Appeal Nos. 19-2308 and 19-3333
(Consolidated)

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 IN APPEAL NO. 19-3333

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ORAL ARGUMENT REQUESTED

Disclosure Statements

(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); Rachils Duff Peel & Kaplan, LLC (Michael Rachlis)

(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

A. District Court Jurisdiction.

The District Court had subject matter jurisdiction over the underlying action pursuant to 28 U.S.C. § 1331 (federal question), as well as 28 U.S.C. § 1367(a) (supplemental jurisdiction). The federal statutes and constitutional provisions involved in the case are 42 U.S.C. § 1983, 28 U.S.C. § 1343, as well as the First, Fifth, and Fourteenth Amendments of the United States Constitution. U.S. CONST. amend. I, V & XIV.

B. Appellate Jurisdiction.

The United States Court of Appeals for the Seventh Circuit has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1291:

(a) on November 6, 2019, the district court issued a final order and ruling (Docket Nos. 164 and 165) (the "November 6 Order"), denying Plaintiffs' motion for relief pursuant to Fed. R. Civ. P. 60 and 62.1;

(b) on November 22, 2019, Plaintiffs timely-filed a notice of appeal from the November 6, 2019 Order (Docket No. 166).

II. Statement of Issues

Does a district court abuse its discretion by denying Plaintiffs' motion for relief pursuant to Fed. R. Civ. P. 60(b)(2), 60(b)(5), and/or 60(b)(6) when the district court fails to consider new determinations presented by two federal agencies that contradict key findings in the district court's prior rulings on which it explicitly relied in granting Defendants summary judgment?

III. Introduction

The Obama Presidential Center ("OPC") has been mired in controversy since the Jackson Park site was selected pursuant to a 2015 ordinance that announced that "the City defers to the sound judgment of the President and his Foundation as to the ultimate location of the Presidential Library." [A.109][1] The controversy is thus not surprising, for it involves the indisputable transfer of public trust property to a private party, executed through an extreme (and unconstitutional) delegation of government power to a private citizen, issues that have been and continue to be closely scrutinized by the United States Supreme Court. *See, e.g., Gundy v. United States*, 139 S. Ct. 2116 (2019). These issues are discussed in the opening brief of the companion appeal (19-2308), which challenges the District Court's June 11, 2019 grant of summary judgment to the Defendants (referred to as the "City"), with which this appeal is consolidated. However, subsequent to the District Court's

[1]Because this appeal has been consolidated with Plaintiffs' earlier appeal (19-2308), appendix references here will be to the short appendix and supplemental appendix that was submitted by Plaintiffs with their opening brief in the first appeal that was filed on October 25, 2019. The mandatory short appendix and additional appendix materials submitted with this appeal will begin with the next consecutive number, which is A.326.

decision, the public dissemination of new material information and determinations from ongoing federal reviews revealed the heavy costs associated with the OPC project as proposed.

One example of this new information that presents a major roadblock to the approval of the OPC project is the content of a draft joint Report of July 2019 on the Assessment of Effects (the "AOE Report") issued by the City of Chicago for the National Park Service, the Federal Highway Administration, and the Illinois Department of Transportation, which identifies significant adverse effects to historic resources (here Jackson Park and the Midway Plaisance). The AOE Report was issued as part of the federal review that is being performed under the auspices of the National Historic Preservation Act, 54 U.S.C. § 306108, 36 C.F.R. Part 800. That report (after public comment) was to be finalized, and a mandatory process to consider how such effects can be avoided, minimized, or in the last resort, mitigated, is to occur (with public participation).[2] The publication of the AOE Report has provided new evidence and credibility to the objections that the District Court glossed

[2] A revised AOE Report was issued by the City just a few days ago (January 16, 2020) which will be discussed at pages14-15 and Section VI.B, *infra.*

over and/or ignored in its original summary judgment decision, which led to the Plaintiffs' August 7, 2019 Rule 60 motion (the "Rule 60 Motion") to vacate the District Court's summary judgment decision in favor of the City because the findings of the AOE Report were contrary to the facts provided by the City and relied upon by the District Court, and at a minimum, required that those facts be considered and developed in context and presented so that they could be part of the decision on the merits.

As the Plaintiffs will further discuss in this brief, the District Court committed at least two fatal errors in its brief November 6 Order denying Plaintiffs' Rule 60 Motion which necessitate reversal. First, the District Court repeated and emphasized all of the legal and factual errors found in the original summary judgment decision, as it failed to consider the new information contained in the AOE Report. Second, it misconstrued or ignored the AOE Report's determinations and relevant case law so as to buttress its effort to deny Plaintiffs' Rule 60 Motion. In so doing, and in denying the Rule 60 Motion, the District Court abused its discretion. The June 11, 2019 Judgment must be vacated and reopened in order to avoid a massive injustice which will destroy one of the great historical

landmarks in the City of Chicago as well and set an ominous precedent and detrimental public policy for the future in the City and elsewhere.

IV. Statement Of The Case

A. Two Consolidated Appeals Arise Out Of Two Rulings Of The District Court.

This consolidated appeal arises out of the City's effort to convey Jackson Park to the Obama Foundation for purposes of developing the Obama Presidential Center.

Plaintiffs have a pending appeal (19-2308) of the District Court's grant of summary judgment in favor of the Defendants. On June 11, 2019 the Court granted Defendants' motion for summary judgment [A.001-052]. In granting Defendants' motion, the District Court relied 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, based on the District Court's interpretation of the law, asked *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." In effect it held that the public

trust doctrine did not impose any fiduciary duties on the Defendants. Their only task was to make clear their authorization of the act.

In its June 11, 2019 summary judgment decision, the District Court stated in the alternative that if any scrutiny was required, the "facts" revealed "a multitude of benefits" to the City of Chicago and its citizens:

> 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 (quoting Dkt. 124 ¶¶ 25–30, 39–47)]

The Plaintiffs' opening brief and supporting appendix in its appeal from that summary judgment decision (No. 19-2308) were filed on October 25, 2019. [Appeal Doc. Nos. 23 & 24]

This separate opening brief is filed in the second appeal pursuant to this Court's orders [Appeal Doc. Nos. 28 & 35] and involves Plaintiffs' appeal of the denial of Plaintiffs' Rule 60 Motion asking the District Court to vacate and reopen the summary judgment that it granted in favor of the City based on the determinations in the AOE Report that became available only after the District Court issued its summary judgment decision.

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

The City's 2018 Ordinance recognized that the National Park Service and the Federal Highway Administration were in the midst of conducting various statutory reviews of the OPC project [A.159-60], proceedings which, until finished, precluded construction of the OPC under both the National Historic Preservation Act and the National Environmental Policy Act (NEPA). This has been recognized by the City:

> "Indeed, even apart from the City Council approvals at issue here, the project could not commence until various federal reviews are concluded as well, such as reviews by the National Park Service and the Federal Highway Administration."

[Docket No. 19, ¶ 8]

1. The publication of the AOE Report.

Approximately six weeks after the Court's June 11, 2019 Opinion, those agencies issued the draft AOE Report titled "Assessment of Effects" (https://www.chicago.gov/city/en/depts/dcd/supp_info/jackson-park-improvements.html). While a draft (and subject to a public comment period that ended August 30, 2019), the report was detailed and prepared under well-established criteria and procedures set out in the National Historic Preservation Act; 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 § 800.5(a). [*See* A.294-320] Under that federal regulation, "adverse effects" include the following:

> (1) *Criteria of adverse effect*. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.
>
> (2) *Examples of adverse effects*. Adverse effects on historic properties include, but are not limited to:
>
> (i) Physical destruction of or damage to all or part of the property;
>
> (ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;
>
> (iii) Removal of the property from its historic location;

> (iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;
>
> (v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;
>
> (vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and
>
> (vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.
>
> (3) *Phased application of criteria*. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

Put differently, the definition of adverse effects under the statute is broad enough to encompass not only ordinary common law nuisances, but also general impact on the character, ambience, aesthetics, and feel of the park, as well as specific harms to trees, birds, and wildlife that live within it.

The AOE Report runs 56 single-spaced pages. Rather than endorsing the District Court's "no benefit whatsoever" standard – a standard that virtually any project can arguably pass – the AOE Report determined that the OPC project would create severe adverse impacts on Jackson Park and the Midway Plaisance. As the letter accompanying the AOE Report provides, "the Federal Highway Administration (FHWA) has determined that the subject undertaking will have an 'adverse effect' to the Jackson Park Landscape District and the Midway Plaisance." [A.294]

The AOE Report determined 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 proposed OPC Tower Building, the closure of various roads, the clear cutting of old age trees, the radical alteration of the Women's Garden, and the destruction of the viewshed and distinctive ambience of the original Olmsted design for Jackson Park. [A. 309-320, AOE Report 22-33] Taken together, these adverse impacts raise serious questions whether *on net* the OPC provides benefits to the public at large.

Once an adverse effect is determined, as included in the AOE Report, a mandatory review associated with evaluating the adverse

effects is to be performed where there is to be consideration of avoidance, minimization and mitigation measures for the project. 36 CFR § 800.6. As the Federal Highway Administration states, "[t]he final step of the Section 106 process involves consultation . . . to seek ways to "avoid, minimize or mitigate the adverse effects." [A.295]

2. A public meeting was conducted relative to the AOE Report.

The AOE Report was the subject of discussion at a public meeting held on August 5, 2019 at the Logan Center on the University of Chicago campus. At that occasion, the City made clear its response that despite the identification of these severe adverse impacts, the intention was to proceed with the OPC as proposed. Specifically, Abby Monroe of the City's Department of Planning and Development stated: "The location itself is not something that would change….The city is proposing Jackson Park and the Midway as the location for these projects, so that is, at this point, what the project entails." Aaron Gettinger, "Public comment period on adverse affects [sic] of OPC to remain open 'til Aug. 30," Hyde Park Herald, August 5, 2019, available at:

https://hpherald.com/2019/08/05/public-comment-period-on-adverse-affects-of-opc-to-remain-open-til-aug-30/ (subject to judicial notice).

Those comments were followed by a statement from Brad Koldehoff, the Cultural Resources Unit Chief of the Illinois Department of Transportation. Without any attention to the efforts required to avoid or minimize the adverse effects, he repeated the City's position as he said this about the possible modifications to the project in light of the AOE Report:

> Asked how adverse effects identified in previous federal reviews have been mitigated, Brad Koldehoff with the Illinois Department of Transportation said excavations, analysis and a data recovery plan have been employed at archaeological sites. In the case of adversely effected historic buildings and districts, authorities would work with consulting parties to determine the best way to mitigate "by perhaps planting trees to help screen; to do public outreach activities; to help document and put online various things."
>
> "Parks are living things. Whether there's a federal action or not, there will be modifications to parks," Koldehoff said. "This is really an opportunity. If what is planned really is an adverse effect, then we want what can be done: What can you all tell us? What do you perceive that we really should be doing to help make the park a better place?"

Id.

Just within the last few days, the City has tried to address some of these difficulties through the publication of a revised AOE Report. This new AOE Report (hereinafter the "Second Report"), published on the City

of Chicago's website on January 16, 2020[3], has done nothing to alter the basic difficulties that were apparent when the AOE Report was issued six months ago.

Included in this Second Report is another iteration of the serious adverse effects not only on Jackson Park and the Midway Plaisance [A.365-397, Second Report at 39-71], but also now includes, after years of study, a new, previously unidentified, and significant adverse effect on Chicago's Park Boulevard Historic System. [A.381-383, Second Report at 55-57] Notwithstanding all of these adverse effects, the Second Report tries to soften the AOE Report through changing words and adding language. This is discussed in Section VI.B, *infra*.

C. Other Ongoing Federal Reviews Of The OPC.

It is important to evaluate the AOE Report in light of other required and ongoing federal reviews related to the OPC project.

A federal review is being performed in connection with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4331, *et seq*. (1969), which include "preserv[ing] important historic,

[3]https://www.chicago.gov/content/dam/city/depts/dcd/supp_info/jackson/final_aoe.pdf (subject to judicial notice). Excerpts are included in the appendix submitted with this brief [A.365-399]

cultural, and natural aspects of our national heritage." 42 U.S.C. § 4331(b)(4) [*See* A.306, AOE Report at 6 (referencing federal agency requirement that project comply with NEPA, as well as other federal statutes)] For projects of this magnitude, the preparation and evaluation of an environmental impact statement is typical. *See, e.g.,* 42 U.S.C. § 4332(C).

A separate and substantive review is also to be conducted by the Federal Highway Administration under Section 4(f) of the Department of Transportation Act, 49 U.S.C. §303(c). [*See* A.306, AOE Report at 6 (referencing that federal agency must ensure that project meets Section 4(f) among other statutory requirements)] This section mandates a stringent standard that must be met before approving any transportation project that would "use" any historic properties or public parklands, such as Jackson Park. The statute prohibits the "use" of parkland or historic properties unless there is "no prudent or feasible alternative" to doing so, and unless the agency has implemented "all possible planning to minimize harm." 49 U.S.C. § 303(c). The City, however, has suggested that this statute does not apply to either the road closings in Jackson Park, or to the construction of the OPC — see Federal Review, Frequently

Asked Questions (July 28, 2018)(also published on the City of Chicago website)— on the ground that (and in the absence of any federal funding for that phase of the project), the "decision whether to locate the OPC in Jackson Park belongs to the City of Chicago and is not a federal decision." [A.337 (subject to judicial notice)]

D. Plaintiffs File A Rule 60 Motion.

On August 7, 2019 – nine days after the issuance of the AOE Report and two days after the public meeting – Plaintiffs filed their combined Fed. R. Civ. P. 60 Motion and request for an indicative ruling pursuant to Fed. R. Civ. P. 62.1, to vacate the District Court's June 11, 2019 Judgment and related rulings pursuant to Rule 60(b)(2), 60(b)(5) and 60(b)(6). [Dkt. 156 (excerpt at A.321-323)] The Rule 60 Motion included a detailed memorandum and the entirety of the AOE Report. [Dkt. 156-1–156-6] The Rule 60 Motion argued that the AOE Report provides credible determinations on behalf of the federal agencies that largely contradict the facts advanced by the City and adopted by the District Court in its June 11, 2019 Judgment, and as a result required that the summary judgment ruling be vacated. [*See* Dkt. 156-1 at 4-8] A response by the City was filed on August 15, 2019. [Dkt. 159]

E. The District Court Denies The Rule 60 Motion.

On November 6, 2019, four months after the Plaintiffs filed their motion, the District Court issued a ruling denying the Rule 60 Motion. [A.326-332] During that four-month period, the District Court did not ask for any oral argument by either side on the content of the motion.

Instead, the District Court issued a brief five-page decision which did not once address any single substantive objection to the OPC plans (detailed as adverse effects to Jackson Park and the Midway Plaisance) that the Plaintiffs identified from the AOE Report. The District Court's November 6 Order did not address any statement or finding in the AOE Report. The decision did not explain why the District Court's own cost-benefit analysis – which was set out in the summary judgment decision – could remain unchanged in the face of explicit findings to the contrary in the AOE Report. Instead, the vast majority of the November 6 Order repeats the discussion of the original ruling on summary judgment, and then in conclusory fashion suggests that the AOE Report did not meet any of the recognized criteria for relief under Rules 60(b)(2), (5) and (6). The November 6 Order also suggests that the motion filed by Plaintiffs was addressed solely to the cause of action for violation of the public

trust. However, no such limitation is set forth in Plaintiffs' Rule 60 Motion.[4]

The District Court's decision thus ignored not only the abundant information contained in the Rule 60 Motion, but also the publicly available responses to the AOE Report after the Rule 60 Motion was filed. For example, the decision took no notice of the City's public response to the AOE Report, discussed on pages 13-14, *supra*. The City also indicated that it would conduct another public meeting on September 23, 2019 to follow up on the August 5th meeting. [*See* A.333 (subject to judicial notice)] Neither that meeting nor a finalized report materialized before the District Court issued its order. Indeed, both were two months overdue when the District Court denied Plaintiffs' Rule 60 Motion, refusing to provide a single word answering *any* of Plaintiffs' substantive concerns about the shortfalls of the OPC identified in the AOE Report.

The District Court's November 6 Order fails to note any of the other serious public challenges that also relied upon the AOE Report to point out the evasive responses of the City and the Obama Foundation. To that

[4] The District Court's summary judgment decision acknowledges that the public trust doctrine issues related to, impacted and/or was otherwise part of Plaintiffs other claims. [A.40-48]

point, the Advisory Council for Historic Preservation, another federal agency who is a key player and participant in the ongoing federal review process under the National Historic Preservation Act that led to the issuance of the AOE Report, issued its own letter in light of the AOE Report and the August 5th meeting, raising significant concerns and providing that the AOE Report should actually provide even *more* information so that "informed consideration of avoidance, minimization, or mitigation measures," can occur. [A.334-336 (subject to judicial notice)]

Another example is from The Cultural Landscape Foundation (the "TCLF") (a consulting party in the ongoing federal reviews) which published a detailed article on August 16, 2019, in which it concluded that the Obama Foundation had been problematically inaccurate about the impacts of its project on Jackson Park when its representatives Fred Wagner, a lawyer representing the Obama Foundation, and Michael Strautmanis, the foundation's chief engagement officer, "publicly shrugged off the findings" of the AOE Report announcing that they were "pleased with the report." The TCLF stated that "the Foundation must have been less than truthful when it filed its application with the Chicago

Plan Commission in January 2018 when the foundation wrote that the proposed development will 'respect the cultural, historical and recreational heritage of the lakeshore parks' and create new opportunities 'while respecting the historic features and content of Jackson Park.'" The Obama Foundation Gets a Reality Check, https://tclf.org/obama-foundation-gets-serious-reality-check (subject to judicial notice).[5]

V. Summary Of The Argument

The Court's November 6, 2019 Ruling should be reversed because it improperly disregarded various key determinations prepared for and issued by two federal entities that specified in great detail a set of adverse effects that would result from locating the proposed OPC in Jackson Park. At virtually every point, the AOE Report revealed the numerous shortfalls in the location, design and implementation of the OPC proper, coupled with the massive destruction to roadways and parklands that the larger project necessarily entails.

[5] The article also noted that it had on January 3, 2018 submitted to Abby Monroe a detailed critique of the proposed OPC as a consulting party in both the Section 106 Review and the National Environmental Policy Act. /https://tclf.org/sites/default/files/atoms/files/TCLF_Jackson%20Park_Section%20106.pdf.

Instead of facing these issues head on, the District Court adopted from its earlier decision a flawed two-part standard of review that makes it impossible in practice for anyone to ever challenge any decision made by the City Council over the disposition of vital public lands to private parties. The basic premise of that judgment is that the only question that matters is whether the City Council authorized the construction of the OPC. Under that standard, any notion of a fiduciary duty as a constraint of public affairs is totally removed, so that the City Council would be limited by no constitutional constraints at all.

Sensing that this extreme position is untenable, the District Court falls back on a vacuous substantive standard, finding that the OPC would pass muster if it "supplies any benefit whatsoever." By that standard, any complex project will always pass constitutional muster because there will always be at least one small group of citizens who can claim some benefit from any project, however ill-conceived. In this instance, that benefit could go to any hiker who wants to walk across Jackson Park without having to stop at a traffic signal. But at the same time under the District Court's standard, the massive inconvenience to the thousands of commuters, drivers, small businesses, users of taxi, limousine services,

and public transportation from the road closures would not matter at all, even though they dwarf the microscopic benefits to pedestrians, which covers a few dozen persons most days, as opposed to the tens of thousands of people who use the current road system. The public trust doctrine is not so toothless, and it does not permit the City to stress tiny benefits while ignoring massive dislocations and other issues. Nor does it allow the City to ignore all relevant costs no matter how great and lasting, which the AOE Report outlines and magnifies. It is therefore an abuse of discretion for the District Court to do the same, while adopting these two fatally flawed standards. The District Court did just that, however, when it refused to address at any time in any fashion, however perfunctory, the huge giveaway of 19.3 acres of public lands; the massive disruption of traffic patterns; and the wholesale destruction of hundreds of old-growth trees and other adverse effects on Jackson Park and the Midway Plaisance.

These issues are, to be sure, part of the first appeal with which this one has been consolidated. But the Rule 60 Motion calls attention to the extensive information contained in the AOE Report that validates these specific concerns, none of which were addressed by the District Court,

which wrongly assumed that none of this mattered. It is an abuse of discretion to refuse to consider this material and previously unavailable information. The November 6, 2019 Order must therefore be reversed.

VI. Argument

A. The Court's Ruling On Plaintiffs' Rule 60 Motion Was An Abuse Of Discretion And Must Be Reversed Because Its Enforcement Is Detrimental To The Public Interest.

The District Court's November 6, 2019 ruling on the Rule 60 Motion is reviewed for an abuse of discretion. *See, e.g.*, *Ervin v. Wilkinson*, 701 F.2d 59, 60-61 (7th Cir. 1983). "In determining whether there has been an abuse of discretion, the Court is entitled to assume that plaintiff's factual allegations are true … where no evidence or response is offered in opposition." *Id.* at 61 (quotations, brackets and citation omitted); *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995) (same).

B. The District Court Abused Its Discretion By Ignoring The Material Determinations Of The AOE Report.

Neither the Defendants' nor the District Court's analysis of Plaintiffs' Rule 60(b)(2) motion challenge that the AOE Report is new evidence under Rule 60(b)(2) and could not have been presented earlier. Instead, the District Court's analysis solely rejects such evidence because Plaintiffs purportedly failed to show that "the draft report, as newly

discovered evidence, constitutes 'material' evidence that 'would probably produce a new result' if considered by this Court.'" [A.329, Opinion at 3] In so holding, the District Court claimed that the AOE Report should have little or no weight:

> According to the Federal Highway Administration, the report serves as only one step in the broader Section 106 process, which culminates in a consultation between a variety of federal, city, and state offices to "avoid, minimize or mitigate" any adverse effects. *Id*. at 2. As such, this Court cannot find that an unfinished review of the OPC's potential effects on *historic properties* shows that the *public* will receive no public benefit whatsoever from the OPC. Nor can the draft report alter the longstanding legal precedent regarding museums' role in serving the public interest. Thus, it will not produce a new result, even under the public trust doctrine's heightened levels of scrutiny.

[A. 330-31, Opinion at 3-4]

This was an abuse of discretion. Even the most cursory examination indicates that this characterization short-changes the essential and material features of the AOE Report, which in turn challenged the facts presented by the City and were relied upon by the District Court. The point becomes clear by looking at what are now the two iterations of the AOE Report. The AOE Report is explicit in its condemnation. The Second Report for its part softens, as will become clear, the conclusions of the AOE Report without offering any explanation why either new facts

or new standards should drive a retreat from its original conclusions. The bracketed material in italics show where modifications have been made in the Second Report.

First, with respect to the OPC itself, the AOE Report provides:

> The OPC will transform the cultural landscape within the project footprint [*and affect some contributing features beyond the footprint*.] The project site overlays part of the western park perimeter of the historic property. The proposed design replaces contributing landscape characteristics, which include spatial organization, topography, vegetation, and circulation, with new features. While location of proposed partially underground buildings and development of green roofs on three of the buildings reduces the visibility of new buildings within the landscape and provides the appearance of green space within the footprint of the project, its implementation will alter the character of the historic landscape. In particular, [*the addition of the museum building and other buildings will alter*] the historic design principles of the prominence of landscape scenery, unified composition, and orchestration of use will be changed within the historic open space of the project footprint by the addition of the Museum Building and other buildings. This is not consistent with the SOI standards that state: "When alterations to a cultural landscape are needed to assure its continued use, it is most important that such alterations do not radically change, obscure, or destroy character-defining spatial organization and land patterns or features and materials."

[A.317, AOE Report at 30; A.377, Second Report at 51]

Second, the AOE Report states with respect to nearby lands to the south of the OPC:

> With the exception of the English Comfort Station building (Exhibit 3b-16), the remainder of the contributing historic features south of the Perennial Garden/Women's Garden to 62nd Street will be removed or altered to accommodate the elements associated with the OPC. The western perimeter exhibits integrity to the period of significance and demonstrates continuity in the larger patterns of spatial organization, land use, views, circulation, and tree massing.[*As noted in the 1895 General Plan, the western perimeter and Museum of Science and Industry grounds were designed along formal, architectural lines as a park edge that interfaces with the adjacent residential areas and contrasts with more scenic areas of the lakeshore, fields and lagoons. The formal areas of the park were to be lighted after dark and always kept open in contrast to more rural areas. Portions of the OPC campus internally demonstrate this design directive; however, the overall development plan deviates from contributing spatial organization related to the full park perimeter and adjacent areas.*] The area designed and designated by Olmsted as an outdoor place for exercise [he used the term "gymnasia"] retains the designed composition and general form of two open fields surrounded by canopy trees that are joined in the middle by the historic layout of the Western Perimeter Playground and English Comfort Station (Exhibit 4b: 1-7). Olmsted's use of "men's gymnasium" and "women's gymnasium" for the north and south fields refers to the original meaning of the word as a general place of exercise, rather than as a room or building for enclosed sports activities. The change to this portion of the historic property is not consistent with SOI standards that stipulate the need to preserve contributing historic features and discourage "placing a new feature where it may cause damage to, or be intrusive in spatial organization and land patterns."

[A.318, AOE Report at 31; A.378, Second Report at 52]

Finally, the AOE Report makes this observation about the road closures:

> Closure of the Midway Plaisance (South Roadway; eastbound) between Stony Island Avenue and Cornell Drive removes a historic circulation route. This roadway segment demonstrates a particularly strong expression of historic landscape character related to the design of the property. The south roadway of the Midway Plaisance forms part of the formal and balanced juncture between the eastern parts of the original South Park (Jackson Park, the Midway Plaisance, and Washington Park). Closure of the roadway section removes an aspect of spatial organization that is fundamental [fundamental changed to "*basic as proposed prior to the World Columbian Exposition in the 1871 plan"*] to the historic design of Jackson Park at its connection to the Midway Plaisance.

[A.316, AOE Report at 29; A.376, Second Report at 50]

In an effort to explain why the AOE Report should be ignored the District Court claims that the requested relief is inappropriate because "the Section 106 process remains far from exceptional; in fact, Plaintiffs' original complaint, filed in May 2018, demonstrates that they knew about the Section 106 process since the filing of this suit. ¶ 48. Nevertheless, Plaintiffs proceeded forward with no mention of any need to wait for the Section 106 process." [A. 328, Opinion at 2] But what the District Court fails to recognize is that the Plaintiffs had not acquired any knowledge of the *findings* of the Report solely because they knew that the *process* was

ongoing.[6] In any event, none of these issues raised actually deals with the materiality of the determinations in the AOE Report.

Further evidence of the materiality of the AOE Report's findings is found in the City's determined effort to avoid the stark implications of the AOE Report. Its sole response in the August 5, 2019 post AOE Report meeting was focused on "mitigating" the damage by tree screening, documentation, and public outreach, an improperly feeble and predetermined focus which is inconsistent with the letter and spirit of the governing statute. This exclusive emphasis on mitigation ignores the first two elements in the statutory mandate that require first, a search for avoidance alternatives, and second, minimization of adverse impacts, an oddity given that the Federal Highway Administration recognizes these elements are required. [A.295] The first of these notions means that the overall analysis has to consider an alteration of the proposed site or project to avoid the major adverse effects posited in the AOE.

[6] Indeed, it is easy to imagine the response of the District Court if the Plaintiffs insisted in May 2018 that no proceedings take place until the AOE report was finalized. If the Plaintiffs had made any of these motions, either then or now, it is likely that they would have been castigated for demanding that the District Court hold off indefinitely from making any final determination under the public trust doctrine until all related proceedings were concluded.

Minimization requires consideration of changes in the layout or design of the OPC and its supporting buildings so as to make them more consistent with the general tenor of the site. Here, for example, avoidance and minimization measures could include relocation to a new site, moving the OPC further south away from the Museum of Science and Industry and lowering its height from 235 feet to less than the 70+ feet, which is the height of the Museum of Science and Industry, and leaving existing roadways in place albeit with traffic calming and pedestrian access improvements. Yet strikingly, since the public meeting of August 5, 2019, until January 16, 2020, the City did not make one public statement as to how it will address these adverse impacts.

As should be evident from the changes identified above, in its January 16, 2020 Second Report, the City provided a more sanitized version of the AOE Report, which includes new propaganda and other linguistic gimmickry to diminish or otherwise water down earlier language (but nonetheless is forced to repeat its earlier conclusion, namely the serious and numerous adverse effects on Jackson Park, the Midway Plaisance and other nearby areas). For example, the City will

attempt to suggest that the adverse effects are not significant because while:

> [the] proposed undertaking will have an ***adverse effect*** to the Jackson Park Historic Landscape District and Midway Plaisance because it will alter, directly and indirectly, characteristics of the historic property that qualify it for inclusion in the National Register, the City provides that the Cultural Resources Unit of IDOT has reviewed the continued NRHP eligibility of the historic district in light of the determination and concluded that the proposed changes will not sufficiently diminish or remove the overall integrity of the historic district in such a way that it would no longer qualify for NRHP listing.

[A.366, Second Report at 40 (emphasis in original)]

However, this new statement in the Second Report is based solely on the referenced IDOT memo of September 9, 2019 from Elizabeth Roman to Brad Koldehoff (quoted above for his suggestion that the planting of new trees and screens is sufficient to mitigate address adverse effects of a massive tree-cutting), and is clearly included to soften the conclusion of the AOE Report by claiming that a person in IDOT has concluded that the adverse effects are not enough to throw Jackson Park off the National Register.[7] This self-serving conclusion is undercut by the

[7] In any event, it is important to note that the mandates of the National Historic Preservation Act, Section 4(f) and NEPA are *not limited* to cases where the adverse effect is so extreme that the property loses its eligibility for the National Register.

simple observation that a key federal agency familiar with such issues (the Advisory Council for Historic Preservation) did not endorse any such conclusion, but moved sharply in the opposite direct by making a host of highly critical and concerning comments to the contrary. [A.334-336] It is therefore helpful to unpack the IDOT memo to expose the weaknesses of its "analysis." [*Id.*]

The IDOT "analysis" is largely conclusory in nature. It contains no inventory of the changes, and does not speak of their effects, either alone or in combination, even as it confirms, as it must, the existence of severe adverse effects. For example, the memo affirms that "the entirety of the structures, buildings, site furnishings, objects, circulation (roads and paths), and natural features (topography, vegetation, and water features) within Jackson Park and Midway Plaisance contribut[es]to its cultural landscape." [A.404] And further, the memo admits that "*character-defining elements* will be altered by the undertaking, with roadway and path improvements, and foreseeable construction of the OPC itself." Yet, the memo sets forth in conclusory fashion that such "effect is limited to specific portions of the historic district's character defining elements and does not sufficiently diminish or remove its overall integrity in such a

way that it would no longer be eligible for NRHP listing." [A.405] This unsupported conclusion is not only meaningless (*see* note 6, *supra*), but is also contradicted by the numerous specific findings in the report itself that the cultural landscape of the entire park is adversely and seriously affected [A.367-369, Second Report at 41-43] as well as the AOE Report itself.

One additional point that the Second Report reveals is that the City has not, and refuses to properly investigate and communicate the issues and costs of this predetermined and improperly delegated project. The Second Report reveals a new and heretofore hidden adverse effect, namely a serious adverse effect upon the Chicago Park Boulevard System. "The proposed undertaking will have an adverse effect to the CPBS Historic District because it will alter, directly and indirectly, characteristics of one portion of the district that qualify it for inclusion in the National Register." [A.382, Second Report at 56] This area was not unknown before the issuance of the AOE Report, but was discussed and identified as being impacted by this adverse effect only at this time. This is evidence of a failure of diligence at a minimum. As the Rule 60 Motion reflects, the new evidence not only establishes the magnitude of the

fiduciaries' failures to properly investigate the land transfer, and the lack of benefits of such transfer, but fully undermines the evidence that the City advanced.

C. A Judgment Must Be Reopened When New And Material Evidence Undermines The Decision Below On The Facts Or Theory On Which The Decision Was Based.

Caselaw, sound public policy, and good old-fashioned common sense all favor Rule 60(b)(2) relief when new evidence refutes the theory or facts upon which the judgment at issue was based. The substantive issues that are covered by these principles range all over the legal landscape, but the principle of justice embodied in Rule 60(b)(2) cuts across all substantive areas of law. The same principles that govern changes in corporate government, an inaccurate description of an organization's mission and purpose, or a change in tax status all deal with just one recurrent question: Given the new information that could not have been obtained earlier, should the court tolerate the certain injustice that comes from ignoring relevant evidence or should it reopen the case so that a full and fair decision of the case on the merits is possible? Rule 60(b)(2) resolves that conflict with this cautious but vital exception to the principle of finality.

So, for example, a Rule 60(b)(2) motion was granted when a transcript of a National Day of Prayer meeting held in a village hall became available after a court order had been issued authorizing the meeting under the theory that there was a limitation of prayers on behalf of the leaders and communities. The district court was presented with the transcript which it found established that the meeting included non-civic activities of an overtly religious nature. Based on that information, the district court granted the defendants' motion (in part) vacating its prior ruling under the Establishment Clause, previously in favor of the plaintiffs. *DeBoer, et al. v. Village of Oak Park,* 86 F. Supp. 2d 804, 808 (N.D. Ill. 1999), *aff'd in part, rev'd in part on the merits*, 267 F.3d 558, 564 (7th Cir. 2001).

Adopting a similar analysis, a district court granted a Rule 60(b)(2) motion where a corporation's receipt of a letter advising it that the California Franchise Tax Board issued it a conditional revival of its corporate status constituted newly discovered evidence warranting relief from the final judgment which dismissed the corporation's lawsuit due to the suspension of the corporation's corporate status. It was irrelevant that the corporation began the process of reviving its status before the

court entered the order dismissing the case. *Amesco Exports, Inc. v. Associated Aircraft Mfg. & Sales, Inc.*, 87 F. Supp. 2d 1013, 1015 (C.D. Cal. 1997). *See also, e.g. Serio v. Badger Mut. Ins. Co.*, 266 F.2d 418 (5th Cir. 1959) (vacating judgment based upon lack of proper records when those records were finally located months after judgment was entered).

The AOE Report's findings go to the heart of the ruling and determinations of the District Court's summary judgment decision, contesting the information adopted and relied upon for its analysis. The AOE Report also provides the type of detailed information that a fiduciary must actively acquire and investigate to discharge its duties with respect to the disposition of any public trust property. The District Court's effort to suggest that the "draft report fails to alter the Court's interpretation of the Museum Act's plain language" [A.330, Order at 4] is wholly misplaced. The District Court did not even discuss a single such determination, ignoring them in predetermined fashion despite their largely wholesale contradiction of the City's statement of facts upon which the District Court's summary judgment opinion relies. The District Court ignored the new evidence that reflected credible and material contradictions, requiring at a minimum, that the summary

judgment be vacated and further proceedings be permitted to consider and evaluate the new evidence in context. Applying those principles here, the AOE Report made it clear, like the transcript that revealed the non-civic content of meetings at issue in *DeBoer,* that the factual underpinnings of the Court's opinion regarding uses of Jackson Park and the "benefits" cited and relied upon by the District Court associated with the OPC were at best disputed and at worst blatantly false. It was an abuse of discretion to ignore this new, material evidence and deny the motion to vacate.

D. The District Court's Decision On Plaintiffs' Rule 60 Motion Must Be Reversed Because The District Court Misread And Misinterpreted All Relevant Precedents To Justify Ignoring The AOE Report.

1. The District Court's reading of *Paepcke* does nothing to avoid the implications of the AOE Report.

The District Court's opinion doubles down and even expands upon its misreading of Illinois law in its summary judgment ruling to justify avoidance of the AOE Report. "An abuse of discretion occurs when a court applies the wrong legal standard or considers inappropriate factors in reaching a conclusion of law." *Gramercy Mills, Inc. v. Wolens,* 63 F.3d 569, 573 (7th Cir. 1995) (citation omitted).

The District Court did so here as it misstated the holding and import of the 1970 decision of the Illinois Supreme Court in *Paepcke v. Public Bldg. Comm'n of Chicago*, 263 N.E.2d 11, 19 (Ill. 1970), by reading that decision as supporting the view that "courts facing public trust claims over never-submerged, statutorily designated parkland must ask only whether sufficient legislative intent exists for a given land reallocation or diversion." [A.329, Opinion at 3] In fact, *Paepcke* stands for no such broad proposition.

Indeed, as acknowledged by the District Court, *Paepcke* held that objectors to a public project were entitled to standing on the ground that they owned undivided partial interests in public property. There is absolutely no point in granting standing in one breath and then insisting in the next it imposes no real limitations on what the City may do. In a passage that the District Court nowhere quotes, *Paepcke* states: "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." *Id*. at 73. It is utterly pointless to insist that the public trust doctrine has "any meaning or vitality" and then to insist that the legislative judgment is

wholly unreviewable for any breach of the well-established fiduciary duties of good faith and full disclosure. *Paepcke* did not give the City a blank check to impose whatever result it wanted without regard to collateral consequences. It allowed a small tract of public lands to be put to use for a school, without any transfer of title to any private party.

To be sure, Jackson Park is a park that need not, as *Paepcke* noted, be preserved in its "pristine purity" (*id.* at 21). But that modest statement hardly justifies any decision to utterly transform a world-class monument into a sprawling complex controlled by a private entity that is utterly inconsistent with the design and ambition of Jackson Park. *Paepcke* is far more modest. Its holding was that the public trust doctrine was not offended by change in use of part of Washington Park from a generic park to a needed public school; without any transfer of public property to any private party, this change did not violate the public trust doctrine — a manifestly higher standard.

Indeed, just those words "meaning and vitality" were carried over from *Paepcke*, which did not involve any submerged lands, to *Scott v. Chicago Park Dist.*, 360 N.E. 2d 773, 781 (Ill. 1976), which did. There those identical words were invoked to strike down a purported

conveyance of some 196.4 acres of submerged lands in Lake Michigan to the United States Steel Corporation. There is no question that the transfer of submerged lands can tip the balance in cases where public properties are conveyed to private parties, but conversely, it is quite clear that the use of these identical words in connection with non-submerged lands does not result in the toothless standard of review that the District Court applied. The common point between *Scott* and the instant case is that they both involve transfers of public land to private hands, whose massive physical destruction is in no way sheltered by the far more limited decision in *Paepcke,* which sanctioned a change in use that involved no transfer of public lands to private parties.

As such, the failure to open the record to evaluate the AOE Report, and thereby allow a meaningful review of the City's efforts to obtain, evaluate and investigate such information misreads *Paepcke* and public trust law embodied within it (as set forth in Plaintiffs' opening brief in the companion appeal).

2. The District Court also misreads and misapplies other Illinois cases in regards to public and private benefits in an effort to blunt the effect of the AOE Report.

The District Court's Rule 60 decision separately attempts to support the denial based on its consideration of two questions: "(1) whether the OPC primarily benefits a private entity, with no corresponding public benefit; and (2) whether the OPC's primary purpose benefits the public, rather than private interests." [A.330, Order at 4] It then answered both questions in favor of the City, based "upon well-established case law concerning public stadiums and the longstanding importance of museums to the general public." *Id.* In support of this conclusion, the Court cited three separate decisions. *Friends of the Parks v. Chicago Park Dist.*, 786 N.E.2d 161 (Ill. 2003); *Furlong v. South Park Comm'rs*, 151 N.E. 510, 511 (Ill. 1926); and *Fairbank v. Stratton*, 152 N.E.2d 569, 575 (Ill. 1958). *Id.* Once again, the court has abused its discretion in attempting to justify its failure to ignore the material new evidence through these cases, as none of these decisions come close to supporting the sweeping unilateral power that the District Court claims was vested in the City.

Plaintiffs have already explained how the *Friends of the Parks* decision was clearly distinguishable from the instant case. [Appeal Doc. No. 23 at 47-49] In that case, the contract between the Park District and the Chicago Bears under the Illinois Sports Facilities Act did not require the transfer of any new public land to private parties, and the business arrangements between the two parties over the use of Soldier Field left the City with the power to control its use for other purposes, including entering into a transaction to allow soccer to be played at Soldier Field when not in use by the Chicago Bears. [*Id*. at 48]

The two other decisions are, if anything, even further removed from the current situation. In *Furlong*, the plaintiffs challenged the decision of the Park District to engage in "reconstruction of the Fine Arts Building" on the one hand and the "restoration" of its exterior on the other. The former task was to allow for the internal addition of a "convention hall, school of industrial arts, or women's memorial building." The plaintiffs also sought to prevent the financing of these activities by a bond offering.

All of these activities were confined within a single building, while here with the OPC, they are spread into several buildings, including a

large athletic center that does not meet the definition of a museum. *See*, *e.g.*, 765 ILCS 1033/10 (definition of a museum "includes, but is not limited to, historical societies, historic sites, landmarks, parks, archives, monuments, botanical gardens, arboreta, zoos, nature centers, planetaria, aquaria, libraries, technology centers, and art, history, science, and natural history museums.") By no reasonable extension does an athletic facility belong on that list, because it is not, as the statute provides (*id.*, § 10 (ii)) "operated primarily for educational, scientific, historic preservation, cultural, or aesthetic purposes." More importantly, nothing whatever in *Furlong* involved the transfer of any park property to private hands, let alone required the massive destruction of major park lands and public roads to achieve that result. The fact that a museum is somehow involved in both transactions does not make the two cases identical. Indeed, at no point in *Furlong* was the public trust doctrine raised, because the case presented no opportunity whatsoever to find a breach of fiduciary duty.

A similar analysis applies to *Fairbank*, where the issue before the Court was whether the Metropolitan Fair and Exposition Authority, a public body, could build in Burnham Park an exposition and auditorium

for public use. There were two objections to the proposal. The first was that a portion of the land used for the project was submerged, and the second was whether the project could expend public funds when the land was acquired under a lease from the Chicago Park District. There was a further objection that even though the Park District could reclaim the land for itself, there was "no statutory authority for the Park District to provide in a lease that the land be reclaimed at the expense of the Authority." 152 N.E.2d at 574. The case solely dealt with an issue of statutory interpretation on which the Court rightly concluded that, taken as a whole, "nothing appears to indicate a legislative intent that submerged land become a part of the Park District only if it is reclaimed by the district itself rather than through a lessee." *Id.*

Even though both *Fairbank* and the instant case involve public lands, the two are wholly distinguishable. The only transfers involved in *Fairbank* were between two public entities, so there was no possible diversion of public resources to private parties, including massive destruction of a historical landmark at independent public expense. There was no possibility of a breach of the public trust, so again there was no reason to raise that issue. This utterly innocent transaction in

that case provides no support for a conclusion that the public interest dominates the private in the instant case.

Neither *Furlong* nor *Fairbank* then provide the slightest support for any comparison of public and private benefits. Hence there was no reason to accept the District Court's far more extreme proposition that so long as there is any public benefit whatsoever, the size of the private benefit does not matter. That test is so lax that any project receiving statutory authorization would generate as a matter of course at least some benefit to some portion of the public, *e.g.* supporters of the OPC. Hence, this supposed independent substantive test is in practice a de facto confirmation of the District Court's fundamental claim that all that matters in these cases is the simple fact of statutory authorization. But the public trust doctrine requires more. It demands that the District Court inquire as to *both* the value of these benefits and the public costs incurred in order to obtain the posited benefits. The District Court simply did not conduct this inquiry.

In sum, District Court's statement that the OPC would provide "increased access" to Jackson Park and the Museum of Science and Industry also ignored the massive road closures and clearcutting of

mature and healthy trees would be required to make good the plan. As explained above, the District Court failed to evaluate or consider the very points that were detailed in the AOE Report without legal precedent or justification.

E. The Court Erred In Denying Plaintiffs' Rule 60 Motion Because Continued Application Of The District Court's Summary Judgment Decision Involves An Inequitable And Grievous Wrong.

In an effort to bolster its summary judgment submissions, the City put forward what are manifest changes to Jackson Park, and used these supposed "facts" to demonstrate the supposed "benefits" and "enhancements" to Jackson Park from the OPC. There is no doubt that these physical changes alter Jackson Park. But the District Court wholly abused its discretion when it continued to insist that all these changes should be described as "benefits" and "enhancements" without so much as even looking at the federal agencies' current findings, which expressly and unequivocally conclude that Jackson Park and the Midway Plaisance will be "adversely effected" by these physical changes. Adverse effects are the precise opposite of an "enhancement or benefit." The District Court abused its discretion in rejecting Plaintiffs' submission under Rule 60(b)(5), finding that it was equitable to maintain the judgment since the

Court determined that the AOE Report did not alter or impact the public trust analysis. [A.331, Order at 5]

The District Court's November 6 Order embodies a wooden response, one that fails to consider the information in the context of the other "facts" advanced. By its blinkered view of the evidence and failing to vacate the summary judgment ruling in light of this evidence, the District Court ensures the occurrence of a grievous wrong even though it will necessarily eviscerate the public trust protection that applies to a unique and critically important and irreplaceable asset for the City.

Courts recognize the propriety of granting a Rule 60(b)(5) motion when new circumstances will result in a "grievous wrong." Rule 60(b)(5) provides that a court may relieve a party from a judgment where it is no longer equitable that the judgment should have prospective application, even where a judgment has been entered and not completely satisfied. *See Horne v. Flores,* 557 U.S. 433, 454 (2009). Courts should exercise flexibility in their decisions and should consider the goals of the original judgment, the factors that are important to the particular litigation – including the public interest where the litigation involves public rights –

and the nature of the change in circumstances. *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 384 (1992).

This is done, for example, where a federal agency provides an interpretation of a matter subsequent to the issuance of a judgment. *See City of Duluth v. Fond du Lac Band of Lake Superior Chippewa,* 702 F.3d 1147 (8th Cir. 2013). In the *Duluth* case, the defendant-band of a Native American tribe filed a post-judgment motion pursuant to Rule 60(b)(5) and 60(b)(6) asserting that a change in interpretation from a federal agency established by Congress (the National Indian Gaming Commission ("NIGC")) supported relief from an earlier consent decree providing significant payments to the City. Many years after the consent decree was approved by the NIGC, the NIGC determined that the consent decree was illegal because of the "sole proprietary" rule set forth in the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701. The trial court granted the motion, which was affirmed by the Eighth Circuit.

> We agree with the district court that a binding adjudication by a federal agency, which has been tasked with interpreting and enforcing a statute enacted by Congress, represents a change in law for the purposes of Rule 60(b). The City cites no cases holding to the contrary. Indian gaming is an area subject to intense federal oversight, and the City does not explain how the government's regulatory interest would be protected if the Duluth casino were somehow exempted

> from the NIGC's most recent interpretation of the sole proprietary interest rule. Even if *Rufo's [v. Inmates of Suffolk County*, 502 U.S. 367 (1992),] reference to "statutory or decisional law" were read to be so narrow as to exclude an agency decision, the Court's quoted sentence applied only to cases where the change in law "makes legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 388, 112 S. Ct. 748. The case before our court deals with an opposite scenario, for here the change made illegal what was previously legal.
>
> In the situation here, the NIGC's change in the law governing Indian gaming made illegal what the earlier consent decree was designed to enforce. In its discussion of legal change, the Court categorically stated in *Rufo* that a "consent decree must ... be modified if ... one or more of the obligations placed upon the parties has become impermissible under federal law."

City of Duluth, 702 F.3d at 1153.

The District Court ignored this decision completely, even though there is only one possible distinction between the two cases, namely that in *City of Duluth*, the initial agency decision was final and conclusive, while in this case the decision of the federal agencies was subject to further comment and review. But that distinction hardly justifies ignoring the agency decision in the instant case. Instead it only requires that the relief requested be proportionate to the state of the proceedings. In *City of Duluth*, there was an authoritative and final judgment that the consent decree was illegal, at which point the court upheld the issuance

of a permanent injunction that barred the collection of the taxes.

In this case, the AOE Report is not a final judgment, but it is far more than a casual or off-handed expression of views. It is a detailed report that has legal consequences under federal law, and is certainly entitled to some deference in legal proceedings. *See Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). Moreover, not only are the ongoing federal environmental and historic preservation reviews admittedly recognized as directly applicable to this project, the entire statutory scheme represents a Congressionally created and approved process that provides more information so that the fiduciaries and stakeholders can consider impacts and facts that a proponent of a project (without such obligations) would ignore. Accordingly, the correct response to this novel question is, at a minimum, to reopen the case so that the effect of the AOE Report can be analyzed in full before the District Court.

Moreover, it should be clear that under both the federal statute and the city ordinance, the examination of any major projects such as this one should be searching and thorough, given the strong policy in both laws to preserve the current character of such a critical site (which is indisputably public trust property). *See NPCA v. Semonite,* 916 F.3d 1075

(D.C. Cir. 2019) (discussing scope of judicial review). Given the level of expertise, the regulations issued pursuant to the NHPA are entitled to substantial deference. And it is hard to see how the AOE Report prepared pursuant to these regulations should receive any less respect. *See McMillan Park Committee v. Nat'l Capital Planning Comm'n,* 968 F.2d 1283, 1288 (D.C. Cir. 1992) ("we see no basis for extending the Advisory Council's NHPA regulations any less deference than is traditionally afforded the [National Environmental Policy Act] regulations of the Council on Environmental Quality.").

Alternatively, the Plaintiffs argue that there are independent justifiable reasons for opening the judgment under Rule 60(b)(6). The Supreme Court has said that such relief is extraordinary, including scenarios of manifest injustice or where there has been an intervening development of the law. *See, e.g., Klapprott v. United States,* 335 U.S. 601, 614–15 (1949); *Ackermann v. United States,* 340 U.S. 193, 199 (1950) (discussing the "extraordinary circumstances" in *Klapprott).* That is precisely the situation here, and the failure to address those circumstances was an abuse of discretion.

An example of a proper application of the standards under Rule 60(b)(6) is seen in *Good Luck Nursing Home Inc. v. Harris*, 636 F.2d 572. 577-78 (D.C. Cir. 1980). In that case, the district court made an award of certain legal and accounting fees. The government then brought a Rule 60(b)(6) motion to provide information that was previously undisclosed to the court that affected the judgment specifically related to different litigation which had been pending. The district court determined that the new information showed that its initial decision was based on a misconception of the facts, a decision affirmed by the D.C. Circuit Court. *Id*.

A similar analysis is appropriate here. The AOE Report more than establishes that the rationale advanced by the City of "benefits and enhancements" was based on a fundamental misconception of the facts, one very different from that presented in the City's statement of facts. There is a fundamental disconnect between purported facts claiming that the public trust property will be enhanced, when the evidence is that the entire public trust property (including the specific area of construction) will be destroyed or severely damaged.

The extraordinary circumstances here are further illuminated by the City's aggressive position about the status of the ongoing federal environmental and historic preservation review. Despite the serious series of adverse effects (which are now even expanded further based on the Second Report), the City makes no effort to hide the fact that it sole concern is proceeding forward to satisfy the desires of the private party to which the City (improperly) delegated its authority. That was the direct message of the City in the wake of the AOE Report at the public meeting that was held and discussed above. Further, the City's position in regards to the scope of the federal review (including but not limited to Section 4(f) or the historic preservation review), where avoidance, minimization and mitigation issues are mandatory topics, reflects the same predetermined intent.

In this regard, the City's methodology is unprecedented. Rather than actually utilizing due care to investigate facts and impacts as a fiduciary is required to do, the City's insists, without any support whatsoever, that it can insulate itself from all review by segmenting and separating the destruction of Jackson Park and its roadways (which are themselves considered parkland and part of Jackson Park) from the

alteration of both Lake Shore Drive and Stony Island Avenue. No sensible reading of the term "project" allows an integrated undertaking to be segmented in this fashion, each of which proceeding independently of the other. Plaintiffs recognize such issues present legal challenges for another day, but they must be mentioned here because these positions contribute to the extraordinary circumstances, and because the City has generated an unstable and unworkable state of affairs relative to the duties that the City (despite its abdication of them) must perform as fiduciaries of public trust property.

VII. Conclusion

For the foregoing reasons, Plaintiffs-Appellants respectfully request reversal of the District Court's November 6, 2019 decision denying the Plaintiffs' Rule 60 motion, and with instructions to vacate the District Court's summary judgment ruling in favor of the Defendants and to conduct further proceedings consistent with such reversal.

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

/s/ Richard Epstein
One of their attorneys

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VIII. Type-Volume Certification

The undersigned counsel hereby certifies that this brief complies with the type-volume limitations of Rules 28.1(e)(2)(A)(i) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure, as enlarged by order of this Court on January 21, 2020 because it contains 11,113 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

IX. Certificate Of Service

I hereby certify that on January 21, 2020, 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 A. Epstein

X. 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 A. Epstein

Appeal Nos. 19-2308 and 19-3333
(Consolidated)

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 FOR APPEAL NO. 19-3333

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ORAL ARGUMENT REQUESTED

Table of Contents for Required Short Appendix

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

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.3.1
Eastern Division

Protect Our Parks, et al.

Plaintiff,

v.

Case No.: 1:18−cv−03424
Honorable John Robert Blakey

Chicago Park District, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, November 6, 2019:

MINUTE entry before the Honorable John Robert Blakey: For the reasons explained in the accompanying order, this Court denies Plaintiffs' motion to vacate this Court's final judgment order and reopen the case under Rule 60(b), pursuant to Rule 62.1. [156]. This case remains closed. Mailed notice(gel,)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

ORDER

On June 11, 2019, this Court granted Defendants' motion for summary judgment and denied Plaintiffs' cross-motion for summary judgment, terminating this case. [144] [145]. On August 7, 2019, Plaintiffs Protect Our Parks, Inc. and Maria Valencia filed a motion to vacate this Court's summary judgment order and reopen the case under Rules 60(b)(2), (b)(5), and b(6), based upon a draft report issued by two federal agencies as part of the "Section 106" process, originating from Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108. [156].[1] Because this case remains on appeal, Plaintiffs also request an indicative ruling pursuant to Rule 62.1, so that Plaintiffs may ask the Seventh Circuit to remand jurisdiction to

[1] Plaintiffs' motion challenges only this Court's ruling on Count II of Plaintiff's amended complaint, which alleged a breach of the public trust under Illinois law. [91]; [156-1] at 1–2.

this Court for purposes of deciding the Rule 60 motion. *Id.* Defendants filed a response on 8/15/19. [159].

Rule 62.1(a) provides:

> If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

LAJIM, LLC v. GE, 917 F.3d 933, 948 (7th Cir. 2019) (citing Fed. R. Civ. P. 62.1(a)(3)). This Court denies Plaintiffs' motion.

Rule 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding for a variety of reasons, including newly discovered evidence. As an initial matter, relief under Rule 60(b) serves as "an extraordinary remedy . . . granted only in exceptional circumstances." *Id.* (citing *Davis v. Moroney*, 857 F.3d 748, 751 (7th Cir. 2017)). Here, the Section 106 process remains far from exceptional; in fact, Plaintiffs' original complaint, filed in May 2018, demonstrates that they knew about the Section 106 process since the filing of this suit. [1] ¶ 48. Nevertheless, Plaintiffs proceeded forward with no mention of any need to wait for the Section 106 process. For example, on August 20, 2018, Plaintiffs' counsel moved to lift this Court's stay on MIDP and Defendants' deadline to answer the complaint, arguing:

> The prejudice is that [Defendants are] delaying our case by a year when we filed it in May and they're looking to get some type of [ruling] even

> addressing the complaint on the merits maybe in 2019. That's prejudice in and of itself . . . justice delayed is justice denied, your Honor.

[27] at 9. Consistent with the interests of justice, this case has been resolved without undue delay. For these reasons, this Court finds disingenuous Plaintiffs' assertion that the draft report constitutes "some of the most important and relevant factual evidence in this case." [156-1] at 2.

Moreover, Rule 60(b)(2), upon which Plaintiffs primarily rely in their motion, permits vacatur based upon "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial." *Anderson v. Catholic Bishop of Chi.*, 759 F.3d 645, 653 (7th Cir. 2014) (citing Fed. R. Civ. P. 60(b)(2)). And to prevail under Rule 60(b)(2), Plaintiffs must show that the draft report, as newly discovered evidence, constitutes "material" evidence that "would probably produce a new result" if considered by this Court. *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 732 (7th Cir. 1999); *Harris v. Owens-Corning Fiberglas Corp.*, 102 F.3d 1429, 1434, n.3 (7th Cir. 1996). This Court states, with certainty, that it would not.

In its summary judgment decision, this Court delineated the three standards under which Illinois courts must apply the public trust doctrine, based upon the property's relationship to navigable waterways. [145] at 23. The OPC site sits upon never-submerged land. *Id.* at 21–22. As such, courts facing public trust claims over never-submerged, statutorily designated parkland must ask only whether sufficient legislative intent exists for a given land reallocation or diversion. *Id.* at 24 (citing *Paepcke v. Public Bldg. Com.*, 263 N.E.2d 11, 19 (Ill. 1970)). This Court found that

sufficient legislative intent exists based upon the Park District Aquarium and Museum Act, 70 ILCS 1290/1. [145] at 24–30. The draft report fails to alter this Court's interpretation of the Museum Act's plain language. Therefore, it will not produce a new result if this case were reopened.

In the alternative, this Court found that even under the heightened levels of scrutiny applied to formerly submerged and presently submerged land, the OPC still does not violate the public trust. *Id.* at 30–35. In arriving at this conclusion, this Court considered whether: (1) the OPC primarily benefits a private entity, with no corresponding public benefit; and (2) whether the OPC's primary purpose benefits the public, rather than private interests. *Id.* This Court answered both questions affirmatively, based upon well-established case law concerning public stadiums and the longstanding importance of museums to the general public. *Id.* (citing *Friends of the Parks v. Chi. Park Dist*, 786 N.E.2d 161; *Furlong v. South Park Comm'rs*, 151 N.E. 510, 511 (Ill. 1926); and *Fairbanks v. Stratton*, 152 N.E.2d, 569, 575 (Ill. 1958)).

In its own words, the draft report "documents the assessments of effect to National Register of Historic Places (NRHP) listed and eligible historic properties associated with" the proposed OPC undertakings. [156-3], § 1.0. According to the Federal Highway Administration, the report serves as only one step in the broader Section 106 process, which culminates in a consultation between a variety of federal, city, and state offices to "avoid, minimize or mitigate" any adverse effects. *Id.* at 2. As such, this Court cannot find that an unfinished review of the OPC's potential effects on *historic properties* shows that the *public* will receive no public benefit

whatsoever from the OPC. Nor can the draft report alter the longstanding legal precedence regarding museums' role in serving the public interest. Thus, it will not produce a new result, even under the public trust doctrine's heightened levels of scrutiny.

Plaintiffs also move for relief under Rules 60(b)(5)—permitting relief from a final judgment when applying the judgment is no longer equitable—and Rule 60(b)(6)—permitting relief for any other justifiable reason. *New Century Mortg. Corp. v. Roebuck*, No. 01 C 3591, 2003 WL 21501780, at *4–5 (N.D. Ill. June 25, 2003) (citing Fed. R. Civ. P. 60(b)(5)–(6)). Because this Court finds that the draft report fails to alter or otherwise impact its public trust analysis, applying this Court's summary judgment decision remains equitable. Plaintiffs have shown no other reason to justify relief in this case.

In short, this Court will not reopen a claim, decided under Illinois law and with deference to the Illinois legislature, to evaluate a draft federal report, which Plaintiffs: (1) concede is part of a still-ongoing federal review process, [156-1] at 3–4; and (2) have known about since the filing of this suit in May 2018, [91] ¶ 48.

Therefore, this Court denies Plaintiffs' motion to vacate its final judgment order under Rule 60(b), pursuant to Rule 62.1(a)(3), [156]. This case remains closed.

Dated: November 6, 2019

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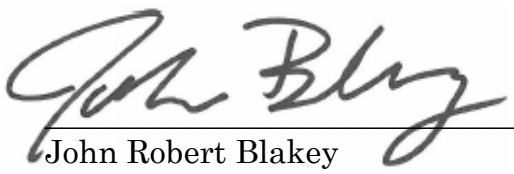

John Robert Blakey
United States District Judge