegation

of authority to the Foundation itself, all of which violate the Fourteenth Amendment. The transfer is also *ultra vires* because it involves a purposeful circumvention of Park District ordinances designed to provide fair value with transfers to a non-public entity (among other issues). These issues cannot be decided without a trial.

V. Standard Of Review

The appeal raises issues from a decision on motions for summary judgment. All such decisions are subject to *de novo* review on appeal. *See, e.g., Hardy v. University of Illinois at Chicago,* 328 F.3d 361, 364 (7th Cir. 2003) (applying *de novo* review and reversing grant of summary judgment).

VI. Argument

A. The Public Trust Doctrine Requires The Evaluation Of The Transfer Of 19.3 Acres Of Land To The Obama Foundation Under The Traditional Standards Of The Business Judgment And Fair Value Rules.

The central challenge in this case is to set the standard of review applicable under the public trust doctrine to the transfer of 19.3 acres of Jackson Park from the City of Chicago to the Obama

Foundation. The District Court held that the set of laws governing fiduciary duties required the Court to rubber stamp the City's transfer, without looking at either how the law was enacted or its substantive terms. Deference above all is the City's single mantra, so that the City's own say-so (irrespective of what it said and why) would automatically satisfy the public trust doctrine. Since it held that Jackson Park consisted solely of "never-submerged lands," the Court held it faced "only" one question: "whether sufficient legislative intent exists" for the project. [A.024] The Court held that the OPC satisfies this standard, pursuant to the Illinois Park District Aquarium and Museum Act, 70 ILCS 1290/1, *et seq*., which provides "sufficient legislative intent . . . to permit diverting a portion of Jackson Park to the OPC." [*Id*., citing *Paepcke,* (distinguished *infra* at 44-46)]

This wholly passive approach is profoundly wrong as a matter of law and public policy, given the meaning of two well-chosen words, "public" and "trust." Public property is the opposite of private property. Public property is held by the City in trust for the public at large. That term "trust" imposes the standard set of

fiduciary duties—loyalty, care and candor—on the City as trustee. Even before the United States constitution was ratified, both courts and commentators noted the close parallelism between public and private fiduciaries. According to John Locke, the social contract required "*that the government had a fiduciary obligation to manage properly what had been entrusted to it.*" Robert G. Natelson, *Legal Origins of the Necessary and Proper Clause, 52, 53, in* Gary Lawson et al., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010) (*citing* John Locke, THE SECOND TREATISE OF GOVERNMENT: § 136 (1690) (emphasis added).

Natelson then identifies six standard fiduciary duties, all of which were violated by the City in this case: A. The Duty to Follow Instructions and Remain Within Authority; B. The Duties of Loyalty and Good Faith; C. The Duty of Care; D. The Duty to Exercise Personal Discretion; E. The Duty to Account, and F. The Duty of Impartiality. Natelson, *Legal Origins:* 57-60. Elsewhere Natelson has written: "I have not been able to find a single public pronouncement in the constitutional debate contending or implying that the comparison of government officials and private

fiduciaries was inapt. The fiduciary metaphor seems to rank just below 'liberty' and 'republicanism' as an element of the ideology of the day." Natelson, *The Constitution and the Public Trust,* 52 BUFF. L. REV. 1077, 1086 (2004).

Not surprisingly, the Constitutional Framers rely on many great English and continental political theorists, most notably John Locke, who wrote that of the legislative power, "to which all the rest are and must be subordinate, yet the Legislative being only a Fiduciary Owner to act for certain ends, there remains still *in the People a Supream Power* to remove or *alter* to the *trust* reposed in them," Locke, SECOND TREATISE ¶ 149 (emphasis added), and further suggested that whenever the government has "manifestly neglected" its fiduciary obligations "the *trust* must necessarily be *forfeited*." (*Id.*) Today, that extreme remedy is no longer necessary because judicial review allows courts to overturn the law while the legislature remains unchanged.

The public trust doctrine cannot tolerate the breach of all the duties of care, good faith and loyalty. In this regard, it finds parallels in modern securities laws that stress the importance of

complete and accurate statements in which omissions of key facts are actionable given the imperative need for full and accurate disclosure. Thus, the security registration statements must not "contain an untrue statement of a material fact" nor "omit to state a material fact ... necessary to make the statements therein not misleading." *See, e.g., Omnicare, Inc. v. Laborers Dist. Council Const. Industrial Pension Fund*, 135 S. Ct. 1318 (2015). Similarly, in dealing with insider trading, "Rule 10b-5: Employment of Manipulative and Deceptive Practices" makes it unlawful for any person "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading." *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318 (2007).

These modern rules have their direct parallels in the early cases that establish the indissoluble connection between the public and private trustee. Thus, in *Milhau v. Sharp*, 15 Barb. 193, 206-207 (N.Y. Gen Term 1853), cited and discussed in Schanzenbach & Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565, 586-87 (2018) [hereinafter S & S,

Reclaiming], private parties sued to overturn a decision of the New York City Board of Alderman authorizing a private party to construct and operate a private railway along Broadway, for a price below that of rival bids. *Milhau*, at 194. The New York court drew an explicit distinction between the government's general police powers over public health and safety, where a city is "vested with the largest discretion," and its far more circumscribed power over properties which it held as a public trustee. (*Id*. at 198) Hence, the court overturned the City's grant to the operators for a "trifling sum," describing its action as a "palpable breach of trust." The court explained:

> [A]s regards the acts of the corporation in reference to its private property, it stands upon a very different footing. Such property is held for the common benefit of all the [city residents]. In respect to that, the corporation is charged with high duties. It is the depositary of a trust which it is bound to administer faithfully, honestly and justly. And no one will contend that the body of men, who for the time being, may be its duly authorized representatives, can legally dispose of its property of great value, without any or for a nominal consideration; and if they shall presume to do so, it will be no excuse for such a gross and unwarrantable breach of trust to say that they acted in their legislative capacity; for the very simple reason that they will not act in that capacity. They will be acting in reference to the private property of the corporation, and, in this respect, will stand upon the same

> footing as if they were the representatives of a private individual, or of a private corporation.

Milhau, at 212.

Milhau stated orthodox legal doctrine: "Municipal corporations hold the titles to streets, alleys, public squares, wharves, etc., *in trust* for the public; and upon principle, such trust property can no more be disposed of by the corporation than can any other trust property held by an individual." 15 AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 1064 (John Houston Merrill ed., Northport, Long Island, Edward Thompson Co. 1891), cited in S & S, *Reclaiming* at 586.

The overall framework of corporate law recognizes a two-tier structure to the fiduciary duties of directors and officers, and elaborated more fully in the frequent cases involving private corporations. However, in both settings, a fiduciary duty is imposed because of the common plight that faces ordinary citizens and public shareholders alike. These individuals are not like employers, or suppliers or customers, all of whom are capable of looking out for their own interests. In contrast, diffuse groups of public shareholders or citizens are unable to monitor the activities

of either the government officials or private managers. By the same token, these officers and directors need a fair measure of discretion to do their work. This separation of ownership from control has organized much of American corporate law since the publication of Berle & Means, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

A more modern statement of the key point is found in Frank Easterbrook & Daniel Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) whose observations about corporate shareholders apply, if anything, with greater force to the vulnerable position of ordinary citizens.

> Investors might try to deal with these [monitoring] problems by combining ever more elaborate contractual strictures with full-time monitors to look over the shoulders of managers. More contractual detail is an implausible solution: recall the need for managerial discretion comes precisely from the high costs of anticipating all problems, contracting about them, and enforcing these contracts through the courts. As for monitors, who monitors the monitors? . . .
>
> The fiduciary principle is an alternative to elaborate promises and extra monitoring. It replaces prior supervision with deterrence . . . .

Id. 92. [3]

If anything, these fiduciary duties are *more* important in the public trust context because shareholders can sell their shares if they disapprove of firm policy. It is, however, far harder to ask citizens to exit their communities by forgoing their homes, friends, and often their jobs. Where exit options are few, voice and oversight must be strengthened. *See generally*, Albert O. Hirschman, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970), which notably applies the same general theory equally to all three forms of organizations.

This basic theory thus explains why the early cases rightly posited the perfect congruence between private and public fiduciary duties, where the standard approach envisions a two-step system solution of a business judgment and fair-value rule. This bipartite system recognizes fiduciaries must make numerous decisions, some of which inevitably go wrong, even if they act in

[3] It might be better to say "supplements" prior supervision given the *ex ante* restrictions on who may become trustees of either public or private institutions.

the best of faith. To impose a strict standard of liability is to force fiduciaries to bear the financial costs for all their incorrect decisions, but denies them any extra reward for their correct decisions. To avoid this fatal imbalance, the law is properly deferential lest no capable persons accept jobs that will mire them in litigation. "Behind the business judgment rule lies review that investors' wealth would be lower if managers' decisions were routinely subjected to strict judicial review." Easterbrook & Fischel, *supra,* at 92. Even ordinary negligence, which invites endless reexamination of prior decisions, is never the standard of liability.

In sum, these early cases, commentary and policy establish that the law has long recognized, and should, the congruence of private and public fiduciary duties. Fiduciaries are allowed to make numerous decisions, some of which inevitably go wrong, under the business judgment rule. But even then they must do their homework and diligently consider the issues.

The inquiry becomes more searching when conflicts of interest concerns appear. "Ordinarily courts require managers to

prove that any conflict-of-interest transaction is "fair" to the firm—that is, that the first receives at least as good as it could have obtained in an arm's length transaction with a stranger." *Id.* at 104. That higher level of scrutiny has its procedural and substantive components: "Entire fairness has two aspects: fair dealing and fair price. The Court must consider how the board of directors discharged all of its fiduciary duties with regard to each aspect of the non-bifurcated components of entire fairness . . . . In determining the transaction's overall fairness, the Court will conduct a unified assessment that involves balancing the process and the price aspects of the disputed transaction." *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 690 (Del. Ch. 1996) (internal citations and quotation remarks removed).

B. The District Court Ignored Well-Established Fiduciary Principles.

The District Court paid no attention to these well-established principles of fiduciary duties on public trustees, and the application of the business judgment rule and fair value tests to such conduct, instead affording complete deference which it incorrectly supported by readily distinguishable precedents.

In *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), Illinois sought to retake possession of Chicago Lakefront property located under tidal waters in 1818 when Illinois was admitted into the Union. "[R]eclaimed from the waters of the lake" the tract which the 1869 Lake Front Act gave Illinois Central Railroad provided it with the "exclusive right to develop and improve the harbor of Chicago by the construction of docks, wharves, piers and other improvements, against the claim of the railroad company. . . ." *Id*. at 439. The conveyance also stated that "nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation. . . ." *Id*. at 449. The Illinois Central constructed tracks and ancillary facilities on the site. By an 1873 Act, Illinois sought to reclaim possession. The state's complaint was *not* that the lands had to remain forever undeveloped, but that *only* the government, could do the development.

The Supreme Court, while recognizing that navigation "may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels

of the submerged lands," still concluded that the power to make more extensive changes could never be "relinquished by a transfer of the property" into private hands, though the submerged land has been filled in. (*Id*. at 452-3) As the dissent of Justice Shiras aptly observed, the Court did not explain why under that rule the state may dispose of "small parcels" at will. Nor did it explain "how the validity of the exercise of the power, if the power exists, can depend upon the size of the parcel granted." *Id.* at 467.

Critically, the public trust prohibition was against the *alienation* of the trust property, not its *new use* as a railroad. After the conveyance was set aside, the state continued to operate the railroad as before. (It is not clear whether the railroad received any compensation for its improvements.) The reason for the separation of use from sale was the fear that any sale would be corrupt, transferring wealth illicitly from the state to a private party. For comments on this case *compare,* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 489, 490 (1970),(1869 legislative grant got everything "backwards" by taking from the general taxpayer to

line the pockets of "a substantial public enterprise," making this transaction "particularly egregious.") *with* Kearney & Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. Chi. L. Rev. 799, , 808-810, 927 (2004) (railroad was to pay part of its revenue to the state, plus make a payment of $800,000 to the City); Richard A. Epstein, *The Public Trust Doctrine*, 7 Cato L. Rev. 411, 422, 424 (1987)(same).

In light of these comments, today a court might view total prohibition of sale as more than is needed, but the general principles of fiduciary duty must still, and do, apply. The public trust doctrine long predates *Illinois Central,* and its concern with submerged lands. *Milhau*, for example, squarely addressed the compensation issue when it attacked the transfer of the franchise for a trifling sum. Whether or not submerged lands are involved, a useful synthesis of the case law is through the proposition "Nor Shall Public Property Be Transferred to Private Use, Without Just Compensation," Epstein, Public Trust, at 417-22. This formulation derives its strength from *Milhau*, where it operates as the

reciprocal of the constitutional prohibition on takings. Working in tandem they protect the public from governmental abuse in both the taking and giving away of land. To make an overall calculation in the givings context, it is critical to ask whether the construction undertaken by a grantee produces external benefits to the public, or imposes external costs that are not offset by appropriate compensation to the state.

That is the framework applied in *People v. Kirk*, 45 N.E. 830 (Ill. 1896) which first authorized the commissioners for Lincoln Park to extend Lake Shore Drive ("LSD") over a portion of Lake Michigan and to sell off to adjoining landowners any submerged lands that might be recovered on the landward side of the LSD extension. The law specifically noted that the entire project could not deal with commerce, navigation, and fishing in the public waters of the lake. In upholding the transaction, the Illinois Supreme Court followed *Illinois Central* when it cautioned that "the legislature has no power to dispose of the waters of Lake Michigan, or the lands under the waters, contrary to the trust under which they are held for the people." *Id*. at 835. The case is

otherwise entirely distinguishable from the current transaction. The main objective was to build a public road that would be retained by the state over public waters. The incidental transfer of particular parcels for fair value was consistent with Illinois Central, so that the transaction was entirely valid under *Illinois Central.*

Similarly, *Paepcke v. Public Bldg. Comm'n of Chicago,* 263 N.E.2d 11 (Ill. 1970). involved a public-to-public transfer. There the plaintiffs, as citizens, taxpayers and property owners, challenged a decision by the City to construct school and recreational facilities in Washington Park and Douglas Park. The Court first recognized that these individuals had standing. "If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it." 263 N.E.2d at 18. The *Paepcke* plaintiffs claimed that this project involved an "alleged illegal diversion use." That rightly faltered on the facts, because the public-to-public transfer eliminated the risk of illicitly funneling benefits off to private

parties, as happened in *Milhau*. Unlike the present case, *Paepcke* did not involve any abdication of diligence that would call for a higher level of scrutiny. The Court never invoked "deference" to hold, correctly, that this transaction satisfied the following five conditions, all of which are designed to ensure that the transaction works for the benefit of the public:

> (1)that public bodies would control use of the area in question, (2) that the area would be devoted to public purposes and open to the public, (3) the diminution of the area of original use would be small compared with the entire area, (4) that none of the public uses of the original area would be destroyed or greatly impaired and (5) that the disappointment of those wanting to use the area of new use for former purposes was negligible when compared to the greater convenience to be afforded those members of the public using the new facility.

Id. at 19.

The Court in *Paepcke* then wrote this oft-quoted passage:

> [T]his court is fully aware of the fact that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary, in good faith and for the public good, to encroach to some extent upon lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. The courts can serve only as an instrument

> of determining legislative intent as evidenced by existing legislation measured against constitutional limitations. In this process the courts must deal with legislation as enacted and not with speculative considerations of legislative wisdom.

Id. at 21.

This passage, however, only supports a proposition that the Plaintiffs do not wish to contest, namely that the City need not preserve the "pristine purity" of public lands "inviolate" from all change. That is not the position of the Plaintiffs. However, that proposition does not entail that there are no constitutional limitations that check the ability of the City to wreck Jackson Park with an outright gift of critical 19.3 acres to the Foundation, with huge collateral costs to the public. To the contrary, *Paepcke's* holdings and framework and hundreds of years of prior law and policy speak otherwise.

In contrast, *Lake Michigan Federation v. U.S. Army Corps of Engineers*, 742 F. Supp. 441 (N.D. Ill. 1990) involved a transfer of some 18.5 acres of submerged land for lakefill to Loyola University to construct a variety of improvements for both public and private use which had received necessary permits from state and local authorities and met all federal requirements. Nonetheless, the

court invoked *Illinois Central* to strike down the deal, noting the total prohibition (regardless of net benefits) against dispositions for submerged waters when done with a private party.

The notion of deference to legislative discretion was raised *In re Marriage of Lappe*, 680 N.E.2d 380 (Ill. 1997), which involved a challenge to the distribution of Civil Service Retirement Benefits in a divorce settlement. *Lappe*, however, did not involve any transfer of public assets; nor did it raise the risk of an illicit transfer of public moneys to private parties. The legislation upheld *in Lappe* involved the same kind of police power regulation upheld in *Milhau*.

Friends of the Parks v. Chicago Park District, 786 N.E.2d 161 (Il 2003) ("*FOTP*") involved a highly contested transaction between the Chicago Bears, the Park District and the City. Plaintiffs challenged on constitutional grounds the Illinois Sports Facilities Act, which raised taxes on Chicago hotels to finance renovations of Soldier Field, owned and operated by the Park District, and used each year for eight home games by a privately-owned professional football team. The focal point of the renovation

of Soldier Field did not involve highway expansion and road closures, but instead largely reworking a sport stadium that was already on site so that it could hold more skyboxes.

Accordingly, the Illinois Court upheld the transaction on two major grounds. First, the transaction was not the equivalent of a long-term exclusive lease because the Park District could permit uses by other groups. *Id*. at 170. Second, the relationship between the Park District and the Bears remained one of landlord and tenant. *Id.* In other words, the Bears have "control" over Soldier Field for a limited number of days per year. The Park District is able to lease the entire Stadium to others, as exemplified by the recent agreement with Chicago's professional soccer team that provides the Chicago Fire with a three-year agreement to play its home games at Soldier Field. "Chicago Fire Signs Deal with city to return to Soldier Field," Chicago Business Journal, 10/8/2019, https://www.bizjournals.com/chicago/news/2019/10/08/chicago-fire-signs-deal-with-city-to-return.html (subject to judicial notice). *FOTP,* moreover, did not sanction the total delegation of the

choice to the Bears, as takes place with the Jackson Park site under the 2015 and 2018 City ordinances.

Next, *Independent Voters of Illinois v. Ahmad*, 13 N.E.3d 251 (Ill. 2014), upheld a financial deal in which the City assigned all revenues from approximately 36,000 parking meters to Chicago Parking Meters for seventy-five years for $1.156 billion subject to downward adjustments ("compensation events") when the City reduced available metered spots within the City. The Illinois Supreme Court rejected challenges that the deal violated both the Home Rule Provisions of the Illinois Constitution, Art. 7 § 6, and the general public purpose doctrine as it provides that the City:

> Also receives the fines generated from parking meter violations for the 75–year term. The City received more than $200 million in fines, forfeitures and penalties for the year 2010 alone. The City also receives the following additional benefits: more than 4,600 new and improved fee-collection devices; the shifting to CPM of the risk that metered-parking revenue will decline over the 75–year term; as well as the shifting to CPM of the duty to operate and maintain the parking meter system.

13 N.E.3d at 264.

On the Court's description, this transaction looks exactly like the kind of arrangement that should be protected by the business

judgment rule. But in fact, the transaction generated widespread public "outrage". *See* Joravsky, FAIL, Part One: Chicago's Parking Meter Lease Deal, 4/9/09 available at https://www.chicagoreader.com/chicago/features-cover-april-9-2009/Content?oid=1098561 (subject to judicial notice). Shanzenbach and Shoked explained that this "flawed" deal was approved even though it was discussed in only a "single meeting" of the Finance Committee; when a CPM chief financial officer testified, he refused to supply data to substantiate the claim that the bid reflected the asset's full value. The purported "fairness opinion" rested solely on the summary of the data, which "did not analyze the price the asset could fetch on the open market, the reasonableness of the seventy-five-year term, or the fact that the sale was being conducted during a major liquidity crisis that had temporarily depressed many assets' values." CPM's legal opinion came only months after the deal was closed. Schanzenbach and Shoked issued this final verdict: "An independent assessment later found that the asset had been undervalued by 46%, or nearly $1 billion." S & S, Reclaiming, 70 Stan. L. Rev. at 567. "Chicago

was not acting as the state's long arm; it was not regulating its residents' activities or providing them with services. It was selling an asset to investors. Chicago was *transacting* rather than *governing." Id.* at 569-70. (Italics in original.) The City is exercising exactly the same function here, except that the deal between the City and the Foundation is a thousand times more disadvantageous to the City on matters of both procedure and substance, given that it is not a simple revenue deal, but requires close analysis of the damage and disruption to the City's retained interests.

Finally, in *Lucas*, *supra* at 28-29, the FOTP challenged the City's decision to convey several parking lots located south of Soldier Field to serve as the home for the new Lucas Museum of Narrative Art (LMNA). A 2015 Amendment to the Park District Aquarium and Museum Act, 70 Ill. Comp. Stat. 1290/1 ("Museum Act") empowered city and park district authorities to allow construction of new museums on public parklands. The LMNA was to be built on formerly submerged lands under a 99-year lease that gave the Lucas Foundation control over the site.

Distinguishing the Soldier Field deal, the court found it involved "no abdication of *control* of the property to the Bears." (Emphasis added by District Court.) The *Lucas* court concluded that a 99-year lease term is a 'legal subterfuge'" under *Illinois Central*, *id.* at 1068, and held that plaintiffs:

> sufficiently pled that the proposed Museum is not for the benefit of the public but will impair public interest in the land and benefit the LMNA and promote private and/or commercial interests. (*Id.* at 1069)

The District Court below avoided *Lucas* by claiming as follows:

> First, that case [Lucas] involved formerly submerged land, rather than never-submerged parkland held in trust due to a legislative enactment, and thus warranted a different level of deference. Second, *Lucas* involved a long-term lease, and therefore a different portion of the Museum Act. Third, the court considered whether sufficient legislative authorization existed only in relation to plaintiffs' procedural due process and *ultra vires* claims, instead of their public trust claim. And fourth, the court evaluated the issue of legislative authorization only at the motion to dismiss stage, rather than on the merits at summary judgment. [A. 27]

Each of these points is wrong, and exemplifies why the summary judgment awarded the City must be reversed.

First, as set forth above, the distinction between formerly submerged and never submerged lands is of little practical

consequence. Thus, heightened scrutiny was required in *Illinois Central, Kirk,* and *Lake Michigan* to protect the public's interest in navigation when submerged lands were filled in. Yet, the public trust doctrine also applied even though navigation played no role in *Lucas*. Most critically, *Paepcke* still applies even though Jackson Park was not found by the District Court to have been submerged. *Paepcke* did not confer standing on all citizens to apply the toothless standard of deference used by the District Court. *Paepcke* is properly read and understood as incorporating the two-tier system of business judgment and fair value to never-submerged lands. Thus, it rightly affirmed the transfer from one public *use* to another. It did not approve what *Lucas* condemned (and the District Court here allowed), a wholly one-sided transfer of public trust lands to a private entity to build a museum that featured a total absence of due diligence in a transaction tainted by pervasive conflicts of interest and insider favoritism.

Second, the asserted distinction between the 99-year "use" agreement and the 99-year "lease" for the OPC is plain subterfuge to avoid *Lucas*. The 2015 Ordinance made clear the City's

intention to lease the land to the Foundation. The 2018 "use" agreement never defines the term "use," and it does not introduce any substantive differences from a lease agreement other than wordplay. The 2018 use agreement neglects to say whether the use is exclusive. However, other language makes clear that the Foundation has exclusive and full use and occupancy of the site and the rights related thereto, i.e., naming rights and revenues. [A.174-175, §§ 2.1, 2.2; A.182-85, §§ 6.4, 6.11] Unlike the Bears' deal, for the Foundation to operate the OPC once constructed, it must have exclusive control.

Third, *Lucas* explicitly accepted the public trust claim and its other related constitutional challenges, as well as the *ultra vires* claim.

Fourth, by holding that the public trust claim survived a motion to dismiss, *Lucas* precludes summary judgment for the City in this case. If the LMNA is not for the benefit of the public, neither is the OPC, which is built by and for the Foundation on public trust land.

C. The District Court Should Be Reversed And Plaintiffs Entitled To A Trial.

The District Court erred in failing to apply the applicable standard from these various authorities, requiring a two-step analysis that incorporates the business judgment rule applicable to public trustees which the City cannot satisfy.

In addition to applying the wrong standard, the District Court made multiple errors by ignoring various admissions establishing the City's lack of diligence and its failure to obtain fair value, while accepting unsupported and/or otherwise disputed facts created by and through its program of public promotion that celebrates tiny public benefits while ignoring huge financial burdens and adverse consequences.

1. The Want Of Diligence By The City Through Its Total Delegation To The Foundation Establishes Both A Violation Of The Diligence Prong Of The Public Trust Doctrine And Is Itself Unconstitutional.

The City makes no effort to establish that it acted with due diligence. Nor could it, given the express delegation of its legislative authority to a private party in the 2015 Ordinance. Its total delegation of all its decision-making authority without any

limitations or guidelines (let alone "intelligible principles") implicates a core constitutional violation. The United States Supreme Court has repeatedly held that a legislative body cannot delegate its own powers to a private party as was done in the matter at bar. *See Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 122-23 (1928)(reversing decision and voiding zoning ordinance based on improper delegation of authority to private landowners; "The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment."); *Yick Wo v. Hopkins,* 118 U.S. 356, 368, 372-73 (1886). *See generally Gundy v. United States,* 139 S.Ct. 2116, 2123, 2129 (June 20, 2019).

Here, the 2015 Ordinance expressly provides the former President and the Foundation with complete "defer[ence] to [their] sound judgment . . . as to the ultimate location of the Presidential Library." That type of unbridled delegation is unconstitutional.

This failure of diligence is also demonstrated in other admitted ways. The City admits that it made no effort to determine fair value for the 19.3 acres of Jackson Park handed over to the Foundation under the supposed "use" agreement.

[A.263-264] This Court may take judicial notice of the sale prices of various properties around Chicago to set at least a lower bound estimate of the value of the Jackson Park lands so transferred. For example, a prominent developer (Sterling Bay) purchased for $100 million dollars a 22-acre site in a Lincoln Park neighborhood referred to as Lincoln Yards, a now vacant former manufacturing facility.[4] Under the Lincoln Yards benchmark, the giveaway of the 19.3 acres of Jackson Park land to the Foundation is likely to well exceed $100 million. To that baseline figure must be added the $175 million cost for road closings, with almost $100 million going towards the closing of Cornell Drive. [A.266] Some price tag has to be established to the clear-cutting of over 350 mature and established trees, and to the obliteration of a world-class monument.

And huge values must attach to the lost time and inefficiency wrapped up with traffic delays and tie-ups, which the City inexplicably and incorrectly labels "enhancements." That

[4] "Sterling Bay completes deal for massive Finkl Steel site". *Crain's Chicago Business,* [https://www.chicagobusiness.com/article/20161209/CRED03/161209827/sterling-bay-completes-deal-for-massive-finkl-steel-site-in-chicago]

characterization is simply indefensible in light of key omissions in the City's report, which was created on the assumption that the OPC would be placed in Jackson Park. For example, the report did not consider the peak load pressure from special events on both driving and parking. [A.276-77] Instead the report grouped special and routine traffic patterns for all OPC activities in ways that concealed these critical variations. [*Id.*] The report did not account for events in Jackson Park and grouped all Obama Center events the same.

Nor does the traffic report address the impact that the road closures will have on the location of available parking spaces. Currently, these spaces are located on the south side of Jackson Park, but their replacement with fewer north-side parking spaces precludes any assumption of complete substitutability. [A.288-293]

Further, the report claims that these street closures will have little or no impact on 67th Street, even though these traffic diversions are likely to increase traffic volume by an anticipated

25-30%. [A.287 (with traffic volumes included on A.273-274; A.279-280)]

The City also has assumed environmental liabilities estimated at millions of dollars (as of 2015). [A.267] That figure could easily skyrocket given the extreme perils of building a massive tower on marshy land with a rising water table. *See* Herlihy, Washington Park is a better OPC site, HPH August 7, 2019, https://hpherald.com/2019/08/07/washington-park-is-a-better-opc-site/ ("The underground garages and basements will require pumping water 24/7 at the Jackson Park site.") (subject to judicial notice). These uncapped liabilities fall upon the City at a time when it faces an anticipated one-year deficit of some $838 million. No faithful fiduciary could incur these expenditures without looking at alternative plans, which the City admits it did not do.

The City seeks to minimize the impact of this project by noting that that the site is just 19.3 acres, or 3.5 percent of the 551.52 acres in Jackson Park. [A.004] But that deceptive statistic assumes falsely that all the square footage in Jackson Park is of

equal value. That is disputed. A significant percentage of Jackson Park is occupied by water (two harbors as well as the lagoons adjacent to the Wooded Island), the 18-hole Jackson Park golf course, and the Museum of Science and Industry along with its grounds. [*See* A.324 & 325] The 19.3 acres must be subtracted from the limited portion of the Park subject to intensive public use.

Further, the 19.3 acres were chosen *pursuant to the improper delegation by the City to the Foundation* precisely because of their commanding presence (and irrespective of impact on traffic flow and the community at large). Thus, on the record, the "*Foundation* has proposed shifting the boundaries of the Original Site to the North and East to incorporate portions of the Midway Plaisance and Cornell Drive, and CDOT has proposed closing additional road segments within the park and making additional Transportation Improvements (as hereinafter defined)" [A.154] (emphasis supplied). The sole reason for these dislocations is that the *Foundation* wanted to secure maximum public visibility of the OPC, no matter the costs.

There is no evidence supporting the City's view that the adverse impacts wrought by the OPC are confined to that 19.3 acre footprint. Indeed, the AOE determined that the OPC has an "adverse effect" on Jackson Park and the Midway Plaisance as a whole, focusing upon the height and location of the OPC, the closure of various roads, the clear cutting of old age trees, and the destruction of the viewshed and distinctive ambience of the original Olmsted design for Jackson Park. [A.309-310] The cultural landscape is so negatively impacted that these cumulative effects "diminish the historic property's overall integrity by altering historic, internal spatial divisions that were designed as a single entity," as was the "overall historic road network," thus adversely "alter[ing] the historic property's designed spatial organization and the relationship between interconnected systems of pedestrian and vehicular circulation." [A.309-310]

2. The Failure Of Diligence, Existence Of Conflicts, Insider Favoritism And Delegation Of Authority To A Private Party Required Higher Scrutiny Which The Trial Court Failed To Exercise.

The complete delegation of authority not only dooms the transaction at issue, but it should also have triggered a

heightened level of scrutiny which the District Court failed to recognize or apply here. However, there are other facts that required such an analysis and precluded summary judgment.

For instance, the terms of the Use Agreement, whether it be its length, the nominal payment, the delegation of the sole right to use, occupy, maintain and operate the property, and maintenance of all revenue streams (including naming rights) are all indicia of a sweetheart deal. [Dkt. 136 at pp. 32-34] This abuse is magnified by the fact that no appraisal or fair value determination was performed, nor were any alternatives to Jackson Park reviewed or considered by the City; the land was selected and analyzed as the best location *not* by the City or for its citizens who effectively own the property, but by the Foundation, which dictated its demands to the City. And all of this was embraced and facilitated by the fact that former Mayor Rahm Emanuel was former President Obama's Chief of Staff in 2009 and 2010, evidenced by the complete (and improper) deference set forth in the 2015 and 2018 Ordinances.

This is precisely the situation of concern in *Lucas* where "lessees for years holding a valid lease have such an interest in real property as to be classified as owners in the constitutional sense." *Lucas,* 160 F. Supp. 3d at 1068. Under these circumstances, a higher level of judicial scrutiny is required to evaluate the transaction, and when applied here require reversal. Those are the teachings of the underlying history of the public trust doctrine, cases such as *Milhau, Illinois Central, Paepcke* and others discussed above.

3. The City's Conclusory Statements, Misstatements, And Omissions On The Effects Of The OPC Deal Also Preclude Summary Judgment.

The District Court adopted "facts" that were misstated or omitted on virtually every arguably relevant fact as it rested its judgment on this conclusory statement:

> The OPC surely provides a multitude of benefits to the public. It will offer a range of cultural artistic, and recreational opportunities – including an educational museum, branch of the Chicago Public Library, and space for large scale athletic events -- as well as provide increased access to other areas of Jackson Park and the Museum of Science and Industry." [A.032]

Here is a partial catalogue of the purported "facts" offered by the City and accepted by the District Court, which are comprised of conclusory statements mixed with inaccuracies, and startling omissions.

First, the City claims that its program will:

> "(1) improve access by pedestrians through the park, across lagoons to the lake, (2) offer unimpeded pedestrian and bike access to the Museum of Science and Industry from the South Side, (3) replace some of the land currently occupied by Cornell Drive with a 'restful Woodland Walk," (4) create new pedestrian access points and ADA compliant design features [i.e. SOF 42] and (5) reduce air and noise pollution, improve bird habitats and attract new wildlife to the OPC site area [i.e. SOF 47]. [A.015]

These "facts," drawn largely from the 2018 Ordinance and the DPD Study, use the words "improvements" or "enhancements" to belittle the serious costs and inconvenience that these actions impose on the public at large. Those facts are disputed and cannot support the grant of summary judgment.

No one disputes that the proposed changes are major, but to describe the wholesale cutting of trees and closing of roads as "improvement" is fanciful at best. Similarly, the City claims that the OPC project "enhance[s] outdoor spaces that currently exist"

[A.154; A.156], but it never attempts to explain how or why "physical destruction" of trees is an "enhancement" or the "removal" of property counts as an "improvement". To the contrary, the destruction of many hundreds of old-growth trees proposed by the Foundation would have a negative impact on the OPC site, the Park overall, and the near neighborhoods, given the well-documented beneficial effects of mature urban trees. https://www.greenblue.com/na/9-reasons-our-cities-need-mature-urban-trees/.[5] If they were indeed enhancements or improvements, the City should welcome them even if the OPC were never built. But these became "improvements" only after the siting of the OPC was demanded by the Foundation in Jackson Park. Instead, the AOE offers a more accurate description when it condemns all these alterations as "adverse events" that require avoidance and mitigation.

[5] This plan is an example of the environmental degradation due to loss of habitat that is plaguing the city, nation and world. *See* https://www.sciencemag.org/news/2019/09/three-billion-north-american-birds-have-vanished-1970-surveys-show; https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/ (subject to judicial notice)

The City claims its "restful Woodland Walk" will "reconnect[] the Lagoon with the park's western edge, stitching new east-west connections through a coherent landscape." [A.133] Sheer fiction: the Lagoon *was never connected, so reconnecting is not possible.* [Dkt. 136, ¶40; *see also* ¶46 (benefit of "re-join small segments of park space"] More importantly, that supposed benefit ignores the $92 million to tear up Cornell Drive, which would create years of noise and pollution, much of which will remain even after the project is completed.

The City also claims in conclusory fashion a supposed improvement in "park-like acoustics for this area, and for the experience of the Wooded Island and lagoons to the east" [*Id.* ¶44; A.129], but ignores the massive disruptions from closing Cornell Drive and alleged increase of visitors in the park. Widening of Stony Island Avenue would shrink Jackson Park to the west and widening Lake Shore Drive would shrink Jackson Park to the east, ensuring that the loss of hundreds of old-growth trees would unnecessarily create a bleak local landscape.

Nonetheless, the City asserts that "the removal of heavily trafficked vehicular roadways in the park would reduce air and noise pollution, improve existing bird habitats, and attract new wildlife to this area of Jackson Park." [A.135] That statement does not identify what new wildlife will be attracted, how the bird habitats have actually been improved, and ignores the added pollution and traffic just outside the Park, which will surely impact these and other activities within the park. It also completely ignores the threats to birds created by the construction of a 235-foot tower in the midst of Jackson Park's migratory bird flyway. http://www.jacksonparkbirding.org/; https://hpherald.com/2017/04/11/jackson-park-matters-lecture-featured-chicago-audubon-society/ (subject to judicial notice).

The City also makes the unsupported claim that the destruction of Cornell Drive and other roadways would reduce "road pollutants" from entering the storm water system bordering the Lagoon, as well as that "salt spray and other airborne pollutants will also be reduced." [A.141] The DPD study does not justify the conclusion, and the Foundation's application (which is

essentially copied by the City), simply notes that "the proposed development is committed to improve storm water management measures which will mitigate storm water run-off issues from the site into the adjacent lagoon." [Dkt. 1-3 at 34 of 39, ¶3] No mention is made of the proposed steps, or their costs and benefits, in light of the serious risk of the further rise of Lake Michigan. *See,* https://www.chicagotribune.com/news/environment/ct-lake-michigan-high-water-levels-impact-20190801-jmhmy4ylgbatlavbny3lv26dui-story.html (subject to judicial notice).

The Foundation continues in the same overoptimistic vein, in words adopted almost verbatim by the District Court, that "[t]he proposed development will help improve access to and through Jackson Park as well as other adjacent lakeshore park space through the elimination of certain portions of South Cornell Drive and the creation of accessible park land in its place, the establishment of *new pedestrian access points and ADA compliant design features.*" (emphasis supplied) [Dkt. 1-3 at 38 of 39, ¶7] Yet the City errs grievously by insisting that its proposed street

closures will result in a net gain of an additional 4.7 acres of publicly available park space throughout Jackson Park. [A.136] This false claim wrongly counts the road closures as *new* parkland when Jackson Park's historic road network are part of the parkland and its intended design. [Dkt. 136-2 at 59-60, 67, 111 of 163]

The City also claims, and the District Court accepts, that the additions of an athletic facility or a public library in Jackson Park automatically count as public benefits. But these facilities can be located elsewhere in the South Side at far lower cost, with greater community access, an analysis forfeited by the City through excessive delegation. Adding these new facilities, moreover, also destroys or impedes using historic Jackson Park as an Olmsted park for "cultural, artistic and recreational opportunities," many of which would be compromised by the building of the OPC there.

The City also makes claims, and the District Court accepts, that placing the OPC in Jackson Park is purportedly consistent with a tradition of siting museums along the lakefront [A.147], and would "continue[] [the City's] heritage of the pairing of

cultural institutions and parks" [A.143-144]. Yet an unrebutted affidavit from an expert witness shows the exact opposite. [Dkt. 119 pp. 1-3] New museums were not placed in the parks. Instead, they were either built with a park subsequently growing around the museum, or incorporated into an existing structure within its original footprint. None of the past history involves anything close to such a building or the massive disruption of existing amenities along the Lakefront. [Dkt. 119 at 12] The City's "undisputed facts" are contrived for only one reason: that the supposed enhancements and improvements were, and are, demanded *by* the Foundation, *to* the Foundation, and *for* the Foundation.

It is precisely to address such massive forms of government abuse that courts have refused to honor such threadbare findings of supposed "benefits" to justify private overreaching. *People ex rel. Scott,* 360 N.E.2d 773, 781 (Ill. 1976). No bare pronouncement by any local governmental entity that makes promiscuous use of the term "benefit" or any of its cognates can justify the giveaway of government lands to private parties. There is a common pattern that exposes the weaknesses of its exposition. The City

cherry picks small social benefits but ignores the huge social costs that they provide.

D. In Addition To The Violation Of The Public Trust Doctrine, The Court's Decision To Grant Summary Judgment In Regards To Plaintiffs' Constitutional And *Ultra Vires* Claims Should Be Reversed.

The Court's decision to grant summary judgment in regards to Plaintiff's procedural due process claims must be reversed on at least two separate grounds. First, as noted *supra*, the improper delegation of authority from the City to the Foundation is a violation of the 14th Amendment, given the utter lack of any "intelligible principle" to guide or border the private party. *See* § C.1, pp. 51-57, *supra*.

Second, Plaintiffs procedural due process rights have been violated consistent with principles applied in *Lucas* which applied Seventh Circuit and U.S. Supreme Court authority as it defeated the City's effort to obtain a judgment on a similar procedural due process count. *See, e.g. Lucas,* 160 F. Supp.3d at 1064-65 ("Construing the allegations in Plaintiffs' favor, Plaintiffs have sufficiently stated a procedural due-process claim under the Fourteenth Amendment"). In so holding, the *Lucas* court relied

upon *Buttitta v. City of Chicago,* 9 F.3d 1198, 1201 (7th Cir.1993) (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)) which provides that "[d]ue process is a flexible concept which 'calls for such procedural protections as the particular situation demands."

Plaintiffs have a protectable property right through their beneficial ownership of the public trust property at issue, recognized by *Paepcke*. The manipulated and improper transfer to the Foundation—emanating from total deference to the OPC—will dramatically alter and restrict those property interests, which will no longer be a "public park … free and clear to all." Finally, there was no authorization for this transaction (nor could there be) given its 99-year give-away for no value. The legislature never approved specifically of the disposition of the land that is the subject of the lease at issue here, or released the restrictions regarding Jackson Park. This is exactly the type of transaction that *Lucas* found problematic, as it also involved the application of the Museum Act and its amendment by the legislature that the City attempted to argue permitted the LMNA museum.

The District Court's effort here to find in the Museum Act the legislative intent necessary to validate the City's action is also misplaced. That analysis was rejected in *Lucas* on the simple principle, fully applicable here, that a declaration of benign intention never justifies a public-to-private party transfer.

Separately, the District Court's discussion of takings law is plainly incorrect. By claiming that the takings clause never relates to public property, it ignores the unique nature of public trust property whose citizens own their own fractional interest. The U.S. Supreme Court has made it clear that that these takings violations are remediable under 42 U.S.C. § 1983. *See Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2167 (2019)("The Civil Rights Act of 1871, after all, guarantees 'a federal forum for claims of unconstitutional treatment at the hands of state officials….'"); *Matthews v. Eldridge,* 424 U.S. 319 (1976)(statutory property interests protected by Fifth Amendment); *Patsy v. Bd. of Regents* 457 U.S. 496, 501 (1982).

Finally, the District Court erred in granting summary judgment on the *ultra vires* claim relative to the transfer. The

improper delegation and transfer between the Park District and the City in order to complete the private party transfer violate 70 ILCS 1205/10-7 (b) which prohibits the Park District from a transfer to a non-governmental entity without an "exchange for other real property of substantially equal or greater value." Similarly, 50 ILCS 605/1 requires, for a public-to-public transfer, that the transferee use and occupy the land. The Foundation and City willfully circumvented these statutes. The 2015 Ordinance expressly set forth the Foundation's demand that the Park District transfer the property to the City, which was then followed in 2018 by the "use" agreement that avoids using the term lease in order to make it appear that the City still has "title" to the property. These machinations were performed expressly to avoid these ordinances and the impact of having a "lease."

If this were not enough, the Museum Act relied upon by the City (and District Court) to circumvent the public trust and constitutional concerns requires that a "lease" be utilized by the City (see 70 ILCS 1290/1). However, the City has stated that the use agreement is not a lease [Dkt. 98 at 100 (2/14/19 Tr., 36:1-9)],

§ J, p.18 *supra*, which means that an effort to rely upon the language and legislative intent of the Museum Act fails.

VII. Conclusion

The judgment of the District Court below should be reversed and remanded to the District Court for further proceedings.

PROTECT OUR PARKS, INC. and MARIA VALENCIA, Plaintiffs-Appellants

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One of their attorneys

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Type-Volume Certification

The undersigned counsel hereby certifies that this brief complies with the type-volume limitations of Circuit Rule 32 (a), (b)and (c) of this Court, because it contains 13,790 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

/s/ Richard Epstein

Certificate Of Service

I hereby certify that on October 25, 2019, I electronically-filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in these consolidated appeals are registered CM/ECF users and that service will be accomplished by and through the CM/ECF system.

/s/ Richard Epstein

Appeal No. 19-2308

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PROTECT OUR PARKS, INC., CHARLOTTE ADELMAN,
MARIA VALENCIA, JEREMIAH JUREVIS,
Plaintiffs-Appellants,

v.

THE CITY OF CHICAGO AND THE CHICAGO PARK DISTRICT,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
Hon. John Robert Blakey
No. 18-cv-3424

REQUIRED SHORT APPENDIX TO OPENING BRIEF OF PLAINTIFFS-APPELLANTS PROTECT OUR PARKS, INC. AND MARIA VALENCIA

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ORAL ARGUMENT REQUESTED

Appendix Certification

The undersigned counsel hereby certifies that all of the materials required by Circuit Rule 30(a) and 30(b) are included in the Appendix.

/s/ Richard Epstein

Table of Contents for Required Short Appendix

Docket. No. Cite	Date of Entry or Filing	Description	Appendix Number
Dkt. 145	6/11/19	Memorandum Opinion and Order from District Court (Blakey)	A.001-A.052
Dkt. 146	6/11/19	Judgment In A Civil Case	A.052.1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PROTECT OUR PARKS, INC., CHARLOTTE ADELMAN, MARIA VALENCIA, and JEREMIAH JUREVIS,	
Plaintiffs,	Case No. 18-cv-3424
v.	
CHICAGO PARK DISTRICT and CITY OF CHICAGO,	Judge John Robert Blakey
Defendants.	

MEMORANDUM OPINION AND ORDER

This dispute arises out of the City of Chicago (City) and the Chicago Park District's (Park District) efforts to bring the Obama Presidential Center (OPC) to the City's South Side. Plaintiffs sue to prevent construction of the OPC on a specific site within Jackson Park. [91] ¶ 1. Following this Court's ruling on Defendants' Rule 12(b)(1) motion to dismiss, [92], the parties completed full discovery and filed cross-motions for summary judgment, [112] [122]. On June 11, 2019, this Court held a hearing, and heard oral argument only on those issues and counts which required consideration beyond the briefs.

This order addresses the merits of the case. In doing so, this Court faces the same challenge presented to the Illinois Supreme Court in *Paepcke v. Public Building Commission of Chicago*, 263 N.E.2d 11 (Ill. 1970). As they put it:

> [T]his court is fully aware of the fact that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary, in good faith and for the public good, to encroach to some extent upon lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. The courts can serve only as an instrument of determining legislative intent as evidenced by existing legislation measured against constitutional limitations. In this process the courts must deal with legislation as enacted and not with speculative considerations of legislative wisdom.

Id. at 21. With this principle in mind and for the sound reasons set forth below, this Court grants Defendants' motion for summary judgment, [122], and denies Plaintiffs' motion for summary judgment, [112]. The facts do not warrant a trial, and construction should commence without delay. This case is terminated.

I. Background

The following facts come from Plaintiffs' Rule 56.1 statement of facts, [112-1], Defendants' Rule 56.1 statement of facts, [124], Plaintiffs' statement of additional material facts, [136], and Defendants' statement of additional material facts, [139].[1]

A. The Parties

Plaintiff Protect Our Parks, Inc. is a nonprofit park advocacy organization located in Chicago. [112-1] ¶ 1; [124] ¶ 1. Its members include individuals who reside in the City of Chicago and pay taxes to the City. *Id.* Plaintiff Adelman resides in

[1] Both parties submitted their responses to each other's statements of material facts and their own statements of additional facts within the same docket number. *See* [136] [139]. Unless otherwise noted, all cites to [136] and [139] in this opinion refer to the parties' statements of additional facts.

Wilmette, Illinois. *Id.* Plaintiffs Valencia and Jurevis reside in the City of Chicago. *Id.*

Defendant Park District exists as a body politic and corporate entity established by Illinois law, pursuant to the Chicago Park District Act, 70 ILCS 1505/.01, *et seq*. [112-1] ¶ 2; [124] ¶ 2. Defendant City is a body politic and municipal corporation. [112-1] ¶ 3; [124] ¶ 3.

B. Selecting the OPC Site

In March 2014, the Barack Obama Foundation (Foundation) initiated a search for the future site of the OPC. [112-1] ¶ 4. Both the University of Chicago and the University of Illinois Chicago (UIC) proposed potential locations. *Id.* ¶¶ 5, 19. UIC proposed two sites, generally located at: (1) the North Lawndale neighborhood; and (2) the east end of the school's campus. *Id.* ¶ 19; [126-2] at 105098. The University of Chicago proposed three sites, generally located at: (1) the South Shore Cultural Center[2]; (2) Jackson Park; and (3) Washington Park. [112-1] ¶ 5; [126-2] at 105098. At this time, the Park District owned both the Jackson Park and Washington Park parkland identified in the University of Chicago's proposal. [126-2] at 105098.

In addition to these sites, nine entities from several locations throughout the country submitted proposals for the OPC, resulting in a total of 14 potential sites. [112-1] ¶ 25. The Foundation performed an analysis of the proposals from all submitting entities, evaluating the sites based upon the following criteria:

- Project Site and Access: desirability of site, surrounding community, control of site, local accessibility, global accessibility

[2] The City and Park District later eliminated the South Shore site from consideration as a potential location. [112-1] ¶ 7.

- Project Execution: education impact, tourism impact, economic development impact, enhancements to the physical environment
- Community Engagement: engagement plan, quality/breadth of partners, means of engagement
- Indications of Support: partnership structure, alignment of mission, financial capacity.

Id.; [117-5] at 5. The Foundation assigned numerical scores to each site based upon the above evaluation criteria, and ranked the sites based upon these scores. [112-1] ¶ 26; [117-5] at 8–9. The Washington Park Site received the highest score at 122 out of 150; the Jackson Park site received the second highest score at 121 out of 150; and the UIC's proposed locations received a combined score of 120 out of 150, putting it in third place. *Id.*

On July 29, 2016, the Foundation issued a press release announcing that it chose Jackson Park as the OPC site. [124] ¶ 13; [114-16].

C. The OPC Site

i. Site Location

The site selected for the OPC within Jackson Park comprises 19.3 acres, or 3.5 percent of the 551.52 acres comprising Jackson Park. [124] ¶ 6. It lies on the western edge of Jackson Park and includes existing parkland bounded by South Stony Island Avenue to the west, East Midway Plaisance Drive North to the north, South Cornell Drive to the east, and South 62nd Street to the south. *Id.* ¶ 7. The OPC site also includes land within the park that currently exists as city streets: the portion of East Midway Plaisance Drive North between Stony Island Avenue and South Cornell

Drive, and a portion of South Cornell Drive between East Midway Plaisance Drive South and East Hayes Drive. *Id.* As part of the OPC construction, these street portions would be closed and removed "to restore" the landscape's connection to the Lagoon and Lake." *Id.* ¶¶ 7, 40.

The site lies approximately half a mile from Lake Michigan, separated by: (1) six-lane Cornell Drive; (2) the lagoons and Wooded Island of Jackson Park; (3) Jackson Park's golf driving range and other grounds; (4) Lake Shore Drive; and (5) a pedestrian and bike path. *Id.* ¶ 7. It sits entirely above ground, although the parties dispute whether the site formerly sat beneath Lake Michigan. *Id.* ¶ 9; [136] ¶ 9 (Plaintiffs' response).

ii. Site Components

The OPC will consist of a campus containing open green space, a plaza, and four buildings: (1) the Museum Building; (2) the Forum Building; (3) a Library Building; and (4) a Program, Athletic, and Activity Center. [124] ¶¶ 23, 26. It will also include an underground parking garage. *Id.* ¶ 23.

[91] ¶ 50.

The Museum will comprise the OPC's principal building and "central mission." [124] ¶ 24. It seeks to "tell the stories of the first African American President and First Lady of the United States, their connection to Chicago, and the individuals, communities, and social currents that shaped their local and national journey." *Id.* ¶ 25. In doing so, the Museum will feature artifacts and records from President Obama's presidency, including items on loan from the National Archives and Records Administration (NARA). *Id.* ¶¶ 24–25; [125-5] (Exhibit D, Recital J).

The Forum Building will contain collaboration and creative spaces, including an auditorium, meeting rooms, recording and broadcasting studios, and a winter garden and restaurant. [124] ¶ 27.

The Library Building will include a branch of the Chicago Public Library and a President's Reading Room, featuring curated collections and displays of archival

material, including digital access to Obama Administration records. *Id.* ¶ 28; [125-5] (Exhibit D, (Sub) Exhibit "C").

The Program, Athletic, and Activity Center will host public programs such as "presentations, events, athletics, and recreation." [124] ¶ 29; [125-5] (Exhibit D, (Sub) Exhibit "C").

The OPC's green space will include features such as: (1) play areas for children; (2) "contemplative spaces for young and old"; (3) a sledding hill; (4) a sloped lawn for picnicking, recreation and community and special events; (5) walking paths; and (6) a nature walk along the lagoon. [124] ¶ 30. The Foundation will also "preserve and enhance" the existing Women's Garden and Lawn, keeping it open and available as green space. *Id.*

iii. Site Accessibility

According to the Use Agreement between the City and Foundation, discussed in detail below, the OPC buildings must "be open to the public at a minimum in a manner substantially consistent with the manner in which other Museums in the Parks are open to the public." *Id.* ¶ 26; [125-5] (Exhibit D, § 6.2(a)(i)). All other portions of the OPC, such as the green space, must remain open to the public during regular Park District hours. [124] ¶ 30; [125-5] (Exhibit D, § 6.2(a)(ii)).

The OPC will charge fees for entry into the Museum and for the parking garage. [112-1] ¶ 43. It will, however, provide free public access to many interior spaces within the OPC, including portions of the garden and plaza levels in the Museum Building and the top floor of the Museum Building. [124] ¶ 26. Moreover,

the Foundation must operate the OPC in accordance with the free admission requirements of Illinois' Park District Aquarium and Museum Act, which mandates free admission to all Illinois residents at least 52 days out of the year and to all Illinois school children accompanied by a teacher. *Id.* ¶ 37. The admission fee policy for members of the public who are City residents, or low-income individuals and their families participating in the Supplemental Nutrition Assistance Program (or equivalent program), must also be "substantially consistent with comparable general admission fee policies" for such individuals maintained by "other Museums in the Park." [125-5] (Exhibit D, § 6.10).

D. OPC Municipal Approval Process

i. Jackson Park's Creation

In 1869, the General Assembly passed "An Act to Provide for the Location and Maintenance of a Park for the Towns of South Chicago, Hyde Park and Lake" (1869 Act). [112-1] ¶ 17; Private Laws, 1869, vol. 1, p. 358. The statute provided for the formation of a board of public park commissioners to be known as the "South Park Commissioners." *Id.* The Act authorized these commissioners to select certain lands, which, when acquired by said commissioners, "shall be held, managed and controlled by them and their successors, as a public park, for the recreation, health and benefit of the public, and free to all persons forever." Private Laws, 1869, vol. 1, p. 360. Pursuant to this authority, the commissioners acquired the land now known as Jackson Park. [112-1] ¶ 17; [139] ¶ 17 (Defendants' response). The Illinois Legislature enacted the Park District Consolidation Act in 1934, which consolidated

the existing park districts, including the South Park District, into the Chicago Park District. 70 ILCS 1505/1.

ii. Transfer From the Park District to the City

In early January of 2015—before the Jackson Park site selection—the Foundation expressed "concerns regarding the City's lack of control" over the proposed Jackson and Washington Park sites and indicated that "consolidating ownership of the sites and local decision-making authority in the City was a prerequisite to a successful bid." [126-2] at 105098–99.

Subsequently, in February 2015—in an open meeting during which members of the public spoke and submitted written comments—the Park District's Board of Commissioners voted to approve the transfer of "approximately 20 acres of property" located in Washington Park or Jackson Park to the City. [124] ¶ 11; [125-4] at 4, 11. Following this meeting, the OPC site's boundaries within Jackson Park shifted to the north and east. [124] ¶ 11.

In February 2018, after a public meeting, the Board of Commissioners confirmed authority to transfer the reconfigured site to the City. *Id.*

In March 2015, the City Council enacted an ordinance "authorizing the execution of an intergovernmental agreement between the City of Chicago and the Chicago Park District necessary to acquire selected sites in order to facilitate the location, development, construction and operation" of the OPC. [124] ¶ 12; [126-2] at 105096. In October 2018, following the Jackson Park selection, the City Council passed an ordinance finding it "useful, desirable, necessary and convenient that the

City acquire the OPC site from the Park District" for the "public purpose" of constructing and operating the OPC. [124] ¶ 12; [125-5] at 85886 § 2.

iii. City Council Approval

In January 2018, the Foundation applied to the City for a zoning amendment to build the OPC on the Jackson Park site as a "planned development"—a designation required for certain institutional and campus-oriented projects. [124] ¶ 13; [126-3]. The Foundation also applied for approval under the City's Lake Michigan and Chicago Lakefront Protection Ordinance (LPO). [124] ¶ 13. The City's Department of Planning and Development (DPD) subsequently reviewed both applications and prepared a report (DPD Study) as required by the City's Municipal Code. *Id.* The DPD Study recommended approving both applications. *Id.*

On May 17, 2018, the Chicago Plan Commission—which reviews proposals involving planned developments and the Lakefront Protection Ordinance within the City—held a public hearing on the Foundation's application for a planned development zoning amendment and for approval under the LPO. *Id.* ¶ 14; [126-5]. Representatives from the City and the Foundation testified at the hearing, and over 75 members of the public commented on the proposals. [124] ¶ 14. The presentation from DPD staff included a slideshow depicting various renderings of the OPC proposal. *Id.*

At the conclusion of this hearing, the Plan Commission found that the OPC project conformed with the LPO and approved the Foundation's application under the LPO. *Id.* ¶ 15. In doing so, the Plan Commission adopted the DPD Study as its

findings of fact. *Id.* Under the City's Municipal Code, the Plan Commission serves as the final decisionmaker as to whether a project complies with the Lakefront Plan of Chicago and the purposes of the LPO. *Id.*; Municipal Code of Chicago (MCC) § 16-4-100(e).

Also at the May 17 hearing, the Plan Commission recommended approval of the Foundation's application for a zoning amendment. [124] ¶ 16. Again, the Plan Commission adopted the DPD Study as the Commission's own findings of fact. *Id.* Under the City's Municipal Code, after considering a zoning amendment application, the Plan Commission must refer the application to the City Council, which serves as the final decisionmaker on the amendment. *Id.*; MCC § 17-13-0607.

Accordingly, on May 22, 2018, the City Council's Committee on Zoning, Landmarks and Building Standards held a public hearing to consider the zoning amendment. [124] ¶ 17. Following testimony from City and Foundation representatives and public comments, the Committee voted to recommend approval. *Id.* The next day, the full City Council approved the amendment, enacting an ordinance that authorized construction of the OPC as a Planned Development; this ordinance controls the size and layout of the OPC's buildings. *Id.* ¶ 18.

In October 2018, the City Council considered and approved two additional ordinances for the OPC project. *Id.* ¶ 19. First, it considered the Operating Ordinance, which allows the City to accept title to the Jackson Park site from the Park District and to enter into agreements with the Foundation governing the Foundation's use of the site. *Id.* On October 11, 2018, the City Council's Committee

on Housing and Real Estate held a public hearing on the Operating Ordinance, during which City and Foundation representatives testified about the ordinance and members of the public commented. *Id.* The Committee voted unanimously to recommend adopting the Operating Ordinance, and the full City Council unanimously approved it on October 31, 2018. *Id.*

Second, the City Council considered an ordinance authorizing the City to vacate portions of East Midway Plaisance Drive South and Cornell Drive within Jackson Park for conversion into parkland as part of the OPC site. *Id.* ¶ 20. On October 25, 2018 the City Council's Committee on Transportation and Public Way held a public hearing on the ordinance, during which City and Foundation representatives again testified, and members of the public commented. *Id.* The Committee voted unanimously to recommend adopting the ordinance, and the full City Council unanimously approved it on October 31, 2018. *Id.*

iv. The Use Agreement

One of the agreements authorized by the Operating Ordinance includes the Use Agreement, which sets out the terms by which the Foundation may use Jackson Park for the OPC. *Id.* ¶ 21; [125-5] (Exhibit D). The Use Agreement does not transfer ownership of the OPC site, nor does it lease the site to the Foundation. *See generally* [125-5] (Exhibit D); [112-1] ¶ 46. Rather, section 2.1 of the Use Agreement provides the Foundation with the following rights with respect to the OPC site for a 99-year term:

> (a) the right to construct and install the Project Improvements[3] (including the Presidential Center);
>
> (b) the right to occupy, use, maintain, operate and alter the Presidential Center Architectural Spaces[4]; and
>
> (c) the right to use, maintain, operate and alter the Presidential Center Green Space and Green Space.[5]

[125-5] (Exhibit D, §§ 2.1–.2).

The Foundation will construct the OPC's buildings at its own expense and upon completion, transfer ownership of the buildings and other site improvements to the City at no charge. *Id.* §§ 2.1, 4.4; [124] ¶ 34. The Foundation will also maintain the OPC site and buildings at its sole expense for the entire life of the Use Agreement. [124] ¶ 35; [125-5] (Exhibit D, §§ 2.2, 7.1). The City is not required to enter into the Use Agreement until the Foundation establishes an endowment for the OPC and the site, and confirms that it has funds or commitments sufficient to pay the projected construction costs. [124] ¶ 36.

As to consideration, the Use Agreement provides:

> The consideration for this Agreement is Ten and 00/100 Dollars ($10.00) payable by the Foundation on the Commencement Date, the receipt and

[3] The Use Agreement defines "project improvements" as the Presidential Center Architectural Spaces and all other improvements constructed, installed, or located on the OPC site by the Foundation in accordance with the Use Agreement. [125-5] (Exhibit D, Art. I). The "Presidential Center" includes the "Presidential Center Architectural Spaces" and the "Presidential Center Green Space," as well as all other improvements and fixtures constructed, installed, or located by the Foundation in accordance with the Use Agreement. *Id.*

[4] "Presidential Center Architectural Spaces" includes the Museum Building, the Forum Building, the Library Building, the Program, Athletic and Activity Center, the Underground Parking Facility, the Plaza, and all "other facilities and improvements ancillary to any of the foregoing," such as loading/receiving areas and service drives. [125-5] (Exhibit D, Art. I).

[5] "Presidential Center Green Space" means all portions of the Presidential Center other than the Presidential Center Architectural Spaces. [125-5] (Exhibit D, Art. I). "Green Space" means all portions of the OPC site excluding the Presidential Center. *Id.*

> sufficiency of which, when taken together with the construction, development, operation, maintenance and repair of the Presidential Center and the other Project Improvements by the Foundation, the vesting of ownership of the Project Improvements by the Foundation in the City (as contemplated herein), as well as the material covenants and agreements set forth herein to be performed and observed by the Foundation, are hereby acknowledged by the City.

[125-5] (Exhibit D, Art. III).

With respect to operating the OPC, the Use Agreement prohibits the Foundation from using the OPC for political fundraisers or in any manner inconsistent with its status as a tax exempt entity under Section 501(c)(3) of the Internal Revenue Code. *Id.* at § 6.3(d); [124] ¶ 21. The Foundation must use revenues collected from general and special admission fees, parking and other visitor services, third-party use fees, food and beverage sales, and retail sales for the OPC's operations and maintenance, or deposit such revenues into an endowment for those purposes. [124] ¶ 21; [125-5] (Exhibit D, § 6.9).

In addition, the Foundation must provide the City with an annual report on the OPC's operations, and in conjunction with the City, form an Advisory Operations Committee to address ongoing operational issues related to the OPC and any concerns arising from nearby and adjacent areas of Jackson Park. [124] ¶ 21; [125-5] (Exhibit D, §§ 17.3–.4). If the Foundation ceases to use the OPC for its permitted purposes—essentially, operating the OPC—under the Use Agreement, the City may terminate the Agreement. [124] ¶ 21; [125-5] (Exhibit D, §§ 6.1, 16.2).

E. OPC Studies

The City did not perform a comparative analysis of the economic or other community impact on the City as a result of building the OPC at one particular location versus another. [112-1] ¶¶ 28–29. Rather, the DPD Study looked at the Jackson Park site specifically, while studies performed by private institutions analyzed the impact of generally placing the OPC in Chicago and the State of Illinois. [124] ¶¶ 13, 55–56.

The DPD Study first looked at the environmental and community impact of placing OPC on Jackson Park. Generally, it concluded that the OPC would increase recreational opportunities on the South Side of Chicago, bring more visitors to Jackson Park and the surrounding communities, increase the use of surrounding open space, and improve safety. *Id.* ¶ 53. Specifically, it found that by closing certain streets within Jackson Park, and by expanding or reconfiguring other streets in and around Jackson Park, the OPC would, for example: (1) improve access by pedestrians through the park, across the lagoons to the lake, *id.* ¶ 39; (2) offer unimpeded pedestrian and bike access to the Museum of Science and Industry from the South Side," *id.* ¶ 40; (3) replace some of the land currently occupied by Cornell Drive with a "restful Woodland Walk," *id.* ¶ 41; (4) create new pedestrian access points and ADA compliant design features, *id.* ¶ 42; and (5) reduce air and noise pollution, improve existing bird habitats, and attract new wildlife to the OPC site area, *id.* ¶ 47. In total, the DPD Study found that the roadway work conducted in connection with the OPC

will create a net gain of an additional 4.7 acres of publicly available park space throughout Jackson Park. *Id.* ¶ 45.

The DPD Study also addressed the OPC's economic benefits. It found that the OPC would create nearly 5,000 new, local jobs during construction, and more than 2,500 permanent jobs once the OPC opens. *Id.* ¶ 54. Deloitte Consulting LLP similarly completed a report, commissioned by the Chicago Community Trust,[6] assessing the OPC's economic impact on the State of Illinois and City, as well as the South Side. *Id.* ¶ 55. It projected that the OPC's construction and operation would create an increase of $11.3 million in revenue generated on an annual basis from state and local taxes within Cook County. *Id.* A study commissioned by the University of Chicago and conducted by Anderson Economic Group also projected that by building the OPC on the South Side, tax revenue for the City and for Chicago Public Schools would increase by a combined $5 million annually. *Id.* ¶ 56.

F. OPC Costs

The City has estimated the costs for roadway alterations and other infrastructure work in Jackson Park at $174 million to $175 million. [112-1] ¶ 33; [127-5] at 22–23. According to Defendants, portions of this estimated cost will go towards infrastructure improvements in areas of Jackson Park not adjacent to the OPC to further the Park District's broader South Lakefront Plan. [139] ¶ 33 (Defendants' response); [128-4] at 012159. A traffic impact study conducted by Sam Schwartz Engineering, DPC demonstrates that the Washington Park site would have

[6] The Chicago Community Trust serves as a "community foundation dedicated to making the Chicagoland region more vibrant through service." [128-5] at 5.

also required substantial roadway alterations, although it did not estimate a specific cost. [139] ¶ 1; [139-4].

In 2015, the City estimated costs for environmental remediation to the OPC site within Jackson Park at $1,246,083 to $1,852,831. [112-1] ¶ 34; [114-9] at 011749. Comparably, the City estimated environmental remediation costs for the proposed Washington Park site at $2,506,836 to $6,959,946. *Id.* Other estimated costs related to constructing the OPC in Jackson Park include: $3,285,843 for relocating utilities, [112-1] ¶ 35; $367,800 for relocating a water main and fire hydrant, *id.* ¶ 36; and $4,972.72 for architectural/engineering services, *id.* ¶ 37.

F. Procedural History

On February 19, 2019, this Court granted in part and denied in part Defendants' motion to dismiss based upon lack of subject matter jurisdiction. [92].[7] Plaintiffs' remaining claims assert: (1) a violation of due process under 18 U.S.C. § 1983 (Count I); (2) breach of the public trust under Illinois law (Count II); (3) *ultra vires* action under Illinois law (Count III); (4) a request for declaratory judgment as to the inapplicability of the Illinois Museum Act (Count IV); and (5) a special legislation claim under Illinois law (Count V). [91].

[7] This Court previously granted six motions for leave to file briefs as *amici curiae* in relation to Defendants' motion to dismiss or for judgment on the pleadings [48]. *See* [77]. Following the parties' cross-motions for summary judgment, the *amicus* authors requested that this Court consider their original briefs at the summary judgment stage. *See* [113] [131] [132] [134]. This Court has carefully considered all *amicus* briefs in relation to the parties' cross-motions for summary judgment, [54-1] [56-1] [61-1] [69-1] [73] [75].

Following full discovery, the parties filed cross-motions for summary judgment on May 3, 2019, [112] [122], their responses on May 17, 2019, [137] [138], and their replies on May 24, 2019, [141] [143].

II. Legal Standard

Summary judgment is proper where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute as to any material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In determining whether a genuine issue of material fact exists, this Court must construe all facts and reasonable inferences in the light most favorable to the non-moving party. *See CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528 (7th Cir. 2014). The non-moving party has the burden of identifying the evidence creating an issue of fact. *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1104 (7th Cir. 2008). To satisfy that burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, a mere "scintilla of evidence" supporting the non-movant's position does not suffice; "there must be evidence on which the jury could reasonably find" for the non-moving party. *Anderson*, 477 U.S. at 252.

Cross-motions for summary judgment "do not waive the right to a trial;" rather, this Court treats "the motions separately in determining whether judgment should be entered in accordance with Rule 56." *Marcatante v. City of Chicago, Ill.*, 657 F.3d 433, 438–39 (7th Cir. 2011).

III. Analysis

Defendants move for summary judgment on all five of Plaintiffs' remaining claims. [123-1]. Plaintiffs, on the other hand, move for partial summary judgment on their due process (Count I), public trust doctrine (Count II), and *ultra vires* (Count III) claims. [120] at 15.[8] This Court analyzes each remaining count in turn, beginning with Plaintiffs' public trust claim.

A. Count II: Breach of the Public Trust

i. Public Trust Origins

The public trust doctrine traces its roots back to English common law, during the time when "the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England." *Ill. Cent. R.R. Co. v. State of Illinois*, 146 U.S. 387, 435 (1892); *see also Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 454–55 (1852). In England, no navigable stream existed "beyond the ebb and flow of the tide," nor were there any locations, outside of tide-waters, "where a port could be established to carry on trade with a foreign nation, and where vessels could enter or

[8] Even though Plaintiffs' motion for summary judgment lists Count IV in its motion for summary judgment, Plaintiffs later fail to address the merits of that count, and thus, waiver applies. *Compare* [112] (moving for summary judgment on Count IV) *with* [120-1] at 15 (memorandum of law excluding Count IV from the claims upon which Plaintiffs move for summary judgment); *See generally* [120-1].

depart with cargoes." *Propeller Genesee*, 53 U.S. at 454–55. Accordingly, the public maintained an interest in the use of tide-waters, and only the crown could "exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest." *Ill. Cent.*, 146 U.S. at 436. Non-tide waters, however, could be privately owned. *Id.*

The Supreme Court offered the "classic statement" of how U.S. courts should apply this common law principle in *Illinois Central Railroad*. *Lake Michigan Fed'n v. United States Army Corp. of Eng'rs*, 742 F. Supp. 441, 444 (N.D. Ill. 1990). In 1869, the Illinois legislature granted Illinois Central Railroad, in fee simple, title to over 1,000 acres of submerged land extending into Lake Michigan about one mile from a portion of Chicago's shoreline, and authorized the railroad to operate a rail line over the property. *Ill. Cent.*, 146 U.S. at 444. After the railroad improved the property and began operations, the legislature repealed the enabling legislation and revoked its original grant. *Id.* at 438.

In rejecting the railroad's challenge to the State's action, the Court first held that the common law distinction between tide and non-tide waters no longer applied; the Great Lakes, while unaffected by the tide, still facilitated commerce "exceeding in many instances the entire commerce of States on the borders of the sea." *Ill. Cent.*, 146 U.S. at 436. Accordingly, the public trust doctrine, founded upon "the necessity of preserving to the public the use of navigable waters from private interruption and encroachment," applied equally to "navigable fresh waters," including the Great Lakes. *Id.* at 436–37.

Second, the Court found that while the State owned the submerged land, it could not transfer that land to the railroad because the State's title was "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Id.* at 452–53. Thus, the Court concluded that "the control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Id.* at 453.

ii. The OPC Site Sits Upon Never-Submerged Land

As an initial matter, the parties dispute whether under the public trust doctrine, the OPC site constitutes land that was never submerged under Lake Michigan or land that was formerly submerged under the Lake. As is discussed below, this determination directs what level of deference this Court gives to the State in applying the public trust doctrine under Illinois law.

Both parties concede that as early as 1822, and at the time the state authorized the creation of Jackson Park in 1869, the OPC site sat above Lake Michigan. [124] ¶¶ 8–9; [136] ¶ 9 (Plaintiffs' response); [124-5] (Excerpt of 1822 Map of Federal Township, including Far West Section 13 in which the OPC site is located). Nevertheless, Plaintiffs contend that the OPC site constitutes formerly submerged land, based solely upon an Illinois State Archaeological Survey (ISAS) Technical Report. [136] ¶ 9 (Plaintiffs' response). Plaintiffs fail to note, however, that the map

to which they site in the ISAS report documents the "Late Pleistocene and early Holocene lake levels." [136-3] at 10. In other words, Plaintiffs invite this Court to find that because the OPC site may have been submerged approximately 11,000 years ago, it constitutes "formerly submerged" land for purposes of the public trust doctrine. [136-3] at 7–10.

Respectfully, this Court declines Plaintiffs' invitation. The Illinois Supreme Court has held that the date of Illinois' admission into the Union serves as the date it "became vested with the title to the beds of all navigable lakes and bodies of water within its borders." *Wilton v. Van Hessen*, 94 N.E. 134, 136 (Ill. 1911). Put differently, this Court must ask whether land was submerged as of the date Illinois achieved statehood.

Defendants' map, obtained from the Illinois State Archives, demonstrates that as early as 1822, the OPC site sat above Lake Michigan. [124] ¶ 9; [124-5]. Plaintiffs fail to offer any evidence or argument to demonstrate that just four years earlier—when Illinois entered the Union—the OPC site sat beneath the Lake. *See generally* [137]. In fact, the page to which Plaintiffs cite in the ISAS report includes a map from the "Early Nipissing" period showing that as recently as 4,000 years ago, Jackson Park sat above ground. [142] ¶ 9; [136-3] at 10.[9] As such, the factual record confirms that the OPC site constitutes never-submerged land under the public trust doctrine. This Court now turns to the merits of the parties' public trust arguments.

[9] Plaintiffs conceded this point at oral argument.

iii. The Public Trust Doctrine Applies to the OPC Site

Defendants first argue that because *Illinois Central* referred only to "navigable waters," and because the OPC site sits upon never-submerged land, the OPC cannot fall within *Illinois Central*'s application of the public trust doctrine. [123-1] at 18.

But Illinois courts have extended the public trust doctrine to Chicago parkland, including land within Jackson Park, because of the 1869 Act's directive that such land "shall be held, managed and controlled by them and their successors, as a public park, for the recreation, health and benefit of the public, and free to all persons forever." *See Clement v. Chi. Park Dist.*, 449 N.E.2d 81, 84 (Ill. 1983) (affirming lower court's approval of a golf driving range in Jackson Park under a public trust doctrine analysis); *Paepcke*, 263 N.E.2d at 15–19 (Ill. 1970) (applying public trust doctrine to park land in Washington and Douglas Parks). Thus, consistent with prior caselaw, this Court analyzes the OPC site under the public trust doctrine.

iv. Deference

Next, Plaintiffs argue that this Court should apply a general level of "heightened scrutiny" when analyzing the OPC site under the Illinois public trust doctrine. [120-1] at 16–17. Not so. Illinois public trust cases require courts to apply the doctrine using varying levels of deference, based upon the property's relationship to navigable waterways. *See, e.g.*, *Paepcke*, 263 N.E.2d at 15–19 (applying public trust doctrine to never-submerged park land); *Friends of the Parks v. Chicago Park Dist.*, 786 N.E.2d 161, 169–170 (Ill. 2003) (applying public trust doctrine to formerly submerged land); *Lake Michigan Fed'n*, 742 F. Supp. at 444–46 (applying public trust

doctrine to presently submerged land). In fact, Plaintiffs recognize that such levels of deference exist when asserting that the OPC site sits upon formerly submerged land. *See, e.g.*, [136] ¶ 9; [91] ¶ 45.

The below analysis, therefore, finds that the OPC does not, as a matter of law, violate the public trust under the level of scrutiny applied to never-submerged lands. In the alternative, this Court also finds that, even under the heightened levels of scrutiny (applied to formerly submerged and submerged lands), the OPC still does not violate the public trust.

a. Never-Submerged Land: *Paepcke* Requires Deference to the Illinois Legislature

The Illinois Supreme Court recognizes that Illinois legislators retain significant control over never-submerged land they themselves choose to designate within the public trust; and thus, when applying the public trust doctrine to land that is not—and never has been—submerged, reviewing courts must ask only whether sufficient legislative intent exists for a given land reallocation or diversion. *See Paepcke*, 263 N.E.2d at 19.

In *Paepcke*, the court considered allowing Chicago's Public Building Commission, with the Park District's cooperation, to construct a school-park facility on never-submerged land within Washington Park. *Id.* at 14. As in this case, the land at issue derived from the 1869 Act. *Id.* at 13. There, the court affirmed the trial court's dismissal of plaintiffs' challenge under the public trust doctrine because "sufficient manifestation of legislative intent" existed to "permit the diversion and reallocation contemplated" by defendants' plan. *Id.* at 18–19. In finding the requisite

legislative intent under the Public Building Commission Act and related statutes, the court warned that "courts can serve only as an instrument of determining legislative intent as evidenced by existing legislation measured against constitutional limitations" and in "this process the courts must deal with legislation as enacted and not with speculative considerations of legislative wisdom." *Id.* at 21. Thus, courts facing public trust claims over statutorily designated parkland must ask only whether legislation "is sufficiently broad, comprehensive and definite to allow the diversion" at issue. *Id.* at 19 (citing *People ex rel. Stamos v. Public Building Com.*, 238 N.E.2d 390 (Ill. 1968)).

Here, as in *Paepcke*, sufficient legislative intent exists to permit diverting a portion of Jackson Park for the OPC. The relevant piece of legislation—the Park District Aquarium and Museum Act (Museum Act)—explicitly states that cities and park districts with control or supervision over public parks have authorization to:

> purchase, erect, and maintain within any such public park or parks edifices to be used as aquariums or as museums of art, industry, science, or natural or other history, *including presidential libraries, centers, and museums* . . .

70 ILCS 1290/1 (emphasis added).

Moreover, the Museum Act permits the City to contract with private entities to build a presidential center:

> The corporate authorities of cities and park districts . . . [may] permit the directors or trustees of any corporation or society organized for the construction or maintenance and operation of an aquarium or museum as hereinabove described to erect, enlarge, ornament, build, rebuild, rehabilitate, improve, maintain, and operate its aquarium or museum within any public park . . . *and to contract with any such directors or trustees of any such aquarium or museum relative to the erection,*

> *enlargement, ornamentation, building, rebuilding, rehabilitation, improvement, maintenance, ownership, and operation of such aquarium or museum*.

Id. (emphasis added).

This clear legislative directive states a broad, comprehensive and definite intention to allow the City to contract with directors or trustees of a museum (the Foundation) to build a presidential center (the OPC) in a public park (Jackson Park). *See also People v. Pack*, 862 N.E.2d 938, 940 (Ill. 2007) ("The best indication of legislative intent is the statutory language, given its plain and ordinary meaning."). In other words, the Museum Act reflects the legislature's determination that presidential centers, as a type of museum, remain consistent with a parcel's designation as public parkland. *See also Furlong v. South Park Comm'rs*, 151 N.E. 510, 511 (Ill. 1926) (declining to enjoin South Park Commissioners' efforts to issue bonds to renovate Fine Arts Building to include a museum—now the Museum of Science and Industry—in Jackson Park, because park purposes "are not confined to a tract of land with trees, grass and seats, but mean a tract of land ornamented and improved as a place of resort for the public, for recreation and amusement of the public."); *Fairbanks v. Stratton*, 152 N.E.2d 569, 575 (Ill. 1958) (upholding construction of an exposition building and auditorium—now the McCormick Place convention center—on submerged land under the public trust doctrine).

1. The Museum Act Authorizes the OPC

Nevertheless, Plaintiffs argue that the Museum Act fails to "authorize the [OPC] transaction" because the Act fails to specifically cite to Jackson Park. [120-1]

at 32–33; [137] at 19–20; [143] at 11.[10] They rely upon *Friends of the Parks v. Chicago Park Dist.*, 160 F. Supp. 3d 1060, 1064–65 (N.D. Ill. 2016) (*Lucas II*), in which the court evaluated a Park District proposal to enter a 99-year ground lease with the Lucas Museum of Narrative Art under the Museum Act. [120-1] at 33. There, plaintiffs' due process and *ultra vires* claims alleged that the legislature failed to specifically reference the land subject to the ground lease; and the court denied defendants' motion to dismiss both claims. *Friends of the Parks*, 160 F. Supp. 3d at 1064–65.

Even assuming that the *Lucas II* case was rightly decided (which this Court need not address), that ruling does not apply here. First, that case involved formerly submerged land, rather than never-submerged parkland held in trust due to a legislative enactment, and thus warranted a different level of deference. *Id.* at 1063. Second, *Lucas II* involved a long-term lease, and therefore a different portion of the Museum Act. *Id.* at 1068. Third, the court considered whether sufficient legislative authorization existed only in relation to plaintiffs' procedural due process and *ultra vires* claims, instead of their public trust claim. *Id.* at 1064–66. And fourth, the court evaluated the issue of legislative authorization only at the motion to dismiss stage, rather than on the merits at summary judgment:

> Plaintiffs . . . plead that the General Assembly, in enacting the [Museum Act] purportedly transferring control of the property, did not "refer

[10] Plaintiffs make their detailed comments regarding the absence of proper legislative authorization with respect to their due process claim [120-1] at 32–33, but they also contend that courts must apply the "heightened scrutiny" standard to all types of land in evaluating a public trust claim as well [120-1] at 16. Because this Court finds proper legislative authorization relevant to its analysis of both the due process and the public trust doctrine claims, this Court considers Plaintiffs' authorization arguments under both counts.

> specifically to the alienation, forfeiture or disposition of the land that is subject of the ground lease." Plaintiffs have alleged that, by failing to provide specific approval for the transfer of the subject land, the General Assembly has acted in violation of Plaintiffs' right to due process. Construing the allegations in Plaintiffs' favor, Plaintiffs have sufficiently stated a procedural due-process claim under the Fourteenth Amendment.

Id. at 1064–65; *see also id*. at 1065–66 (articulating the same reasoning in relation to plaintiffs' *ultra vires* claim).

Most importantly, in *Paepcke*, the Illinois Supreme Court explicitly rejected plaintiffs' argument that the "legislature must clearly and specifically state with reference to the park or parks in question explicit authority to divert to new public uses." 263 N.E.2d at 19. *Paepcke* insists that courts should consider whether the legislature stated sufficiently broad, comprehensive, and definite intent. *Id*. (adopting analysis in *Stamos*, 238 N.E.2d at 398). Here, as in *Paepcke*, this Court finds that the Museum Act evinces that intent, and therefore sufficiently authorizes construction of the OPC in Jackson Park.

Plaintiffs also assert that even if the Museum Act authorizes the transaction, it cannot "release the restriction" contained in the 1869 Act that Jackson Park must remain "a public park, for the recreation, health and benefit of the public, and free to all persons forever." [120-1] at 20, 33. Plaintiffs argue that Defendants seek to reallocate "open, free public park to a more restrictive use by authorizing the Foundation to erect numerous building[s] that will not be open and free, and will have restricted and paid access." *Id*.

Certainly, the Museum Act does not lift the 1869 Act's "restriction." *See generally* 70 ILCS 1290/1. But, Illinois courts have time and again made clear that

museums and other structures—including those with fees—fall within permissible public park purposes and thus do not violate the 1869 Act. *Furlong*, 151 N.E.2d at 511 (recognizing the "construction and maintenance of a building for museums, art galleries, botanical and zoological gardens, and many other purposes, for the public benefit," as legitimate park purposes); *Clement v. O'Malley*, 420 N.E.2d 533, 540–41 (Ill. App. Ct. 1981) (approving construction of golf course in Jackson Park, in part because the "mere fact that a fee is charged for the use of special facilities does not as such render the facility closed to the public, provided such fees are reasonable for the general population of the community.") (internal citation omitted), *aff'd sub nom.*, *Clement v. Chi. Park Dist.*, 449 N.E.2d at 84. Moreover, the same terms of the Museum Act apply to the Museum of Science and Industry, also located in Jackson Park. [124] ¶ 31.

And even if the Museum Act did violate the 1869 Act, the *Paepcke* court—upholding construction of a school building not open to "all persons forever"—made clear that the state legislature, having created the parkland, could reallocate its use. *See* 263 N.E.2d at 18 ("[A]s far as the rights of the public in public trust lands are concerned," it would be "contrary to well established precedent" to hold that "the legislature could never, by appropriate action, change or reallocate the use in any way."); *see also Choose Life Ill., Inc. v. White*, 547 F.3d 853, 858 n.4 (7th Cir. 2008) ("It is axiomatic that one legislature cannot bind a future legislature.").

The Illinois General Assembly, through the Museum Act, sufficiently authorizes the construction and operation of the OPC in Jackson Park. As such, this

Court cannot find, as a matter of law, that the OPC violates the public trust doctrine. Nonetheless, in the alternative, this Court next analyzes the OPC site under the remaining levels of public trust scrutiny for clarity and finality.

b. Formerly Submerged Land: No Corresponding Public Benefit Test

The next level of scrutiny (used for formerly submerged land) under the public trust doctrine also requires a finding in Defendants' favor. Under this standard, a diversion of formerly submerged parkland violates the public trust only if it: (1) does not contain sufficient legislative authorization, pursuant to *Paepcke*; and (2) primarily benefits a private entity, with no corresponding public benefit. *Friends of the Parks*, 786 N.E.2d at 169–70 (citing *Paepcke*, 263 N.E.2d at 21).

In *Friends of the Parks*, the Illinois Supreme Court considered a section of the Illinois Sports Facilities Authority Act, which permitted public financing of physical improvements to Soldier Field. *Id.* at 163. The land at issue occupied formerly navigable, or submerged, water of Lake Michigan. *Id.* at 163. There, plaintiffs argued that the Sports Facilities Authority Act violated the public trust doctrine because it allowed a private party (the Bears) to use and control Soldier Field "for its primary benefit with no corresponding public benefit." *Id.* at 169.

In upholding the lower court's grant of summary judgment, the court first distinguished two cases—both of which involve submerged land—which Plaintiffs here also rely upon: *Illinois Central* and *People ex rel. Scott v. Chicago Park District*, 360 N.E.2d 773 (Ill. 1976):

> There is little similarity between *Illinois Central* or *Scott* and the case before us. The Park District is, and will remain, the owner of the Burnham Park property, including Soldier Field. Neither the Act, the implementing agreements, nor the project documents provide for a conveyance of the Soldier Field property to the Bears. There is no abdication of control of the property to the Bears. The Park District will continue in its previous capacity as landlord under a lease agreement with the Bears and will continue in its existing role as owner of the remainder of the Burnham Park property.

Id. at 170. Here too, the City will retain ownership over the OPC site, as well as the OPC buildings once constructed by the Foundation. Exhibit D, §§ 2.1–.2, 4.4. And the City will not abdicate control over the site: if the Foundation ceases to use the OPC for its permitted purposes under the Use Agreement, the City may terminate the Agreement. [124] ¶ 21; [125-5] (Exhibit D, §§ 6.1, 16.2).

Second, the court invoked *Paepcke*'s language regarding legislative intent, finding it "equally applicable" that the General Assembly had authorized public financing for renovating government-owned stadiums under the Sports Facilities Authority Act. 786 N.E.2d at 170. Here, this Court again notes that such clear authorization exists in the form of the Museum Act.

And finally, the court noted that through improvements to Soldier Field, the public would enjoy "athletic, artistic, and cultural events" as well as better access to the stadium, museums, and the "lakefront generally" due to improved parking. *Id.* Because of these public benefits, the project proposal did not violate the public trust doctrine, even though the court acknowledged that the Bears, as a private entity, would also benefit from the project. *Id*. As such, even if this Court considers a for-profit sports team comparable to a non-profit foundation seeking to build a

presidential center, *Friends of the Parks* confirms that any benefits the Foundation receives from the OPC do not render the OPC violative of the public trust doctrine. Rather, diverting formerly submerged parkland violates the public trust only if it primarily benefits a private entity with "no corresponding public benefit." *Id.* at 169–70.

And the OPC surely provides a multitude of benefits to the public. It will offer a range of cultural, artistic, and recreational opportunities—including an educational museum, branch of the Chicago Public Library, and space for large-scale athletic events—as well as provide increased access to other areas of Jackson Park and the Museum of Science and Industry. *See* [124] ¶¶ 25–30, 39–47. In short, if improvements to a football stadium sufficiently benefit the public, the OPC must, too. Accordingly, the OPC does not violate the public trust doctrine under the level of scrutiny applied to formerly submerged lands, as articulated in *Friends of the Parks*.

c. Submerged Land: Primary Purpose Standard

Finally, an analysis of those cases in which courts have considered presently submerged land further demonstrates that the OPC does not violate the public trust doctrine. Under the public trust test applicable to such land, courts ask whether the "primary purpose" of a legislative grant is "to benefit a private interest." *Lake Michigan Fed'n*, 742 F. Supp. at 445; *Scott*, 360 N.E.2d at 781 (finding a public trust violation where the court could "perceive only a private purpose for the grant.").

In *Scott*, for example, the Illinois Attorney General sued to invalidate a statute authorizing U.S. Steel Corporation to purchase a portion of Lake Michigan to expand

its steel plant. 360 N.E.2d at 779–80. The relevant authorizing legislation stated that the additional facility would "result in the conversion of otherwise useless and unproductive submerged land into an important commercial benefit development to the benefit of the people of the State of Illinois." *Id.* at 781. Further, defendant steel company argued that the facility would serve the public by creating jobs and boosting the city and state economy. *Id.* The court invalidated the statute, holding that while "courts certainly should consider the General Assembly's declaration that given legislation is to serve a described purpose," the "self-serving recitation of a public purpose within a legislative enactment is not conclusive of the existence of such purpose." *Id.* (internal citation omitted). Rather, to "preserve meaning and vitality in the public trust doctrine, when a grant of submerged land beneath waters of Lake Michigan is proposed . . . the public purpose to be served cannot be only incidental and remote." *Id.*

Even if the OPC falls within the standard of review applicable to presently submerged land (which it does not), this Court cannot find the Museum Act's explanation of presidential centers' public benefits "self-serving" or "incidental and remote." The Museum Act states that presidential centers, as a type of museum, further "human knowledge and understanding, educating and inspiring the public, and expanding recreational and cultural resources and opportunities." 70 ILCS 1290/1. This explanation of the OPC's public benefits aligns with well-established caselaw. *See, e.g.*, *Furlong*, 151 N.E. 510 at 511 (finding that because parks exist as places "of resort for the public, for recreation and amusement" the "construction and

maintenance of a building for museums, art galleries . . . and many other purposes, for the public benefit" are legitimate park purposes); *see also Fairbank*, 152 N.E.2d at 575 (upholding construction of an exposition building and auditorium on submerged land in Burnham Park because they were "in the public interest" and thus did not violate the public trust doctrine). And the OPC's primary purpose matches this legislative directive, as its principal building and "central mission"—the Museum—seeks to educate the public by telling "the stories of the first African American President and First Lady of the United States, their connection to Chicago, and the individuals, communities, and social currents that shaped their local and national journey." [124] ¶¶ 24–25.

Unconvincingly, Plaintiffs attempt to twist this public benefit into a private purpose, arguing that the Museum's mission merely "seeks to preserve and enhance the legacy of the former President and his wife" rather than benefit the public. [120-1] at 24; [137] at 13. But this Court cannot accept such a mischaracterization; under Plaintiffs' theory, any museum with which a select group of individuals disagree could violate the public trust. This Court will not, as the *Paepcke* court cautioned against, transform itself into a legislature or zoning board and then rewrite the educational merits of any given museum or presidential center built on public trust land. 263 N.E.2d at 21; *see also Friends of the Parks*, 786 N.E.2d at 165 (where plaintiffs submitted an economics professor's affidavit to argue that authorizing legislation benefited a private interest, rather than serve the declared public objectives

announced in the Act, the trial court correctly considered the affidavit irrelevant and declined to inquire "into the merits or accuracy of the legislative findings").

The case before this Court does not involve proposals to use public trust land to expand railroad tracks, *Illinois Central*, 146 U.S. at 436–37, a steel plant, *Scott*, 360 N.E. at 775, or even a private university, *Lake Michigan Fed'n*, 742 F. Supp. at 443. Rather, Defendants seek to contract with the Foundation to build facilities such as a museum, branch of the Chicago Public Library, and outdoor recreational areas—all of which the City will own. [124] ¶¶ 23–30, 34. This project involves a public park, not a forest preserve. Accordingly, this Court relies upon controlling caselaw, constitutional limitations, the City Council's determinations, and the Museum Act in finding that the OPC's primary purpose benefits the public, rather than private interests. As such, this Court finds that the OPC survives the (inapplicable) level of scrutiny provided to presently submerged lands under the public trust doctrine.

v. The OPC Withstands Scrutiny Under the Wisconsin Factors

In *Paepcke*, the Illinois Supreme Court found "it appropriate to refer to the approach developed by the courts of our sister State, Wisconsin, in dealing with diversion problems." 263 N.E.2d at 19. The court proceeded to list the five factors used under Wisconsin's interpretation of the public trust doctrine:

> (1) that public bodies would control use of the area in question, (2) that the area would be devoted to public purposes and open to the public, (3) the diminution of the area of original use would be small compared with the entire area, (4) that none of the public uses of the original area would be destroyed or greatly impaired and (5) that the disappointment of those wanting to use the area of new use for former purposes was

> negligible when compared to the greater convenience to be afforded those members of the public using the new facility.

Id. The court then noted that while "not controlling under the issues as presented in this case we believe that standards such as these might serve as a useful guide for future administrative action." *Id*.; *see also Friends of the Parks*, 2015 WL 1188615, at *5 (N.D. Ill. Mar. 12, 2015) (*Lucas I*) (noting that the "'Wisconsin test' . . . was not adopted as applicable in public trust cases, and the Illinois Supreme Court again declined to use the test in *Friends of the Parks*.") (citing *Friends of the Parks*, 786 N.E.2d 161).

In *Clement*, the Illinois appellate court approved the Park District's proposal to construct of a golf driving range in Jackson Park under a public trust analysis. 420 N.E.2d at 540–41. But unlike in *Paepcke*, no state authorizing legislation existed from which the court could infer sufficient legislative intent. As such, the court analyzed the Jackson Park driving range according to the five Wisconsin factors:

> The property will still be controlled by the Park District. The mere fact that a fee is charged for the use of special facilities does not as such render the facility closed to the public, provided such fees are reasonable for the general population of the community. In this respect, we note nothing in the record to indicate the charges were unreasonable. Moreover, the designation of 11 acres as a driving range is small compared to the approximately 570 total acres in Jackson Park, and the public uses of the original area have not been destroyed or greatly impaired since picnicking, casual play activities, jogging, and meadow bird nesting are still possible elsewhere in the park. Finally, due to the small amount of land taken up by the driving range relative to total park acreage, the disappointment of those wanting to use the area for former purposes is likely to be slight – particularly since the range now offers the same convenience to south area public which has been provided in the north area for many years in Lincoln Park.

Id. at 541 (internal citations omitted). Although this Court need not apply the Wisconsin factors here, both parties discuss them here in relation to the OPC. *See* [137] at 4; [141] at 4. As such, this Court finds, as did the *Paepcke* court, that they provide helpful guidance under the public trust doctrine.

An analysis of the OPC under the Wisconsin factors requires the same result as in *Clement*. If the Foundation ceases to use the OPC for its permitted purposes under the Use Agreement, the City may terminate the Agreement. [124] ¶ 21; [125-5] (Exhibit D, §§ 6.1, 16.2). Only a portion of the OPC will require an entrance fee, and the Use Agreement and Museum Act require: (1) free admission to all Illinois residents at least 52 days out of the year; (2) free admission for Illinois school children accompanied by a teacher; and (3) an admission fee policy for City residents and certain low-income individuals "substantially comparable" to those maintained by other museums in Jackson Park. [124] ¶ 37; [125-5] (Exhibit D, § 6.10). The OPC will comprise only 19.3 acres, or 3.5 percent of Jackson Park's total 551.52 acres. [124] ¶ 6. As in *Clement*, the site will not destroy or greatly impair the land's original use; activities such as picnicking, jogging, and meadow bird nesting will not only be accessible in other areas of the park, but also within certain parts of the OPC site. *Id.* ¶¶ 30, 47. And here, too, the small amount of land taken up by the OPC site relative to total park acreage means the disappointment of those wanting to use the area for former purposes remains slight, particularly given: (1) the OPC's proposed green space areas; and (2) that the Museum of Science and Industry already exists

within the park. *Id.* ¶ 31. Here, as in *Clement*, this Court finds that the OPC satisfies the Wisconsin factors.

vi. Plaintiffs' Alternative Legal Theories Fail

Plaintiffs offer two alternative public trust theories in support of their motion for summary judgment: (1) a comparative, benefit-maximization analysis demonstrates that the choice to locate the OPC in Jackson Park constitutes an "arbitrary" or "unreasonable" legislative decision; and (2) the Foundation will not pay "fair market value" for use of the OPC site. [120-1] at 17–28. Neither theory exists under Illinois law.

First, Plaintiffs argue that the City failed to perform an analysis of whether locating the OPC on public trust park land "provides any benefit whatsoever over locating the Presidential Center on non-public trust property," and thus that the decision to locate the OPC within Jackson Park remains "arbitrary" and unreasonable." [120-1] at 17–20. In other words, Plaintiffs dispute whether Jackson Park is "the best" location for the OPC. *Id.* at 10, 18. But Plaintiffs fail to cite to any instance in the public trust jurisprudence in which courts have required government entities to pick "the best" location, much less require courts to review such assessments *de novo*. Quite simply, Illinois law imposes no obligation upon this Court to revisit the cost-benefit assessments of state and local lawmakers or otherwise sift through impact studies on its own to determine whether the UIC proposed sites, Washington Park, or Jackson Park constitutes the best location for the OPC. *See, e.g.*, *River Park v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) ("Federal

courts are not boards of zoning appeals."). Rather, as is discussed above, courts need only look to the relevant authorizing legislation and cited public benefits for a given project within the lawmakers' own analysis; in other words, "value dependent assessment[s] of the best use of the property" are "highly subjective" and "irrelevant to an analysis of the propriety of a grant of public land." *Lake Michigan Fed'n*, 742 F. Supp. at 446.

Second, Plaintiffs argue that the Foundation's $10.00 payment, which forms part of its consideration for the Use Agreement, [125-5] (Exhibit D, Art. III), violates the public trust doctrine based upon a "line of cases involving Mississippi's treatment of public trust property known as 'sixteenth section lands.'" [120-1] at 24. According to Plaintiffs, these cases require the City to charge a "reasonable rent" with due regard" for leases of public trust property. *Id.* at 24–28. This theory is also unavailing because, in short, Illinois law controls this case. Plaintiffs do not offer any Illinois court that has cited to Plaintiffs' line of Mississippi cases or adopted those cases' reasoning or analysis. Accordingly, without addressing the possible implications of Mississippi's approach here, this Court declines to ignore controlling Illinois law in favor of an unprecedented rule. *See, e.g.*, *Insolia v. Phillip Morris, Inc.*, 216 F.3d 596, 607 (7th Cir. 2000) ("Though district courts may try to determine how the state courts would rule on an unclear area of state law, district courts are encouraged to dismiss actions based on novel state law claims."); *MindGames, Inc. v. Western Publishing Co., Inc.*, 218 F.3d 652, 655–56 (7th Cir. 2000) ("The rule is that in a case in federal

court in which state law provides the rule of decision, the federal court must predict how the state's highest court would decide the case, and decide it the same way.").

For all of these reasons, this Court grants Defendants' motion for summary judgment as to Plaintiffs' public trust claim (Count II) and denies Plaintiffs' motion for summary judgment as to Count II.

B. Count I: Violation of Due Process

Plaintiffs originally based their due process claim upon three theories: (1) aesthetic and environmental harm pursuant to *Sierra Club v. Morton*, 405 U.S. 727 (1972); (2) the public trust doctrine; and (3) the Fifth Amendment's Takings Clause. *See* [65-1] at 14; [91] ¶¶ 82–83, 85. This Court's prior motion to dismiss opinion found that Plaintiffs failed to establish standing based upon their aesthetic or environmental harm theory, but found that Plaintiffs established standing based upon the public trust doctrine. [92] at 11–14. Because Defendants' 12(b)(1) motion to dismiss did not challenge Plaintiffs' Takings Clause theory based upon subject matter jurisdiction, this Court did not consider it. *Id.* at 8–9. Therefore, only Plaintiffs' Takings Clause and public trust theories of due process remain.

i. Plaintiffs' Takings Clause Theory

As an initial matter, Plaintiffs' Takings Clause theory, to the extent it is included within Count I, fails as a matter of law. The Fifth Amendment states, in relevant part: "nor shall *private* property be taken for public use, without just compensation." U.S. Const. amend. V. (emphasis added). By the clause's plain language, no unconstitutional taking can occur where, as here, the relevant property

is already public. *See, e.g.*, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) ("In sum, the Takings Clause bars *the State* from taking private property without paying for it"); *see also Reichelderfer v. Quinn*, 287 U.S. 315, 323 (1932) (finding "[p]roperty was not taken" when legislation authorized constructing a fire house on public parkland; rather, the "taking occurred when the lands were condemned for the park."). Plaintiffs concede that Jackson Park exists as public parkland. [112-1] ¶ 15. Therefore, Plaintiffs' takings clause theory cannot survive summary judgment.

ii. Plaintiffs' Public Trust Theory

A procedural due process claim requires: (1) a cognizable property interest; (2) a deprivation of that interest; and (3) inadequate process. *Price v. Bd. of Educ.*, 755 F.3d 605, 607 (7th Cir. 2014); *Palka v. Shelton*, 623 F.3d 447, 452 (7th Cir. 2010). Here, Plaintiffs' public trust due process theory fails for two reasons. First, the parties spend considerable time disputing whether, under the public trust doctrine, Plaintiffs hold a sufficient property interest in the Jackson Park site to satisfy a procedural due process claim. *See* [120-1] at 28–34; [123-1] at 31–34.[11] But even assuming Plaintiffs hold a cognizable property interest, Plaintiffs' due process claim fails because they fail to demonstrate a deprivation of that interest.

[11] In doing so, Plaintiffs rely heavily upon this Court's prior motion to dismiss opinion, which found that they established standing for purposes of their federal due process claim, [93] at 12. [120-1] at 29. But this Court's finding that Plaintiffs have standing does not equate to success on the merits at summary judgment. *See, e.g.*, *Booker-El v. Superintendent, Ind. State Prison*, 668 F.3d 896, 899–900 (7th Cir. 2012) ("[S]tanding and entitlement to relief are not the same thing.").

In particular, Plaintiffs argue that Defendants deprived them of adequate process because the "Illinois legislature has not authorized the transactions at issue between the Park District, the City and the Foundation, nor has the Illinois legislature released the restriction on the Jackson Park Site." [120-1] at 28. But, as discussed in detail above with respect to Plaintiffs' public trust claim under *Paepcke*, the General Assembly—through the Museum Act—has authorized the OPC; the Museum Act need not refer specifically to the alienation or disposition of the Jackson Park site itself. *See Paepcke*, 263 N.E.2d at 19. Moreover, this Court has already determined that neither the OPC nor the Museum Act violates the 1869 Act's restriction upon public parkland. *See Furlong*, 151 N.E.2d at 511; *Clement v. O'Malley*, 420 N.E.2d at 540–41. Thus, Plaintiffs fail to establish a deprivation of any interest under their procedural due process claim. For this reason alone, their public trust theory fails as a matter of law.

Second, Plaintiffs cannot base their federal due process claim solely upon violations of state statutes.[12] *See Hebert v. Louisiana*, 272 U.S. 312, 316–17 (1926) ("The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires"); *Tucker v. City of Chicago*, 907 F.3d 487, 495 (7th Cir. 2018) ("[F]ederal due process protection is not a guarantee that state governments will apply their own laws accurately.")

[12] Plaintiffs' response memorandum also argues that Defendants' deprived them of adequate process because the Illinois Property Transfer Act does not authorize the Park District's Sale. [137] at 20. As discussed below, this Court finds that the Property Transfer Act authorizes the Park District's sale. And regardless, this argument fails to establish a deprivation of any due process interest because it relies solely upon an alleged violation of a state statute.

(citing *Simmons v. Gillespie*, 712 F.3d 1041, 1044 (7th Cir. 2013)); *see also Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (holding that a "violation of state law is not a denial of due process law" where plaintiffs' due process claim sought review of Board of Trustees' zoning decision under state law). Absent a cognizable due process claim separate and apart from alleged violations of the Museum Act and 1869 Act, Count I fails as a matter of law.

Accordingly, this Court grants Defendants' motion for summary judgment as to Count I, and denies Plaintiffs' motion for summary judgment as to Count I.

C. Count III: *Ultra Vires* Action

Plaintiffs' *ultra vires* action claim, alleging that the Park District and City engaged in *ultra vires* actions for which they have no authority, rests upon two theories. [91] ¶ 99. First, Plaintiffs make the astounding argument that the OPC violates the Museum Act because it contains outdoor green spaces, in addition to buildings. [120-1] at 34. Second, Plaintiffs argue that because the City itself will not use the OPC site for the term of the Use Agreement, the Park District's transfer of land violates the Illinois Property Transfer Act. *Id*. at 40. Defendants argue that a plain reading of the relevant statutes dispels Plaintiffs' claim. [123] at 37–39. This Court agrees with Defendants.

i. The Museum Act Authorizes the OPC's Green Space

Plaintiffs' first theory proceeds in two parts, as follows. The Museum Act contains two provisions. The first states that the corporate authorities of cities and park districts have authorization to:

> purchase, erect, and maintain within any such public park or parks *edifices* to be used as aquariums or as museums of art, industry, science, or natural or other history, including presidential libraries, centers, and museums, such aquariums and museums consisting of all facilities for their collections, exhibitions, programming, and associated initiatives …

70 ILCS 1290/1 (emphasis added). In the same sentence, the Act clarifies that cities and park districts may also contract with directors or trustees relative to the building and operation "of such aquarium or museum." *Id.*

The second sentence then begins:

> Notwithstanding the previous sentence, a city or park district may enter into a lease for an initial term not to exceed 99 years, subject to renewal, allowing a corporation or society as hereinabove described to erect, enlarge, ornament, build, rebuild, rehabilitate, improve, maintain, and operate its aquarium or museum, *together with the grounds immediately adjacent to such aquarium or museum, and to use, possess, and occupy grounds surrounding such aquarium or museum* as hereinabove described for the purpose of beautifying and maintaining such grounds in a manner consistent with the aquarium or museum's purpose . . .

Id. (emphasis added).

Based upon this second provision, Plaintiffs argue that the Museum Act only authorizes the City to allow the Foundation to build and operate the OPC, together with the grounds immediately adjacent to the OPC, if the City leases the OPC site to the Foundation. [120-1] at 37. Because the Use Agreement does not create a lease between the City and Foundation, Plaintiffs maintain that the OPC site cannot contain any grounds surrounding the building "edifices," and thus that the Use Agreement authorizing OPC green space constitutes *ultra vires* activity. *Id.*; [112-1] ¶ 46.

Essentially, Plaintiffs ask this Court to find that a statute authorizing the construction of a presidential center within a green space prohibits preserving green space within such a center. This Court rejects such an absurd and bizarre reading of the statutory text and context. The Museum Act's first sentence—not relating to leases—defines museums to include presidential centers. 70 ILCS 1290/1. The plain language then goes on to clarify that museums include "all facilities for their collections, exhibitions, programming, and associated initiatives." *Id.* Reading the Museum Act according to its express language, as this Court must, does not allow this Court to limit "facilities" to just buildings. *See, e.g.*, *Williams v. Staples*, 804 N.E.2d 489, 493 (Ill. 2004) (The plain language of the statute serves as "the most reliable indicator of the legislature's objectives in enacting a particular law.") (internal quotations omitted); *Lawson v. FMR LLC*, 571 U.S. 429, 440 (2014) (courts must give "the words used their ordinary meaning"); *Facility*, *New Oxford American Dictionary* 610 (3d ed. 2010) ("facility" defined as "space or equipment necessary for doing something," as in "facilities for picnicking, camping, and hiking.").

The Foundation's design for the OPC green space includes purposeful features such as: (1) play areas for children; (2) contemplative spaces; (3) a sledding hill; (4) a sloped lawn for picnicking, recreation and community and special events; (5) walking paths; and (6) a nature walk along the lagoon. [124] ¶ 30. According to the Museum's mission statement, these "outdoor facilities" will "beautify and enhance the recreational opportunities on the site, creating a fun, safe environment for visitors to enjoy in all seasons." [125-5] (Exhibit D, (Sub) Exhibit "C"). These features thus

comprise part of the OPC's facilities for programming and associated initiatives. Therefore, given the complete absence of any textual support for Plaintiffs' novel statutory construction, this Court cannot find that the Use Agreement, by authorizing the OPC's use of green space, constitutes *ultra vires* activity.

ii. The Illinois Property Transfer Act Authorizes the OPC

Plaintiffs' second theory argues that the Illinois Local Government Property Transfer Act, 50 ILCS 605/0.01 *et seq.*, does not authorize the Park District's transfer of the Jackson Park site to the City.[13] Section 2 of the Property Transfer Act provides:

> If the territory of any municipality shall be wholly within, coextensive with, or partly within and partly without the corporate limits of any other municipality . . . and the first mentioned municipality (herein called "transferee municipality"), shall by ordinance declare that it is necessary or convenient *for it to use, occupy or improve* any real estate held by the last mentioned municipality (herein called the "transferor municipality") in the making of any public improvement or for any public purpose, the corporate authorities of the transferor municipality shall have the power to transfer *all of the right, title and interest* held by it immediately prior to such transfer, in and to such real estate, whether located within or without either or both of said municipalities, to the transferee municipality upon such terms as may be agreed upon by the corporate authorities of both municipalities . . .

Id. at 605/2 (emphasis added). Based upon this language, Plaintiffs contend that the Park District maintains authority to transfer the Jackson Park site to the City only if the City itself will "use, occupy, or improve" the site for the OPC. [120-1] at 41. Because the Use Agreement provides the Foundation with the right to occupy, use,

[13] Plaintiffs also argue that the Park District violates section 2(b) of the Property Transfer Act, which governs the transfer of municipality-owned land limited by restrictions. [137] at 22. This section only applies if transferee municipalities desire the use of the land "free from" the relevant restriction. 50 ILCS 605/2(b). This Court has already found that the Museum Act and OPC do not violate the 1869 Act's restriction on public parkland. Therefore, Plaintiffs' section 2(b) argument fails under Count III as well.

maintain, operate, and alter the OPC, Plaintiffs argue that the Park District's transfer constituted an *ultra vires* activity. Defendants, on the other hand, maintain that: (1) the Property Transfer Act does not prohibit the acquiring municipality from contracting with third parties to assist in improving the transferred land; and (2) the Museum Act, Intergovernmental Cooperation Act, and Article VII, section 10(a) of the Illinois Constitution authorize such a contract. This Court agrees with Defendants.

First, Article VII, section 10(a) of the Illinois Constitution permits units of local government to "contract and otherwise associate with individuals, associations, and corporations" in any manner not prohibited by law. Further, that same section allows local governments to "transfer any power or function, in any manner not prohibited by law or ordinance" to other units of local government. Likewise, the Intergovernmental Cooperation Act, 5 ILCS 220/2–3, allows units of local governments to exercise, combine, transfer, and "enjoy jointly" any of their "powers, privileges, functions, or authority," except where expressly prohibited by law. Thus, read together with the Property Transfer Act, these provisions demonstrate that: (1) each Defendant, as an individual unit of local government, can separately contract with third parties on land that they already own; and (2) either Defendant can transfer land to the other, along with their power to contract with third parties on that land.

Plaintiffs contend that none of these provisions apply, because they only allow transfers not prohibited by law. *See, e.g.*, [91] ¶¶ 63, 67. But Plaintiff fails to point

to any law that prohibits such transfers. For instance, the Property Transfer Act is silent as to whether municipalities can contract with third parties to improve transferred land. [14, 15] *See* 50 ILCS 605/2; *see also Wittman v. Koenig*, 831 F.3d 416, 425 (7th Cir. 2016) ("Legislative silence is ordinarily a weak indication of legislative intent."). And the Museum Act clearly authorizes the City to contract with the Foundation in constructing and operating the OPC. 70 ILCS 1290/1. Moreover, Plaintiffs' reading of the statute would create the nonsensical result of prohibiting transferee municipalities from ever contracting with engineers, architects, or builders to improve a site. This Court rejects Plaintiffs' theory and instead reads each of the relevant provisions of Illinois law within context together and gives each statute effect according to its plain terms.[16] Accordingly, this Court cannot find that

[14] Plaintiffs also argue that the Park District's transfer of the OPC site violates the Illinois Park District Code, 70 ILCS 1205/10-7, which governs the terms by which park districts may sell, lease, or exchange realty. [137] at 21. But the Park District Code explicitly states that it does not apply to the Chicago Park District. 70 ILCS 1205/1-2(d). Accordingly, Plaintiffs' *ultra vires* claim cannot succeed based upon this theory.

[15] Plaintiffs' amended complaint references Article VIII, Section I(a) of the Illinois Constitution in relation to their *ultra vires* claim. [91] ¶ 64. Article VIII, Section 1(a) provides that public funds, property or credit shall be used only for public purposes. Plaintiffs make no such argument in their motion for summary judgment, and thus they have waived the argument. *See generally* [120-1]. In any event, this Court finds, consistent with its public trust analysis, that the OPC's educational and recreational benefits serve a public purpose. *See, e.g.*, *Friends of the Parks*, 786 N.E.2d at 168–69 (finding that Soldier Field "has served public purposes since its dedication in 1924" and would "continue to do so after the completion of the Burnham Park project as authorized by the Act."); *Paschen v. Winnetka*, 392 N.E.2d 306, 310 (Ill. App. Ct. 1979) (under article VIII, section 1(a), courts must ask whether "governmental action has been taken which directly benefits a private interest without a corresponding public benefit").

[16] Even if the Property Transfer Act's silence could somehow be construed as ambiguous (which it is not), this Court would reach the same result by reading each provision and construing them all together (Property Transfer Act, Museum Act, Intergovernmental Cooperation Act, and Article VII, section 10(a) of the Illinois Constitution). *People v. 1946 Buick, VIN 34423520*, 537 N.E.2d 748, 750 (Ill. 1989) (Illinois recognizes the doctrine of *in pari materia*, but only to resolve statutory ambiguities).

the Park District's transfer of the Jackson Park site to the City constitutes an *ultra vires* act under the Property Transfer Act.

This Court grants Defendants' motion for summary judgment as to Count III and denies Plaintiffs' motion for summary judgment as to Count III.

D. Count IV: Declaratory Judgment As to Inapplicability of the Illinois Museum Act

Plaintiffs' theory as to Count IV also falls short. Ostensibly, Plaintiffs contend that the portions of the Museum Act amended in 2016 constitute retroactive changes, and therefore seek a declaratory judgment that the Museum Act cannot authorize the OPC. [91] ¶¶ 100–103.

Specifically, Plaintiffs' allegations as to Count IV proceed as follows:

> 101. The 2016 Amendment to the Museum Act states on its face that it is not retroactive. The temporal reach of the 2016 Amendment states that the amendment is "declaratory of existing law," and therefore the substance of the 2016 Amendment cannot be made retroactive.
>
> 102. However, the 2016 Amendment is not declaratory of existing law. Existing law at the time of the 2016 Amendment does not [ ] allow aquariums and museums on formerly submerged lands, does not allow undefined "edifices" for "presidential libraries and centers" on park land, and does not allow the gifting of park land to private entities by allowing multiple 99 year leases of park land to a private entity – all of which were added in the 2016 Amendment to the Museum Act.
>
> 103. On information and belief, the Defendants will contend that the Illinois Museum Act allows a Presidential Center to be constructed on the Jackson Park Site. Therefore, an actual and justiciable controversy exists between the Plaintiffs and the Defendants related to the applicability of the Museum Act to the Presidential Center.

Defendants move for summary judgment on this claim, arguing that: (1) the 2016 amendment had no retroactive effect on the Operating Ordinance, as the City

Council enacted it in 2018; and (2) in any event, the General Assembly can lawfully apply the amendment retroactively. [123-1] at 39–40. Plaintiffs, however, fail to address Count IV in their response memorandum. *See generally* [137]. Failure to respond to an argument results in waiver, and thus justifies granting Defendants' motion for summary judgment as to Count IV. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010).

Nevertheless, this Court also agrees with Defendants that the Museum Act cannot retroactively apply to the OPC. To the extent Plaintiffs allege in their amended complaint that the Museum Act "cannot be made retroactive," the City did not enact the Operating Ordinance, which authorized the City to accept the OPC site from the Park District and enter into the Use Agreement, until two years after the 2016 amendment. [124] ¶ 19. Therefore, no record exists from which this Court can find the 2016 amendment to the Museum Act constituted an unlawful retroactive provision as applied to the OPC. This Court grants Defendants' motion for summary judgment as to Count IV.

E. Count V: Special Legislation

Count V seeks to void the Museum Act under the Illinois Constitution's Special Legislation Clause, which prohibits a "special or local law when a general law is or can be made applicable." Ill. Const. 1970, art. IV, § 13. According to Plaintiffs, the 2016 amendment to the Museum Act "expressly" allowed a presidential center, and thus constitutes special legislation. Defendants move for summary judgment as to

Count V because the 2016 amendment does not create an exclusionary classification. This Court agrees.

As an initial matter, Plaintiffs spend the vast majority of their amended complaint and summary judgment briefing arguing that the Museum Act fails to authorize the OPC because it lacks specificity. In the same breadth, with respect to Count V, Plaintiffs also claim that the General Assembly acted in an improperly specific manner when it included "presidential centers" within the Act. [91] ¶ 109. Count V falls, however, for the simple reason that it fails to survive Illinois courts' two-part test for special legislation claims.

The special legislation clause prohibits the General Assembly from conferring "a special benefit or privilege upon one person or group and excluding others that are similarly situated." *Crusius v. Illinois Gaming Board*, 837 N.E.2d 88, 94 (Ill. 2005). While the legislature maintains broad discretion to make statutory classifications, the special legislation clause prevents it from making classifications that arbitrarily discriminate in favor of a select group. *Id.*; *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 840 N.E.2d 1174, 1183 (Ill. 2005). Illinois courts thus apply a two-part test to determine whether a law constitutes special legislation: (1) whether the statutory classification at issue discriminates in favor of a select group and against a similarly situated group; and (2) if the classification does so discriminate, whether the classification is arbitrary. *Id.*

Here, Plaintiffs object to the portion of the Museum Act which defines museums to *include* "presidential libraries, centers, and museums." [137] at 25; 70

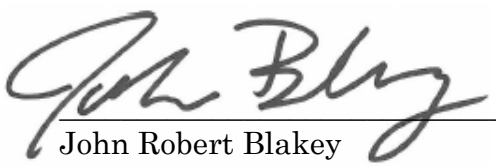
ILCS 1290/1. But this language does not discriminate in favor of a select group or against a similarly situated group, nor does it create any unlawful classification whatsoever. Rather, the Act merely enumerates traditional examples of museums for purposes of the Act. *See* [91-3]; 70 ILCS 1290/1. As such, the amendment does not exclude any entity wishing to operate a museum in a public park under the Museum Act, and therefore fails the two-part test. *See, e.g.*, *Elem. Sch. Dist. 159 v. Schiller*, 849 N.E.2d 349, 363–64 (Ill. 2006) (finding no special legislation where law did not exclude any entity from a benefit received by a property owner pursuant to it). Accordingly, this Court grants Defendants' motion for summary judgment as to Count V.

IV. Conclusion

For the reasons explained above, this Court grants Defendants' motion for summary judgment as to Counts I through V, [122], and denies Plaintiffs' motion for summary judgment as to Counts I through III, [112]. The Clerk shall enter judgment for Defendants and against Plaintiffs. All set dates and deadlines are stricken. Civil case terminated.

Dated: June 11, 2019

Entered:



John Robert Blakey
United States District Judge

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

Protect Our Parks, et al,

Plaintiff(s),

v.

Chicago Park District, et al,

Defendant(s).

Case No. 18 CV 3424
Judge John Robert Blakey

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) Chicago Park District, et al
and against plaintiff(s) Protect Our Parks, et al

.

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

☐ other:

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 John Robert Blakey on a motion.

Date: 6/11/2019

Thomas G. Bruton, Clerk of Court

G. Lewis , Deputy Clerk