

**STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
JO DAVIESS COUNTY**

WENDY CLARK)	
Plaintiff,)	NO: 2022-MR-3
v.)	
)	
CITY OF GALENA, an Illinois municipal Corporation, JAMES BARANSKI, TRUE NORTH QUALITY HOMES, LCC, an Illinois limited liability company, BIEN VIE, LLC, an Illinois limited liability company.)	
Defendants.)	

ORDER – BENCH TRIAL – AMENDED COMPLAINT – COUNTS 1-10

THIS MATTER CAME BEFORE THIS COURT on October 30, 2023 for a bench trial on counts 1 through 10 of the Amended Complaint for Declaratory and Injunctive Relief against the City of Galena, True North Quality Homes, LLC and Bien Vie, LLC on February 14, 2023. Mr. Burke, counsel for Plaintiff, Mr. Cox, Mr. Allen and Mr. Nack, counsel for Defendant, City of Galena, and Mr. Ferrara, counsel for Defendants, True North and Bien Vie, were all present, the Court having heard the evidence, oral arguments and reviewed the post-trial briefs filed by each party on November 27, 2023, and being fully advised in the premises, and after due consideration, the **COURT FINDS AS FOLLOWS:**

The Plaintiff filed 10 counts in the Amended Complaint against Galena. Those 10 counts pled the following causes of action:

- Count I – Declaratory Relief (Substantive due process violations – Galena): alleging, *inter alia*, that Galena’s approval of the PUD application violated Clark’s substantive due process rights because said decisions were arbitrary and capricious and did not bear any relationship to the health, safety, or welfare of Galena (*Am. Compl.*, ¶¶ 131-141);
- Count II – Declaratory Relief (Violations of state statutes and the Illinois Constitution – Galena): alleging, *inter alia*, that, as a non-home rule municipality, Galena’s approval of the PUD Plan was in violation of its own zoning ordinance and the Illinois Constitution, and thus the approvals are invalid as a matter of law (*Am. Compl.*, ¶¶ 142-152);

- Count III – Declaratory Relief (Substantive due process violations – Galena): alleging, *inter alia*, that Galena’s approval of the Rezoning Ordinance pertaining to the PUD Plan on May 23, 2022, violated Clark’s substantive due process rights because the decisions were arbitrary and capricious (*Am. Compl.*, ¶¶ 153-161);
- Count IV – Declaratory Relief (Violations of state statutes and the Illinois Constitution – Galena): alleging, *inter alia*, that, as a non-home rule municipality, Galena’s approval of the Rezoning Ordinance pertaining to the PUD Plan on May 23, 2022 was in violation of its own zoning ordinance and the Illinois Constitution, and, accordingly, the Illinois Constitution, and thus the approval is invalid as a matter of law (*Am. Compl.*, ¶¶ 162-172);
- Count V – Declaratory Relief (Spot Zoning – Galena): alleging, *inter alia*, that Galena’s approval of the PUD Plan constitutes illegal spot zoning and, by approving a Rezoning Ordinance pertaining to the PUD Plan on May 23, 2022, Galena formally committed and allowed for spot zoning (*Am. Compl.*, ¶¶ 173-183);
- Count VI – Declaratory Relief (Contract Zoning – Galena): alleging, *inter alia*, that the annexation agreement and Rezoning Ordinance approved and adopted by Galena with respect to the PUD Plan constitute impermissible contract zoning (*Am. Compl.*, ¶¶ 184-189);
- Count VII – Declaratory Relief (Contract Zoning – Galena): alleging, *inter alia*, that the ordinance amending Galena’s zoning map passed on November 28, 2022, pertaining to the PUD Plan, constitutes impermissible contract zoning (*Am. Compl.*, ¶¶ 190-193);
- Count VIII – Declaratory Relief (Procedural due process violations – Galena): alleging, *inter alia*, that in the process of approving the PUD Plan and related Rezoning Ordinances, Galena conducted a series of public hearings wherein Clark and others were not offered or permitted the right to cross-examine witnesses, a constitutional requirement, necessarily voiding any subsequent approvals of the PUD Application and related rezoning as a matter of law (*Am. Compl.*, ¶¶ 194-202);
- Count IX – Declaratory Relief (Substantive due process violations – Galena): alleging, *inter alia*, that Galena’s approval of the PUD Amendment violated Clark’s substantive due process rights because it was arbitrary, capricious, and did not bear any relationship to the health, safety, or welfare of Galena (*Am. Compl.*, ¶¶ 203-207); and

- Count X – Declaratory Relief (Violations of state statutes and the Illinois Constitution – Galena): alleging, *inter alia*, that, as a non-home rule municipality, Galena’s approval of the PUD Amendment was in violation of its own zoning ordinance and the Illinois Constitution, and, accordingly, the Illinois Constitution, and thus the approvals are invalid as a matter of law (*Am. Compl.*, ¶¶ 208-217).

The parties presented all of the evidence to the Court by agreement and stipulation. The evidence consisted of the following documents:

- Exhibit A – The original application for the planned unit development (“PUD”) that was filed on January 19, 2022 by James M. Baranski on behalf of True North Quality Homes and Bien Vie;
- Exhibit B – The agenda for Galena’s zoning board of appeals (“ZBA”) meeting that was held on February 9, 2022;
- Exhibit C – A memo from Jonathan Miller, the Galena’s Zoning Administrator, that was dated February 1, 2022 and provided to the ZBA members prior to the February 9, 2022 meeting about the application for the PUD that was filed by the Defendants;
- Exhibit D – Section 154.920 of the Galena City Code, which is entitled Zoning Code Amendment and Rezoning;
- Exhibit E – Section 154.301 of the Galena City Code, which is entitled Planned Unit Development District;
- Exhibit F – Section 154.923 of the Galena City Code, which is entitled PUD/TND Rezoning and Plan Review;
- Exhibit G – The minutes from the February 9, 2022 Galena ZBA meeting;
- Exhibit H – The agenda for the February 28, 2022 Galena City Council meeting;
- Exhibit I – The minutes of the February 28, 2022 Galena City Council meeting;
- Exhibit J – The agenda for the April 25, 2022 Galena City Council meeting;
- Exhibit K – The annexation agreement between Galena and True North that was dated May 11, 2022;
- Exhibit L – The agenda for the May 9, 2022 Galena City Council meeting;
- Exhibit M – The agenda for the May 23, 2022 Galena City Council meeting;
- Exhibit N – Galena Ordinance number O.22.11, which was an ordinance annexing 56.17 acres of territory owned by the Defendants into Galena, that was dated May 23, 2022;

- Exhibit O – Galena Ordinance number O.22.12, which was an ordinance amending the zoning map of the City of Galena, that was dated May 23, 2022;
- Exhibit P – The agenda for the May 11, 2022 Galena ZBA meeting;
- Exhibit Q – Section 154.926 of the Galena City Code, which is entitled Appeals;
- Exhibit R – True North’s Approved Preliminary Plan Amendment Request
- Exhibit S – The agenda for the November 9, 2022 Galena ZBA meeting;
- Exhibit T – A memo from Jonathan Miller, Galena’s Zoning Administrator, to the Galena ZBA. The memo was dated October 6, 2022 and was provided to the ZBA members prior to the November 9, 2022 meeting about the preliminary plan amendment request that was filed by the Defendants;
- Exhibit U – The minutes from the November 9, 2022 Galena ZBA meeting;
- Exhibit V – The agenda and minutes for the November 14, 2022 Galena City Council meeting;
- Exhibit W – The agenda and minutes for the November 28, 2022 Galena City Council meeting;
- Exhibit X – Galena Ordinance number O.22.24, which was an ordinance authorizing the execution of the first amendment of the annexation agreement with True North and the amended annexation agreement between Galena and True North that was date December 7, 2022;
- Exhibit Y – Section 10.7 of the Galena comprehensive plan, which is entitled Land Use; and
- Exhibit Z – The Galena zoning map, which is entitled plan area proposed land use map #15.

The Court also reviewed and considered the exhibits attached to the Amended Complaint, many of which were the same documents, as evidence. The parties did not call any witnesses and did not present any evidence outside of the agreed exhibits that were just listed.

This case involves zoning ordinances enacted by a municipality’s legislative body, the Galena City Council, after public hearings were held at that municipality’s ZBA and the City Council. Therefore, it is important to start the Court’s analysis by determining the standard of review and the burden of proof for the issues pled in complaint. This Court will begin that analysis by reviewing the history of Illinois Appellate Court and Illinois Supreme Court opinions

on the standard of review and burden of proof for substantive and procedural due process challenges to zoning ordinances.

The Second District of the Illinois Appellate Court discussed the standard of review and burden of proof in *Rockford Blacktop Constr. Co. v. County of Boone*, 263 Ill. App. 3d 274 (2nd Dist. 1994). The Second District Court held:

“Zoning restrictions are presumed valid, and the party challenging the restriction [*279] has the burden of proving by clear and convincing evidence that the ordinance is unreasonable and arbitrary and bears no substantial relation to public health, safety, morals, or welfare. (Cosmopolitan National Bank v. County of Cook (1984), 103 Ill. 2d 302, 310, 82 Ill. Dec. 649, 469 N.E.2d 183.) “The presumption of validity of an ordinance is overcome when it is shown that there is no reasonable basis requiring the restriction imposed and the gain to the public is small as compared to the hardship imposed on the property owner.” (County of Cook v. Priester (1976), 62 Ill. 2d 357, 368, 342 N.E.2d 41.) The County’s careful, [*11] comprehensive planning of its development bolsters the validity of the zoning restriction. (Racich v. County of Boone (1993), 254 Ill. App. 3d 311, 316, 192 Ill. Dec. 940, 625 N.E.2d 1095.) Where the reasonableness of the restriction is “fairly debatable,” the court may not interfere with the legislative judgment. Harvard State Bank v. County of McHenry (1993), 251 Ill. App. 3d 84, 95, 190 Ill. Dec. 99, 620 N.E.2d 1360.”** (Bold and underline emphasis added) *Id.* at 278-279.

“To determine whether the zoning restriction as applied to a specific property relates to the public health, safety, and welfare, courts consider the following [***13] factors: (1) the existing use and zoning of nearby property; (2) the extent to which property values are [*280] diminished by the restriction; (3) the extent to which the diminution of the plaintiff’s property value promotes the health, safety, and welfare of the public; (4) the relative gain to the public versus the hardship imposed on the plaintiff; (5) the suitability of the property as restricted; (6) the length of the time the property has remained vacant as zoned (*La Salle National Bank v. County of Cook* (1957), 12 Ill. 2d 40, 46-47, 145 N.E.2d 65); (7) the community need for the proposed use; and (8) the care with which the community has undertaken its development plan (*Sinclair Pipe Line Co. v. Village of Richton Park* (1960), 19 Ill. 2d 370, 378, 167 N.E.2d

406). Although no one factor is controlling, the first factor is of paramount importance. (*Hamann v. Sumichrast* (1991), 222 Ill. app. 3d 962, 976, 165 Ill. Dec. 413, 584 N.E.2d 847.) The validity of the ordinance in question will be determined in light of the circumstances of the individual [***14] situation. *Lambrecht v. County of Will* (1991), 217 Ill. App. 3d 591, 594, 160 Ill. Dec. 464, 577 N.E.2d 789.” *Id.* at 279-280.

The Third District of the Illinois Appellate Court also discussed the standard of review for a substantive due process challenge to a zoning ordinance in *Whipple v. Vill. of N. Utica*, 2017 IL App (3d) 150547. The Third District Court held:

“To state a cause of action for a violation of substantive due process, a plaintiff must allege that the deprivation of his or her property interest is arbitrary, unreasonable, or capricious, and that the legislation at issue bears no rational relationship to the public welfare. *Safanda v. Zoning Board of Appeals*, 203 Ill. App. 3d 687, 695, 561 N.E.2d 412, 149 Ill. Dec. 134 (1990). **When a legislative zoning ordinance is challenged based on substantive due process, we examine the ordinance for arbitrariness under the six-factor test set forth in *La Salle National Bank. Our Savior Evangelical Lutheran Church v. Saville*, 397 Ill. App. 3d 1003, 1027, 922 N.E.2d 1143, 337 Ill. Dec. 566 (2009).** Those factors include (1) the existing uses and zoning of nearby property, (2) the extent to which property values are diminished by the particular zoning restrictions, (3) the extent to which the destruction of the plaintiff’s property values promotes the health, safety, morals, or general welfare of the public, (4) the relative gain to the public as compared to the hardship imposed on the individual property owner, (5) the suitability of the subject property [***12] for the zoned purposes, and (6) the length of time the property has been vacant as zoned. *La Salle National Bank*, 12 Ill. 2d at 46-47. **Our supreme court identified additional factors to consider in *Sinclair Pipe Line*, namely (1) whether a comprehensive zoning plan for land use and development exists, and whether the ordinance is in harmony with it, and (2) whether the community needs the proposed use. *Sinclair Pipe Line*, 19 Ill. 2d at 378. Courts evaluate the factors as a whole to determine whether the zoning or rezoning action was reasonably related to a legitimate government interest and was a reasonable method to achieve that purpose. *Napleton v. Village of Hinsdale*, 374 Ill. App. 3d 1098, 1110, 872 N.E.2d 23, 313 Ill. Dec. 263 (2007). The list is not exclusive, and no single factor is controlling.**

La Salle National Bank, 12 Ill. 2d at 47. **Moreover, a complaint does not fail simply because it does not allege facts in support of each and every factor.** Rodriguez, 217 Ill. App. 3d at 1029-30.” (Bold and underline emphasis added) Id. at ¶ 26.

The Second District of the Illinois Appellate Court discussed the purpose of the LaSalle factors in Napleton v. Vill. of Hinsdale, 374 Ill. App. 3d 1098 (2nd Dist. 2007). In Napleton, the Second District Court noted the following:

“We begin by noting that a municipality may utilize its police power to promote and regulate the public welfare. Village of Glenview v. Ramaker, 282 Ill. App. 3d 368, 371, 668 N.E.2d 106, 217 Ill. Dec. 921 (1996). Zoning is such an exercise of a municipality's police power and is targeted at the public [***14] welfare. City of Galena v. Dunn, 222 Ill. App. 3d 112, 120, 583 N.E.2d 616, 164 Ill. Dec. 700 (1991), quoting S. Connor, Zoning, in Illinois Municipal Law, § 10.2 (Ill. Inst. for Cont. [****270] [**30] Legal Educ. 1987) (“[z]oning has been defined as ‘an exercise of the police power that governs where and how land may be used and developed’”). Further, zoning has been immemorially held to be a legislative function exercised by a municipality. Village of Euclid v. Amber Realty Co., 272 U.S. 365, 388, 71 L. Ed. 303, 311, 47 S. Ct. 114, 118, 4 Ohio Law Abs. 816 (1926); La Salle National Bank v. City of Evanston, 57 Ill. 2d 415, 428, 312 N.E.2d 625 (1974); Lapp v. Village of Winnetka, 359 Ill. App. 3d 152, 170, 833 N.E.2d 983, 295 Ill. Dec. 777 (2005). **Additionally, it is similarly well established that, where there is room for a difference of opinion concerning the reasonableness of a zoning ordinance, the determination of the legislative body of the municipality is conclusive.** La Salle National Bank, 57 Ill. 2d at 428; Lapp, 359 Ill. App. 3d at 170. **In other words, rational basis scrutiny will be applied to challenges to legislative enactments to which extreme deference is owed.** People ex rel. Skinner v. Hellmuth, Obata & Kassabaum, Inc., 135 Ill. App. 3d 765, 769, 482 N.E.2d 155, 90 Ill. Dec. 448 (1985), *rev'd on other grounds*, 114 Ill. 2d 252, 500 N.E.2d 34, 102 Ill. Dec. 412 (1986). [***15] Zoning enactments (at least those that do not infringe fundamental rights or engage in discrimination based on race or national origin) are precisely the type of legislative enactments to which this level of deference is owed[.]” (Bold and underline emphasis added) Id. at 1104.

“[T]he development of the *La Salle* factors and the substantial relationship test arose in the context of as-applied challenges to the validity of zoning ordinances, and not facial challenges. The distinction between a facial challenge and an as-applied challenge is important in the zoning context, **as a zoning ordinance may be valid in its general aspects but may be invalid as to a particular piece of property because the balance of hardships (the gain to the public in general versus the detriment to the individual owner) overwhelmingly burdens the individual owner.** *Northern Trust Co.*, 4 Ill. 2d at 438. **To account for this possibility, the *La Salle* factors were developed as a way to explicitly balance the gain to the public against the burden on the individual property owner.** See *La Salle*, 12 Ill. 2d at 46-47” (Bold and underline emphasis added) *Id.* at 1106.

Therefore, it is clear the Court must consider the six *LaSalle* factors and the additional two *Sinclair* factors to determine if the ordinance is arbitrary, unreasonable or capricious and if the zoning action was reasonably related to a legitimate government interest and was a reasonable method to achieve that purpose.

On the other hand, it is also clear from examining these cases, and other Illinois Appellate Court and Illinois Supreme Court cases on this issue, that the *LaSalle* and *Sinclair* factors are mandatory factors the court must consider when reviewing a zoning decision, but they are not factors the legislative body must consider as part of their decision-making process.

It is also evident from Illinois Appellate Court and Illinois Supreme Court cases that the burden of proof for a party challenging a zoning ordinance is clear and convincing evidence. The Second District of the Illinois Appellate Court discussed this in *Thornber v. Vill. of N. Barrington*, 321 Ill. App. 3d 318 (2nd Dist. 2001). In *Thornber*, the Second District Court concluded the following:

“The due process clause prevents the arbitrary and unreasonable exercise of a municipality's police power to zone. The touchstone of constitutionality of any regulation **[**520][****480]** is whether the regulation bears a reasonable relationship to the public interest and is a reasonable method to accomplish the desired objective. See *Opyt's Amoco, Inc. v. Village of South Holland*, 149 Ill. 2d 265, 269-70, 172 Ill. Dec. 390, 595 N.E.2d 1060 (1992). A municipal regulation is constitutional, on its face, if it is rationally based. *City of Carbondale v. Brewster*, 78 Ill. 2d 111, 115, 34 Ill. Dec. 838, 398 N.E.2d

829 (1979). Under this test, the court must determine whether the regulation is rationally related to a legitimate governmental interest. If the regulation bears a rational relationship to the public health, safety, [***13] or welfare and is neither arbitrary nor discriminatory, the requirements of due process are met. *City of Wheaton v. Sandberg*, 215 Ill. App. 3d 220, 227, 158 Ill. Dec. 584, 574 N.E.2d 697 (1991).

To invalidate the ordinance on constitutional grounds, **plaintiffs had the burden of proving, by clear and convincing evidence**, that the ordinance is arbitrary, unreasonable, and bears no relation to the public [*325] health, safety, or welfare. *La Grange State Bank v. Village of Glen Ellyn*, 227 Ill. App. 3d 308, 316, 169 Ill. Dec. 307, 591 N.E.2d 480 (1992). If there is any conceivable basis for finding a rational relationship, the ordinance will be upheld.” (Bold and underline emphasis added) *Id.* at 324-325.

It is also important to consider the different standard of reviews when a court reviews an administrative decision as compared to a legislative decision. The Illinois Supreme Court discussed this difference in *City of Chi. Heights v. Living Word Outreach Full Gospel Church & Ministries*, 196 Ill. 2d 1 (IL Sup. Ct. 2001). In *City of Chi. Heights*, the Supreme Court decided the following:

“When a legislative body acts administratively in ruling on a permit application, its decision is subject to general principles of administrative review: "As the legislature is acting in an administrative capacity, it must follow the zoning regulations, and its actions are reviewable, and subject to judicial reversal if they are without support in the record or [***18] are otherwise arbitrary or unreasonable." K. Young, *Anderson's American Law of Zoning* § 21.10, at 720 (4th ed. 1996). **In particular, the decision to grant or deny the permit application may be reviewed to determine whether the decision was made in compliance with any criteria listed in the zoning ordinance.** [*14] K. Young, *Anderson's American Law of Zoning* § 21.10, at 725 (4th ed. 1996).” *Id.* at 13-14. (Bold and underline emphasis added)

Although the clear weight of authority in the United States holds that a legislative body acts administratively when it rules on applications for special use permits, there is authority in this state which holds that the granting or denial of a permit application is a

legislative act. For example, a line of cases from this court holds, with respect to the legislative bodies of counties, that the decision to grant or deny an application for a special use permit is a legislative act. See, e.g., Kotrich v. County of Du Page, 19 Ill. 2d 181, 166 N.E.2d 601 (1960) (county board of supervisors acted in a legislative capacity in granting a special use permit). **When a legislative body acts in a legislative capacity in ruling on a permit application, its decision is not subject to principles [***19] of administrative review. Instead, the legislative body's decision is reviewed for arbitrariness as a matter of substantive due process under the six-part test set forth in La Salle National Bank v. County of Cook, 12 Ill. 2d 40, 145 N.E.2d 65 (1957). In this context, the landholder's compliance with any special use criteria listed in the zoning ordinance is merely a factor to consider, not the dispositive consideration, in determining whether the granting or denial of the permit application was arbitrary and unreasonable.** See National Pride Equipment, Inc. v. Village of Niles, 109 Ill. App. 3d 639, 644-45, 65 Ill. Dec. 198, 440 N.E.2d 1053 (1982)” (Bold and underline emphasis added) *Id.* at 14.

The Illinois Supreme Court discussed the difference between legislative hearings and administrative hearings, and the different rights that apply, when a violation of procedural due process claim was made in People ex rel. Klaeren v. Vill. of Lisle, 202 Ill. 2d 164 (IL Sup. Ct. 2002). In Klaeren, the Supreme Court wrote the following:

“Turning to the merits of the parties' arguments, defendants maintain that the plain language of the applicable provisions of the Illinois Municipal Code (Municipal Code or Code) [***21] (65 ILCS 5/1-1-1 *et seq.* (West 1998)) grants only notice and an opportunity to be heard at a public hearing concerning a special use in municipalities with a population of less than 500,000. See 65 ILCS 5/11-13-7, 11-13-1.1” *Id.* at 179.

“Plaintiffs counter that the right to cross-examine witnesses is implied in the legislature's requirement of a [*180] "public hearing" in zoning matters because a public hearing is meaningless if the audience is not allowed to participate. Plaintiffs further contend that decisions interpreting "public hearing" to include the right to cross-examine witnesses (see, e.g., E&E Hauling, Inc. v. County of Du Page, 77 Ill. App. 3d 1017, 1021, 33 Ill. Dec. 536, 396 N.E.2d 1260 (1979); Braden v. Much, 403 Ill. 507, 513, 87 N.E.2d 620 (1949)) predate amendments to the applicable sections of the Code. According to

plaintiffs, the legislature's decision not to define further the term in light of controlling authority clearly shows that the legislature intended that public hearings include the right to cross-examine.” *Id.* at 180.

“The appellate majority agreed with plaintiffs, determining that a right of cross-examination was implicit in the applicable Municipal Code sections.” *Id.* at 180.

“We are unwilling to adopt the appellate majority's blanket endorsement of the *E&E Hauling* determination that a " ' ' 'public hearing' before any tribunal or body" ' "includes the full panoply of due process rights. (Emphasis added. [***25]) 316 Ill. App. 3d at 780, quoting *E&E Hauling*, 77 Ill. App. 3d at 1021, quoting *Braden v. Much*, 403 Ill. 507, 513, 87 N.E.2d 620 (1949). To construe so broadly the phrase "public hearing" may be inappropriate in some instances. **Thus, the appellate majority too strictly relied on the Municipal Code for its resolution of this cause. [*182] The resolution of this cause instead depends upon the distinction between legislative hearings and administrative hearings before municipal bodies.**”(Bold and underline emphasis added) *Id.* at 181-182.

“Illinois courts have long held that municipal bodies act in a legislative capacity when they conduct zoning hearings.” *Id.* at 182.

“Having been freshly and squarely presented with the question by the cause at hand, **we now answer it by holding that municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special use petition.** As we stated in *Living Word*, the "clear weight of authority" so holds. *Living Word*, 196 Ill. 2d at 14. To the extent any prior decisions of this court hold the contrary to be true, we now expressly overrule [***28] those decisions.

The reasons for classifying zoning hearings that deal with special use applications as administrative or quasi-judicial are manifest. In these hearings, the property rights of the interested parties are at issue. The municipal body acts in a fact-finding capacity to decide disputed adjudicative facts based upon evidence adduced at the hearing and ultimately determines the relative rights of the interested parties. **As a result, those parties must be afforded the due process rights normally granted to individuals whose property rights are at stake.** See *Balmoral Racing Club*, 151 Ill. 2d at 405 (the starting point, in any due process analysis, is a determination of whether one of these

protectable interests-life, liberty or property-is present); *Brown v. Air Pollution Control Board*, 37 Ill. 2d 450, 454, 227 N.E.2d 754 (1967) ("**a proceeding *** which could affect one's property rights *** [is] governed by the [*184] fundamental principles and requirements of due process of law**").

To what extent the full panoply of due process rights commonly associated with quasi-judicial proceedings must be afforded interested parties depends upon the purpose [***29] of the hearing.

As stated by the United States Supreme Court in *Hannah v. Larche*, 363 U.S. 420, 4 L. Ed. 2d 1307, 80 S. Ct. 1502 (1960),

'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. **Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.** On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that [***30] proceeding, are all considerations which must be taken into account." *Hannah*, 363 U.S. at 442, 4 L. Ed. 2d at 1321, 80 S. Ct. at 1514-15" (Bold and underline emphasis added) *Id.* at 183-184.

"According to the testimony at the preliminary injunction hearing, the joint hearing in the cause at hand served several purposes. The village board was gathering facts to evaluate the proposed annexation. The plan commission was considering Meijer's [***31] proposed development plan and determining whether to recommend that plan to the village board. **The zoning board was, likewise, assessing the special use and rezoning requests with an eye toward whether to recommend that the village**

board grant the requests. Since the joint procedure used by the village involved a special use request, it would be a denial of due process not to afford interested parties the right to cross-examine adverse witnesses. See *Living Word*, 196 Ill. 2d at 21-22; see also *Balmoral Racing Club*, 151 Ill. 2d at 410-11 (**cross examination is " 'the most efficacious test for the discovery of the truth'**)." (Bold and underline emphasis added) *Id.* at 185

“While an interested party's right of cross-examination [*187] may be tailored by guidelines such as these, that right may not be wholly contravened by the procedures used at the joint hearing at issue here.

As we have noted, the joint hearing in this case involved multiple decisions by three separate intra-municipal bodies. Viewed independently based on the individual purposes of each municipal body, whether and to what extent interested parties should be afforded the right to cross-examine adverse witnesses varies depending upon the type of hearing at issue. **When a municipal body acts legislatively, its decision is subject only to review for arbitrariness as a matter of substantive due process. *Living Word*, 196 Ill. 2d at 14. The joint hearing in this case, however, involved a quasi-judicial proceeding in that a special use application was heard and interested parties [***35] were not afforded the right to cross-examine adverse witnesses.**” (Bold and underline emphasis added) *Id.* at 186-187.

After the decision in *Klaeren*, the Illinois legislature enacted section 5-12012.1 to the Illinois Counties Code (55 ILCS 5/5-12012.1) and section 11-13-25 of the Illinois Municipal Code. These sections have the same provisions. One applies to county government bodies and the other to municipal government bodies. The current version of section 11-13-25 of the Illinois Municipal Code contains the following:

- (a) Any decision by the corporate authorities of any municipality, home rule or non-home rule, in regard to any petition or application for a special use, variance, rezoning, or other amendment to a zoning ordinance shall be subject to de novo judicial review as a legislative decision, regardless of whether the process in relation thereto is considered administrative for other purposes. Any action seeking the judicial review of such a decision shall be commenced not later than 90 days after the date of the decision.

(b) **The principles of substantive and procedural due process apply at all stages of the decision-making and review of all zoning decisions.** (Bold and underline emphasis added) (65 ILCS 5/5-11-13-25)

The Illinois Appellate Court has discussed and decided how this affects the standard of review when a party challenges a zoning ordinance. The Second District of the Illinois Appellate Court in *Millineum Maint. Mgmt. v. County of Lake*, 384 Ill. App. 3d 638 (2nd Dist. 2008) was one of the first districts of the Appellate Court to consider the effect these statutes have on the standard of review. In *Millineum*, the Second District Court decided the following.

“Because different forms of judicial review govern administrative and legislative decisions (*Gallik v. County of Lake*, 335 Ill. App. 3d 325, 327, 781 N.E.2d 522, 269 Ill. Dec. 725 (2002)) and because different constitutional protections inure to each [853] [****827] type of decision, the question of whether a particular zoning decision should be considered administrative or legislative has been**

contested in several cases. In *Klaeren*, our supreme court addressed what had become a split of Illinois authority on the issue of whether to classify special-use-permit hearings as legislative or administrative matters for purposes of determining whether the resulting decisions were subject to administrative review, and it held “that municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special use petition. *Klaeren*, 202 Ill. 2d at 183.” (Bold and underline emphasis added) *Id.* at 643.

“The court went on to hold that, since the decision at issue was administrative and not legislative, some requirements of procedural due process adhered. *Klaeren*, 202 Ill. 2d at 184-87.

In *Gallik*, 335 Ill. App. 3d 325, 781 N.E.2d 522, 269 Ill. Dec. 725, we extended the rule from *Klaeren* to hold that a county (as opposed to municipal) decision on a conditional-use permit was also an administrative decision subject to administrative review. *Gallik*, 335 Ill. App. 3d at 329.

After the decisions in *Klaeren* and *Gallik*, the legislature enacted Public Act 94--1027 (Pub. Act 94--1027, eff. July 14, 2006), which added current section 5--12012.1 to the Counties Code (Code) (55 ILCS 5/5--12012.1 (West 2006)).” *Id.* at 643-644.

That said, we note tangentially that the legislative history behind section 5--12012.1 [**855] [****829] supplies support for the trial court's position. Though the legislative history is muddled in some ways, it is rather clear on the question of whether this section was meant to apply to all county decisions on special-use permits or only county approvals of special-use permits. In the Senate, Senator Garrett, apparently reading from written notes, added the following explanation to the record:

"The corporate authorities of municipalities and counties are primarily--lawmaking bodies that operate through the political process. Their legislative decisions have traditionally been subject to de novo judicial review. While accepting the Supreme Court's analysis regarding the character of the special use permit process, the General Assembly notes that quasi-judicial proceedings are to be reviewed on the record, [**856] [****830] which in turn requires such proceedings to be conducted in the manner of a mini-trial. Given their essential legislative character, the corporate authorities of municipalities and counties are not well suited to--conduct mini-trials. In order to promote the efficient and effective governance [***18] of municipalities and counties, the General Assembly hereby adopts Senate Bill 94. **Senate Bill 94 is not intended to question the essential conclusions in Klaeren regarding the legal character of special use permit decisions or due process, but it provides that any special use decision made by a municipality or--county shall be treated as legislative decisions subject to de novo judicial review.** To provide uniformity in the statutes, Senate Bill 94 also provides that any variance, rezoning, or other amendment to a zoning ordinance shall be treated as legislative decisions subject to de novo judicial review. **In conclusion,--Section (b) of Senate Bill 94 is inserted merely to reflect the existing due process protections that have been--an integral part of the zoning process for the past forty years.** While it confirms that public bodies are to conduct their proceedings in a fundamentally fair manner consistent with principles of due process, it is not intended to require public hearing at every stage of the zoning process." 94th Ill. Gen. Assem., Senate Proceedings, May 3, 2006, at 22-23 (statements of Sen. Garrett).

In the House, Representative Mathias, apparently relying on a set of [***19] written notes very similar to those used in the Senate, entered the following explanation into the record:

"For legislative intent, let me read this into the record. 'Special use permits are a distinct type of local zoning relief that apply to uses [*647] affecting the public interest and imposing impacts on neighboring properties. Special use permits can ordinarily be granted only by ordinances adopted by the elected representatives of a municipality or county (the "corporate authorities"). The corporate authorities of municipalities and counties are primarily lawmaking bodies that operate through the political process. Their legislative decisions have traditionally been subject to de novo judicial review. In the case of *People ex rel. Klaeren v. Village of Lisle*, the Illinois Supreme Court underscored the importance of ensuring that local zoning processes for special use permits comport with principles of due process and fundamental fairness. The Supreme Court also noted that the ad hoc nature of special use permit determinations give them a quasi-judicial character. While accepting the Supreme Court's analysis regarding the character of the special use permit process, the General Assembly [***20] notes that quasi-judicial proceedings are to be reviewed on the record, which in turn requires such proceedings to be conducted in the manner of a "mini-trial." Given their essentially legislative character, the corporate authorities of municipalities and counties are not well suited to conduct "mini-trials." In order to promote the efficient and effective governance of municipalities and counties, the General Assembly hereby adopts Senate Bill 94. **Senate Bill 94 is not intended to question the essential conclusions in *Klaeren* regarding the legal character of special use permit decisions or due process, but it provides that any special use decision made by a municipality or county shall be treated as legislative decisions subject to de novo judicial review.** To provide uniformity in the statutes, Senate Bill 94 also provides that any variance, rezoning, or other Amendment to a zoning ordinance shall be treated as legislative decisions subject to de novo judicial review. *** **Nothing in Senate Bill 94 is intended to excuse municipalities and counties from**

conducting their proceedings in a fundamentally fair manner consistent with principles of due process." 94th Ill. Gen. Assem., [***21] House Proceedings, April 25, 2006, at 6-8 (statements of Rep. Mathias).

This legislative history very clearly demonstrates that the legislature's intent in creating section 5--12012.1 was to nullify the effect of Klaeren with respect to all county or municipal decisions on the types of zoning matters listed in the statute, so that all of those matters would receive judicial review as indicated in the statute instead of as indicated in *Klaeren*." (Bold and underline emphasis added) *Id.* at 646-647.

"As discussed above, at the time the legislature enacted section 5--12012.1, courts had chosen between two types of review for the relevant categories of zoning decisions-- administrative review under the Administrative Review Law or "legislative" review for arbitrariness as a matter of substantive due process (see *Living Word Outreach*, 196 Ill. 2d at 14)--before finally settling on the former option (see *Klaeren*, 202 Ill. 2d at 184-87). Against this backdrop, the language of section 5--12012.1, which invokes "de novo judicial review as a legislative decision" (emphasis added), indicates an intent to remove certain zoning decisions from the bounds of administrative review and instead choose the second, "legislative" type of review. As the legislature has the authority to dictate the type of review applicable to administrative [***33] decisions, this interpretation renders section 5--12012.1 constitutional." (Bold and underline emphasis added) *Id.* at 652.

"The "as a legislative decision" language invokes the alternative type of review described in *Living Word Outreach*: review "for arbitrariness as a matter of substantive due process." *Living Word Outreach*, 196 Ill. 2d at 14. This so-called [***653] "legislative" test prescribes the deference to agency decision making necessary under *Devine*, because it requires not that a court independently reevaluate facts or assert independent judgment, but rather that a court intervene only where there was no rational basis for the challenged decision, just as it would with a legislative enactment. Though the "de novo" language indicates that, unlike typical administrative review, evidence outside the already-developed [***34] record may be presented to the trial court, that evidence must bear on a

much [861] [****835] narrower question than is presented in typical administrative review.** Since a trial court in this type of case must confine itself to the question of whether the challenged decision had any rational basis (just as it would with a legislative enactment), the trial court may not conduct even the limited direct factual review allowed under the Administrative Review Law (just as it could not with a legislative enactment). Thus, as indicated by our supreme court in *Living Word Outreach*, the evidence received must bear on the court's review "for arbitrariness as a matter of substantive due process under the six-part test set forth in *La Salle National Bank v. County of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957)." *Living Word Outreach*, 196 Ill. 2d at 14; see also *Napleton*, 374 Ill. App. 3d at 1105-06 (listing *La Salle* factors as well as additional factors considered by other courts). In short, the type of review imposed by section 5--12012.1 may be nominally "de novo" and may allow for presentation of new evidence, but is actually much less searching than the administrative review the statute curtails. We adopt this reading [***35] of section 5--12012.1." (Bold and underline emphasis added) *Id.* at 652-653.

“As indicated above, even if the legislature can proscribe direct judicial review [**862] [****836] of administrative decisions, it oversteps its constitutional authority where it usurps the judiciary's power to interpret the law in cases the courts have the power to hear. Therefore, the legislature has no power to declare a particular procedure legislative or administrative where its true nature, as [***38] determined by the courts, shows the legislature's label to be incorrect. **More importantly, the legislature does not have the power to use such labels to limit by statute the reach of constitutional due process protections. Since the legislature has no power to limit due process via statute, to the extent section 5--12012.1 was intended to shield the listed zoning decisions from the constitutional requirements of due process, it would offend separation of powers principles. We therefore do not adopt that interpretation, and we instead hold that section 5--12012.1 limits only the mode of direct judicial review over the listed zoning decisions, not the application of [*655] due process to any of those zoning decisions.**” (Bold and underline emphasis added) *Id.* at 654-655.

The First District of the Illinois Appellate Court in Dunlap v. Village of Schaumburg, 394 Ill. App. 3d 629 (1st Dist. 2009) also considered the effect section 11-13-25 of the Illinois Municipal Code had on the standard of review when a zoning ordinance was challenged. In Dunlap, the First District Court held:

“As the Village urged in oral argument before this court, the 2006 amendment to section 11-13-25(a) must be understood as a response to the Illinois Supreme Court's decision in People ex rel. Klaeren v. Village of Lisle, 202 Ill. 2d 164, 781 N.E.2d 223, 269 Ill. Dec. 426 (2002), where the court ruled that, in conducting a hearing on an application for a special use permit, the defendant municipality was acting in an administrative capacity (also referred to as a quasi-judicial capacity) rather than a legislative capacity. Millineum Maintenance Management, Inc. v. County of Lake, 384 Ill. App. 3d 638, 647, 894 N.E.2d 845, 856, 323 Ill. Dec. 819 (2008) [***22] (“[L]egislative history very clearly demonstrates that the legislature's intent in creating section 5-12012.1 was to nullify the effect of Klaeren with respect to all county or municipal decisions on the types of zoning matters listed in the statute, so that all of those matters [*640] would receive judicial review as indicated in the statute instead of as indicated in Klaeren”). Id. at 639-640.

“These two types of decisions are subject to different standards of review. Legislative decisions made by municipalities are subject to review only "for arbitrariness as a matter of substantive due process." City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc., 196 Ill. 2d 1, 14, 749 N.E.2d 916, 925, 255 Ill. Dec. 434 (2001); see [**900] [****829] Klaeren, 202 Ill. 2d at 182, 781 N.E.2d at 233. That is, such decisions will be upheld if they represent a rational means to accomplish a legitimate purpose, as long as a fundamental constitutional right is not implicated. Millineum, 384 Ill. App. 3d at 642-43, 894 N.E.2d at 852. As the Klaeren court acknowledged, Illinois courts have traditionally placed most zoning decisions in this category:

“HN10[↑] It is well established that it is primarily the province of the municipal body to determine the use and purpose to which property may be devoted, and it is neither the province nor the duty of the courts to interfere with the discretion with which such bodies are [***24] vested unless the legislative

action of the municipality is shown to be arbitrary, capricious or unrelated to the public health, safety and morals." *Klaeren*, 202 Ill. 2d at 182, 781 N.E.2d at 233, quoting *La Salle*, 12 Ill. 2d at 46, 145 N.E.2d at 68.

As a result, "the landholder's compliance with any special use criteria listed in the zoning ordinance is merely a factor to consider, not the dispositive consideration, in determining whether the granting or denial of the permit application was arbitrary and unreasonable." *Living Word*, 196 Ill. 2d at 14, 749 N.E.2d at 925; see *National Pride Equipment, Inc. v. Village of Niles*, 109 Ill. App. 3d 639, 645, 440 N.E.2d 1053, 1057, 65 Ill. Dec. 198 (1982) (**noting that "'while strict adherence to the [*641] legislative body's own standards is not required of that body in passing on special uses, a legislative body must exercise its power in a reasonable way and adherence to these standards is a strong indication of reasonableness'"**), quoting *La Salle National Bank v. County of Lake*, 27 Ill. App. 3d 10, 17, 325 N.E.2d 105, 111 (1975).

On the other hand, administrative or quasi-judicial decisions are subject to a heightened level of judicial scrutiny. At the time of [***25] the *Klaeren* decision, municipal rulings on applications for special use permits had sometimes been ruled to fall into this category. See *Living Word*, 196 Ill. 2d at 13, 749 N.E.2d at 924. When a municipality makes an administrative zoning decision, "it must follow the zoning regulations, and its actions are reviewable, and subject to judicial reversal if they are without support in the record or are otherwise arbitrary or unreasonable." *Living Word*, 196 Ill. 2d at 13, 749 N.E.2d at 925, quoting 3 K. Young, *Anderson's American Law of Zoning* § 21.10, at 720 (4th ed. 1996). **Thus, the reviewing court not only considers whether the decision is arbitrary, but also considers whether it was made in compliance with any criteria in the zoning ordinance based upon the facts in the record.** *Living Word*, 196 Ill. 2d at 13-14, 749 N.E.2d at 925." (Bold and underline emphasis added) *Id.* at 640-641.

"The *Klaeren* court found that a heightened level of scrutiny was appropriate in order to protect the due process rights of interested property owners. *Klaeren*, 202 Ill. 2d at 183, 781 N.E.2d at 234. Accordingly, it held that "municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special [***26] use petition." *Klaeren*, 202 Ill. 2d at 183, 781 N.E.2d at

234. It then proceeded to find that the zoning board had failed to implement proper procedural safeguards to protect landowners' due process rights under an administrative standard of review. *Klaeren*, 202 Ill. 2d at 185, 781 N.E.2d at 235.

In enacting the 2006 amendment to section 11-13-25(a), which Dunlap seeks to rely upon in the instant suit, the legislature expressly responded to the decision in [**901] [****830] *Klaeren* by passing legislation that defines every "special use, variance, rezoning, or other amendment to a zoning ordinance" (65 ILCS 5/11-13-25(a) (West 2006)) as a legislative act rather than as an administrative act for purposes of review. *Millineum*, 384 Ill. App. 3d at 647, 894 N.E.2d at 855.” (Bold and underline emphasis added) *Id.* at 641.

“Thus, as the Village has argued, the intent of the legislature in enacting this amendment to the Zoning Enabling Act was not to expand private landowners' right to take judicial action against municipal zoning decisions, but rather to clarify that when such challenges are properly made, the decisions are to be reviewed under the standards for legislative rather than administrative actions.” *Id.* at 642.

“Dunlap argues that *de novo* judicial review under section 11-13-25(a) requires the burden of proof to be the same [***42] as it was before the legislative body who made the decision now being challenged. Since the Wehmeiers were the party originally seeking to obtain relief from the existing zoning ordinance in the form of a variance, Dunlap argues that the burden of proof should be upon them.

However, in light of the limitations on *de novo* review of zoning ordinances as described by the *Millineum* court, this argument is ill-founded. Although the *de novo* standard may well relieve us from giving deference to the actions of the Village board (*Ray*, 113 Ill. App. 3d at 515, 447 N.E.2d at 889), and although it might even go so far as to allow presentation of new evidence (*Millineum*, 384 Ill. App. 3d at 652, 894 N.E.2d at 860), it does not mean that we step into the Village board's shoes and exercise our independent judgment on whether the Wehmeiers should be entitled to a variance, which, in effect, is what Dunlap appears to be arguing. Rather, our inquiry is strictly limited to the question of whether there was any rational basis for the Village board's decision that such a variance was warranted. *Millineum*, 384 Ill. App. 3d at 652, 894 N.E.2d at 860. As such, Dunlap is still the party challenging a legislative

[*43] enactment, and the burden of proof still properly remains with her to show that no such rational basis exists.** See *Kleidon*, 120 Ill. App. 3d at 1053, 458 N.E.2d at 940.” (Bold and underline emphasis added) *Id.* at 648.

The Second District of the Illinois Appellate Court considered the effect section 11-13-25 of the Illinois Municipal Code had on the standard of review when a zoning ordinance was challenged further in *Conaghan v. City of Harvard*, 2016 IL App (2d) 151034. In *Conaghan*, the Second District Court held:

“But it could as easily be given a more modest construction: that section 11-13-25 provides not for review *de novo* but for a hearing *de novo*—in a case that is properly before the court on some other established basis. **And, as *Millineum Maintenance* explained, this hearing *de novo* would be limited to the issue of whether the zoning authority's legislative decision violated due process.**

Thus, as we explained in *Millineum Maintenance*, the hearing *de novo* in the trial court that section 11-13-25 provides enables the parties to introduce new evidence that had not been before the county or municipality that decided the zoning matter.” (Bold and underline emphasis added) *Id.* at ¶ 62-63.

“However, aside from the fact that the legislature might have used more straightforward language to effect such a change, this language can reasonably be read to imply that the legislature intended only to provide a hearing *de novo*, under the legal standards for legislative acts, in a case that is *already* properly before the trial court. **Phrased differently, the language can be read to state merely that the rules for judicial review of zoning decisions have been changed, and not that the availability of judicial review has been expanded. The amendment that the legislature chose focused on new procedural rules and legal standards.**” (Bold and underline emphasis added) *Id.* at ¶ 65.

“Section 11-13-25 is limited to standards of review in preexisting causes of action, and to reciting the principle—which would apply even absent such an explicit recitation—that constitutional due process applies to zoning decisions.” (Bold and underline emphasis added) *Id.* at ¶ 71.

The precedents set by the Illinois Appellate Court and Illinois Supreme Court in these cases establish this Court should conduct a hearing *de novo* that is limited to a review of arbitrariness as a matter of constitutional substantive due process under the rational basis test and the *LaSalle/Sinclair* factors or a violation of constitutional procedural due process. It should not consider whether there was strict adherence to the Galena ZBA's or City Council's own standards in approving the PUD. Rather, the Court should decide if the Galena City Council ultimately exercised its zoning power in a reasonable way and the relevance of adherence to those standards is that would be a strong indication of reasonableness as indicated in *Dunlap*. Dunlap, 394 Ill. App. 3d at 640-641.

Therefore, Ms. Clark has to the burden to prove by clear and convincing evidence that the zoning ordinances enacted by Galena deprive her of a property interest and that deprivation was arbitrary, unreasonable, or capricious, and the zoning ordinances did not bear a rational relationship to the public welfare, which includes the public health, safety, morals or welfare.

The zoning ordinances enacted by Galena are legislative actions that are presumed valid. That presumption of validity will only be overcome if Ms. Clark shows that the ordinances were not reasonably related to a legitimate government interest and those ordinances were not a reasonable method to achieve that purpose.

As previously stated, when a legislative zoning ordinance is challenged based on substantive due process, the Court must examine the ordinance for arbitrariness under the *LaSalle* and *Sinclair* factors. *Our Savior Evangelical Lutheran Church v. Saville*, 397 Ill. App. 3d 1003, 1027 (2009). The Court must evaluate those factors as a whole to determine if the zoning action was reasonably related to a legitimate government interest and was a reasonable method to achieve that purpose. *Napleton*, 374 Ill. App. 3d at 1110. This list is not exclusive and no single factor is controlling. *La Salle National Bank*, 12 Ill. 2d at 47.

The first factor to consider is the existing uses and zoning or nearby property. The evidence establishes the property owned by True North that was annexed into Galena and rezoned as a PUD was zoned as limited agricultural before it was rezoned. In addition, all of the adjacent property within the Galena city limits is zoned residential. Finally, all of the adjacent property within the county limits is zoned agricultural. Therefore, this factor weighs in favor of Ms. Clark in that no other adjacent property is zoned commercial.

The second factor to consider is the extent to which Ms. Clark's property value is diminished by rezoning the property to a PUD with an underlying primary commercial zoning. The only sworn testimony from a possible qualified or expert witness that was provided during the public hearing process was from Joan Murray. Ms. Murray, who indicated she was an area realtor, provided this testimony at the public hearing before the Galena City Council on November 14, 2023. The minutes from the November 14 meeting provide the content of Ms. Murray's testimony. Ms. Murray testified:

“Joan Murray, 706 Park Avenue – Murray stated, as a relator, she was appalled listening to the Zoning Board members suggesting that values could increase for the Davis Creek homeowners because the property next to land sold for over six times its actual market value. Murray advised that is not how it works. You do not compare commercial land to residential property to determine value. Murray stated the property values will decrease for owners impacted by this resort. Based on location, this development actually changes their location. Murray stated if the property were to remain agricultural, property values would increase in the future.” (*Ex. “V”, Am. Compl., pg. 5 of minutes*)

The minutes do not indicate if Ms. Murray provided any specific information about her experience as a realtor or if she has any training or other expertise that would qualify her as an expert about the value of properties. For example, how long she has been a realtor? How long she has been a realtor in the Galena area? Does she have any experience or knowledge in real estate appraisal? Does she have experience in selling residential properties, commercial properties or both? Has she ever been the realtor for residential property that has been purchased or sold next to commercial property or property that is similar to the PUD in this case? Ms. Murray also did not provide any testimony or information about how much property values would decrease for the properties that are adjacent to the Parker.

There were comments that were made by members of the Galena ZBA indicating their personal belief that property values would increase in the area surrounding the Parker, and there were also comments from some members of the public on this issue. Once again, none of these individuals provided any information that would qualify them as experts on property valuation and no one else provided any reliable information about how much property values would increase or decrease.

It is also important to note that either party could have called witnesses to testify at the bench trial about this factor. For example, the parties could have called Ms. Murray to provide further testimony on this matter. The parties also could have called an expert witness, such as a real estate appraiser, to testify if the values would increase or decrease, and if so, how much.

This factor considers the extent to which property values are diminished. Ms. Clark did provide any evidence to this Court to indicate the extent that her property values will be diminished. For example, there was no evidence to indicate property values will drop 5%, 10% or 30%.

Therefore, this Court finds the second factor slightly weighs in favor of Ms. Clark because there was testimony from a realtor that property values would decrease, but there was not testimony provided as to the extent the property values would be diminished.

The third factor for this Court to consider is the extent to which the destruction of the plaintiff's property values promotes the health, safety, morals, or general welfare of the public. The rezoning ordinance that would allow the construction at the PUD would promote the general welfare of the public in three ways.

First, it should provide economic opportunities for the community. There should be additional employment opportunities for members of the community in the new jobs that will be available at the Parker. It should provide additional tax revenue to the community through the lodging rentals, the sale of food, wine and other commodities, and the reservation of the wedding venue. It should also provide additional revenue to other businesses in the community if people who stay at the lodging at the PUD go to Galena to shop or eat, or if people who attend wedding events stay at other hotels, motels, or lodging options in the community. These can be important considerations in a community such as Galena, whose economy is based primarily on tourism.

Second, it will result in the restoration of a historic building. All parties agreed that it would be a great benefit to the community if the building known as the Marine Hospital would be restored. In fact, it was one of the historical buildings listed in the comprehensive plan that was marked as important to preserve and restore.

Third, it will open up a large property that includes the Marine Hospital to the public, which is currently not open to members of the public. It will offer members of the public the option to go there to see the Marine Hospital, use the walking trails, visit the gardens, and go to the other facilities that will be built at the PUD.

Once again, neither party provided any testimony or additional evidence about this factor at the trial. The amount these things will promote the general welfare is difficult to quantify. However, the Court finds the promotion of public welfare outweighs the destruction of Ms. Clark's property values based on the three ways the Court found this will promote the public welfare compared to the slight diminishment the Court has previously found for Ms. Clark's property. Therefore, the third factor weighs in favor of the PUD and Galena.

The fourth factor the Court should consider is the relative gain to the public as compared to the hardship imposed on the individual property owner. The Court has previously made findings about how the PUD will promote the public welfare, which are the same findings the Court makes for the relative gain that will occur for the public. The Court has already made findings that the PUD will slightly diminish the property value of Ms. Clark's property, which is a hardship imposed on Ms. Clark.

The Court has not made any findings about any additional hardships that could be imposed upon Ms. Clark. The primary additional concerns that were raised by Ms. Clark, and other neighbors, during the public hearings and meetings were (1) additional traffic on Blackjack Road; (2) additional noise from the PUD; (3) excessive light and light disturbances from the PUD; and (4) water run-off, flooding concerns and land erosion.

First, all parties agreed traffic will increase on Blackjack Road and the amount of traffic that currently uses Blackjack Road is concerning because it causes traffic congestion and safety concerns such as traffic crashes. That being said, no traffic study was conducted by either party to determine how much traffic currently uses Blackjack Road and how this potential increase in traffic could cause further concerns or problems.

In addition, Ms. Clark's residence is located at 1107 4th Street, Galena, Illinois. The traffic on Blackjack Road will not drive directly past her residence, though it will within a short distance, and it will not drive directly past her driveway. That being said, anyone traveling westbound on Blackjack coming into Galena will drive on a short portion of 4th Street that Ms. Clark must use to reach her home, which will result in a specific hardship to Ms. Clark because of increased traffic on 4th Street. This information was obtained from Google Maps at www.maps.google.com. The Court takes judicial notice of the location of Ms. Clark's residence and the nearby roads from Google Maps.

However, it is hard to quantify how much traffic will be on 4th Street because no traffic study was conducted and no expert witnesses provided any testimony or evidence on this issue.

Second, Ms. Clark and others expressed concern over the noise that will come from the PUD from vehicles, the amount of people there, including the wedding venue, and music that will be played outside.

The Court finds that it is reasonable to infer there will be increased noise from the PUD, but once again, there was no testimony or evidence presented to establish what the volume of that noise would be. Ms. Clark has a reasonable general concern that noise may increase. However, she did not provide any expert testimony or other reliable evidence on this issue during the public hearings, meetings or bench trial.

Third, Ms. Clark and others expressed concerned about light disturbances and excessive lighting that will come from the PUD from vehicles, street lights, walking trail lights, cabin/cottage lights and lights from all of the other buildings. Once again, it is reasonable to infer there will be increased light from the PUD, but there was no testimony or evidence presented to establish what the brightness of the light would be. In fact, True North had a lighting expert testify during the February ZBA meeting about how they will design the project and use light fixtures and shades to decrease and avoid light issues for neighbors and the public in general. Ms. Clark has a reasonable general concern that lights will increase in the area where the PUD will be located. However, she did not provide any expert or other reliable evidence on this issue during the public hearings, meetings or bench trial.

Fourth, Ms. Clark and others expressed concerns about water run-off into the Galena River, flooding in the area and land erosion. Ms. Clark and others who live in area near the PUD testified or provided comments about floods that have previously occurred in that area and land erosion that occurs. However, no expert witnesses testified, or no other reliable evidence was presented, that proved the development of the PUD will cause run-off into the Galena River, will cause increased flooding or will cause additional land erosion. In fact, the preliminary plan that has been implemented includes a retention pond and other land conservation efforts to attempt to ensure there will not be any increased run-off, flooding or land erosion. No expert or other qualified witness provided any evidence or information that these designs will not accomplish that.

Therefore, the Court finds the fourth factor weighs of the PUD and Galena's favor for the following reasons:

- There will be increased traffic on Blackjack Road and 4th Street that will cause a hardship to Ms. Clark;
- There will be an increase in noise from the area of the PUD in comparison to the existing noise, but there was no evidence to prove there will be any excessive noise that will cause a hardship to Ms. Clark;
- There will be an increase in lights from the area of the PUD in comparison to the existing lights, but there was no evidence to prove there will be excessive or glaring light that will cause a hardship to Ms. Clark; and
- There was no evidence to prove there will be any increase in water run-off into the Galena River or other areas, flooding or land erosion, which means there will be no hardship caused to Ms. Clark from these issues.
- The hardship caused to Ms. Clark by the slight decrease in her property value, as well as the traffic congestion and safety concerns that will be caused by increased traffic, do not outweigh the relative gain to the public from the PUD.

The fifth factor the Court must consider is the suitability of the subject property for the zoned purposes. The fifth factors weighs in the favor of the PUD and Galena. The Court finds this project is well-suited for the zoned purposes for the following reasons:

- The property is a large size tract that can accommodate the number of lodging facilities and buildings while still maintaining a large amount of the current environmental resources such as wildlife, trees, wetlands and will have a large amount of the area that will not be covered by buildings;
- The property is near the Galena River and the Galena River Trail so walking trails inside the PUD will connect with the Galena River Trail. The PUD is within walking distance of Galena, which will allow guests and patrons of the PUD to walk to Galena and members of the public to walk to the PUD;
- The PUD contains a historical building that Galena has previously determined is important to preserve and restore. The business at the PUD will be designed around this historical building and members of the public will be able to visit it; and

- It is on the outskirts of the Galena city limits, which reduces the amount of residential properties and homes it is adjacent to or near.

The sixth factor the Court must consider is the length of time the property has been vacant as zoned. There was no evidence presented that the property has been vacant as zoned. This factor does not weigh in either party's favor.

The seventh factor the Court must consider is whether a comprehensive zoning plan for land use and development exists, and whether the ordinance is in harmony with it. The parties agree Galena has a comprehensive plan that was drafted in 2003. However, the entire comprehensive plan was not admitted into evidence for the Court's review. Two portions of the comprehensive plan were admitted into evidence. The first is contained in exhibit Y. This is a 9 page document that continues 15 goals for land use in Galena. The second is contained in exhibit Z, which is a plan area proposed land use map that is part of the comprehensive plan.

The 15 goals listed in exhibit Y are as follows:

- Directing Growth – This goal addresses growth on the western edge of Galena and does not address the east side of Galena. The Court finds this goal does not favor or disfavor the PUD;
- Urban Services Extensions – This goal requires a pattern of development and connecting to Galena utilities. The Court finds this goal does not favor or disfavor the PUD;
- Subdivision Ordinance – This goal is not related to growth, annexation, or commercial uses of property. The Court finds this goal does not favor or disfavor the PUD;
- Sidewalks – This goal requires the installation of sidewalk for all new developments in Galena. The Court finds this goal does not favor or disfavor the PUD;
- Landscaping standards – This goal requires all developers to comply any landscaping standards enacted by Galena. The Court finds this goal does not favor or disfavor the PUD;
- Zoning for Traditional Neighborhood Design – This goal applies to residential neighborhoods and does not have anything to do with a commercial zoned PUD. The Court finds this goal does not favor or disfavor the PUD;

- Zoning for Cluster Development – This goal applies to residential neighborhoods and does not have anything to do with a commercial zoned PUD. The Court finds this goal does not favor or disfavor the PUD;
- Zoning for Office / Business Parks – The goal is to provide land for the construction of office / residential structures or office parks. One objective of this goal was to use land on the north or western edge of Galena, in close proximity to the future interchange, for office or business parks. This section of the comprehensive plan does not define an office or business park. However, it is clear the primary use of the PUD will be for lodging, rather than office space or a business park. The Court finds this goal does not favor or disfavor the PUD;
- Home Business Regulations – This goal applies to home businesses and has nothing to do with a commercial zoned PUD. The Court finds this goal does not favor or disfavor the PUD;
- Park / Open Space Districts – This goal applies to parks and open spaces. It has nothing to do with a commercial zoned PUD. The Court finds this goal does not favor or disfavor the PUD;
- Adult Businesses – This goal applies to adult businesses. It has nothing to do with a commercial zoned PUD. The Court finds this goal does not favor or disfavor the PUD;
- Lighting Standards – This requires the development of lighting standards for new development. The Court finds this goal does not favor or disfavor the PUD. Rather, it is simply requirements the PUD will have to comply with when lights are installed;
- Annexation – This goal requires Galena to consider annexing any property that is bounded on three sides by Galena property. The Court finds this goal does not favor or disfavor the PUD;
- Design guidelines – This goal requires all developments to comply with design guidelines enacted by Galena. The Court finds this goal does not favor or disfavor the PUD. Rather, it is simply requirements the PUD will have to comply with when lights are installed;

- Zoning Code Update – The Court finds this goal does not favor or disfavor the PUD;
- Therefore, the Court finds none of the 15 goals favor or disfavor the rezoning of the property to a commercial PUD.

It is evident from the proposed land use map (exhibit Z) that the area the PUD is located in and the nearby surrounding area is all zoned as residential, agricultural or open space. However, there is a small area on U.S. Route 20 that is zoned commercial on the east side of Galena. According to www.maps.google.com, this area is less than 1 mile from the PUD, which the Court takes judicial notice of the distance between the two from Google Maps.

Beth Baranski provided testimony at the February 9, 2022 ZBA meeting to testify why the PUD was consistent with the comprehensive plan. She said there are three pertinent topics under the plan’s vision statement. The plan indicates Galena will strive to diversify its local economy and improve the business environment for tourism by retaining existing businesses, actively attracting clean, new businesses with good-paying jobs, promoting its quality, experience and heritage. Galena will strive to preserve its small-town image by managing physical growth with sound planning and zoning that emphasizes the preservation of the historic development, and infield development, and the efficient and attractive development of new land. Galena will strive to be a beautiful place to live and visit by adhering to a high standard of cleanliness, maintaining high-quality air, water, and soil, protecting our historical and architectural character, and protecting and enhancing our natural resources.

Ms. Baranski said the following goals and objectives in the plan support this request:

- Under Economic Development, Galena will build upon its successful tools and industry, and they should work to address parking. Parking could be addressed by shuttle parking and they should encourage courtesy vans by area hotels;
- Under Transportation, it’s recommended that new shuttle services relieve parking pressure downtown and the plan recommends to encourage visitors to walk from parking areas;
- Under Storm Weather Management, it’s recommended Galena improve storm weather management in new development areas;
- Under Police and Fire Department, Galena should address the capital, equipment and staffing needs for the police and fire department;

- The first goal under Historic Preservation is to maintain and improve the conditions of the historic structures in the community. In Section 6.2 of the plan, under Historical and Cultural Resources, the Marine Hospital is included in a list of major historic structures in Galena and is the only structure on the list that has not been rehabilitated;
- Under Tourism and Natural Resources, Galena should utilize the natural resources and recreation potential of the Galena area to provide another inroad and marketing point for tourism and industry, identifying those natural resources that make the Galena region unique, such as the terrain, access to the Galena and Mississippi Rivers, etc., and being to market these as another reason to visit the Galena area, and work with others to develop trails and natural areas;
- Under Recreational Trails, identify structures, sites, and locations within and outside the city that should be connected via recreational path. Under Preserving Natural Beauty, protect and preserve the natural beauty in and around the city of Galena while continuing to use the natural beauty of the region to attract tourists, ensure that development is consistently the premise of protecting the environment; and
- Under Urban Service Extensions, require development to occur in a rational, planned-out pattern to prevent leapfrog development and allow the city to extend services in a logical manner. Under Lighting Standards, it's recommended to preserve the views provided in the night sky in and around Galena. Under Annexation, require that all new development on the edge of the city of next to the city to gain access to city sewer and water utilities.

Ms. Baranski also provided testimony at the November 9, 2022 ZBA meeting to testify again why the PUD was consistent with the comprehensive plan.

It is important to note that a comprehensive plan is an advisory tool for legislative bodies to implement long-term plans for zoning. The Illinois Supreme Court discussed this in Living Word. The Supreme Court explained that:

“The existence of the comprehensive plan, and the council's reliance upon that plan, does not alter this conclusion. The special use criteria in the City's zoning ordinance do not include conformance with the comprehensive plan as a requirement that must be met before a special use [**930] [****448] permit may be granted. See E. Ziegler,

Rathkopf's Law of Zoning and Planning § 41.08, at 41-37 (4th ed. 1992) ("Zoning ordinances may expressly provide as a standard for issuance of a special permit that the proposed use at the particular location [***33] be compatible with or not negatively impact the local comprehensive zoning plan"). Moreover, the City's zoning ordinance is law; the comprehensive plan is not. **As our Municipal Code explains, "[an official comprehensive] plan shall be advisory and in and of itself shall not be construed to [*23] regulate or control the use of private property in any way, except as to such part thereof as has been implemented by ordinances duly enacted by the corporate authorities."** 65 ILCS 5/11-12-6 (West 1994); see also *Chase v. City of Minneapolis*, 401 N.W.2d 408, 413 (Minn. App. 1987) (**incompatibility with comprehensive plan insufficient basis for denying conditional use permit**); *Amoco Oil Co. v. City of Minneapolis*, 395 N.W.2d 115, 118 (Minn. App. 1986) (same)" (Bold and underline emphasis added) *Living Word*, 196 Ill. 2d at 22-23.

It is also important to note that the zoning ordinances in the Galena City Code require that a zoning amendment or rezoning ordinance demonstrate conformance with the comprehensive plan for a PUD district.

The only part of the comprehensive plan the evidence proved was not in harmony with the PUD and other zoning ordinances is that the area was designated as residential and agricultural in the land map. It is important to note the public should be able to normally rely on the designated areas in a zoning map that is part of a comprehensive plan. On the other hand, Ms. Clark did not present evidence to rebut Ms. Baranski's statements about the parts of the comprehensive plan that the PUD is consistent with. The Court finds the PUD's conformance with the other parts of the comprehensive plan outweigh the fact that the PUD is not in harmony with the land map. The Court finds the seventh factor weighs in the favor of the PUD and Galena.

The eighth factor the Court must consider is whether the community needs the proposed use. It is clear from the evidence presented that Galena already has a large amount of lodging establishments within the city limits. There was also evidence that there is already a wedding venue on the east side of Galena. There was no evidence to indicate the community needs the proposed use. However, the Court has previously found the PUD will benefit public welfare and the community so the factor does not weigh in either party's favor.

The Court has found factors 1 and 2 weigh in the favor of a finding the zoning ordinances are arbitrary, unreasonable and capricious. The Court has also found factors 3, 4, and 7 weigh in favor of finding the zoning ordinances are not arbitrary, unreasonable and capricious. Finally, the Court found factors 6 and 8 do not favor or disfavor either finding.

No single factor is controlling and based on the evaluation of all of those factors as a whole the Court finds the rezoning action was reasonably related to a legitimate government interest and was a reasonable method to achieve that purpose. The Court bases this finding on the following things:

- The findings the Court made when considering the LaSalle and Sinclair factors;
- The LaSalle and Sinclair factors were developed to balance the gain to the public against the burden to the property owner. The Court finds, based on the findings previously made, the gain to the public outweighs the burden to the property owner;
- “[I]t is well established that, where there is room for a difference of opinion concerning the reasonableness of a zoning ordinance, the determination of the legislative body of the municipality is conclusive.” La Salle National Bank, 57 Ill. 2d at 428; Lapp, 359 Ill. App. 3d at 170.” Napleton, 374 Ill. App. 3d 1104;
- “Where the reasonableness of the restriction is "fairly debatable," the court may not interfere with the legislative judgment. Harvard State Bank v. County of McHenry (1993), 251 Ill. App. 3d 84, 95, 190 Ill. Dec. 99, 620 N.E.2d 1360.” Id. at 278-279. Rockford Blacktop Constr. Co., 263 Ill. App. 3d at 278-279;
- It is evident there is room for a “difference of opinion” and it is “fairly debatable” concerning the reasonableness of the ordinances based on the amount of people who supported and opposed the PUD, the comments that were made, and the findings this Court has previously made when examining the LaSalle/Sinclair factors. Therefore, this Court should not interfere with the legislative judgment of Galena;
- “If there is any conceivable basis for finding a rational relationship, the ordinance will be upheld.” Thornber, 321 Ill. App. 3d at 325;
- The Court finds there is a rational relationship to the governmental interests of promoting the public welfare and rezoning this property to a PUD was a reasonable method to achieve that purpose, based on its previous findings; and

- Ms. Clark did not prove by clear and convincing evidence that the ordinance is arbitrary, unreasonable, and bears no relation to the public health, safety or welfare.

Ms. Clark alleged violations of state statutes and the Illinois Constitution in Counts 2, 4 and 10 of the Amended Complaint. Ms. Clark alleged in the following in the Amended Complaint:

- The ZBA nor the City Council undertook any discussion or analysis as required by section 154.923(C)(2) prior to passing the PUD Application;
- The Zoning Administrator made no recommendation as to whether the PUD Application should be approved, in violation of section 154.923(C)(3); and
- The Zoning Ordinance was not considered concurrently with the preliminary plan.

Section 154.923(C)(2) of the Galena City Code lists the review criteria the Galena ZBA and City Council should consider when reviewing a preliminary plan application. Section 154.923(C)(3) indicates, “The Zoning Administrator and Zoning Board of Appeals shall make recommendations and the City Council shall approve, conditionally approve, or deny all applications for a preliminary development plan.”

Ms. Clark’s arguments are, in essence, requesting the Court to conduct an administrative review of the decisions of the Galena ZBA and City Council under her claims that Galena violated state statutes and the Illinois Constitution. The Second District Court discussed and explained this in *Dunlap* as follows:

"[Th]e landholder's compliance with any special use criteria listed in the zoning ordinance is merely a factor to consider, not the dispositive consideration, in determining whether the granting or denial of the permit application was arbitrary and unreasonable." *Living Word*, 196 Ill. 2d at 14, 749 N.E.2d at 925; see *National Pride Equipment, Inc. v. Village of Niles*, 109 Ill. App. 3d 639, 645, 440 N.E.2d 1053, 1057, 65 Ill. Dec. 198 (1982) (noting that ""while strict adherence to the [*641] legislative body's own standards is not required of that body in passing on special uses, a legislative body must exercise its power in a reasonable way and adherence to these standards is a strong indication of reasonableness""), quoting *La Salle National Bank v. County of Lake*, 27 Ill. App. 3d 10, 17, 325 N.E.2d 105, 111 (1975)." *Dunlap*, 394 Ill. App. 3d at 640-641.

“On the other hand, administrative or quasi-judicial decisions are subject to a heightened level of judicial scrutiny. (...) When a municipality makes an administrative zoning decision, "it must follow the zoning regulations, and its actions are reviewable, and subject to judicial reversal if they are without support in the record or are otherwise arbitrary or unreasonable." *Living Word*, 196 Ill. 2d at 13, 749 N.E.2d at 925, quoting 3 K. Young, Anderson's American Law of Zoning § 21.10, at 720 (4th ed. 1996). Thus, the reviewing court not only considers whether the decision is arbitrary, but also considers whether it was made in compliance with any criteria in the zoning ordinance based upon the facts in the record. *Living Word*, 196 Ill. 2d at 13-14, 749 N.E.2d at 925.” *Id.* at 641.

“Accordingly, a legislative body passing on a variance or other zoning ordinance is not strictly required to [905] [****834] conform to its own standards as long as it meets this reasonableness test. *National Pride Equipment*, 109 Ill. App. 3d at 645, 440 N.E.2d at 1057 (noting that a legislative body's adherence to internal standards is not necessary for [*647] a zoning act to be upheld as reasonable, although such adherence is "a strong indication of reasonableness"),** quoting *La Salle National Bank v. Lake County*, 27 Ill. App. 3d at 17, 325 N.E.2d at 111; see also *Living Word*, 196 Ill. 2d at 13-14, 749 N.E.2d at 925 (**contrasting legislative acts with administrative acts, where compliance with internal standards is required**). Therefore, contrary to Dunlap's assertion, the Village's failure to comply with its internal requirement [***39] that a variance be supported by a finding of practical difficulties or particular hardship is not, in itself, sufficient to invalidate the variance.” (Bold and underline emphasis added) *Id.* at 646-647.

Ms. Clark cited two cases in support of her argument. They were *Paul v. Cty. of Ogle*, 2018 IL App (2d) 170696 and *Tierney v. Village of Schaumburg*, 182 Ill. App. 3d 1055, 1059, 538 N.E.2d 904, 131 Ill. Dec. 529 (First Dist. 1989). The Second District of the Illinois Appellate Court held in *Paul*:

“Count II alleged that the county violated its own zoning ordinance in approving the special use. Plaintiffs alleged that a "Motor Carrier Facility," as defined by the county's zoning ordinance, allowed for the storage of trucks or buses but did not allow for the storage of dumpsters. Further, the ordinance provided that vehicle maintenance be conducted only on vehicles owned and operated by the owner of the

property, [***4] whereas the vehicles to be stored on the property here were owned by another entity and would need to be serviced if they did not run properly.” Paul, 2018 IL App (2d) 170696 at ¶ 7.

“In count II, plaintiffs allege that the county failed to follow its own zoning ordinance in granting the special-use permit. Defendants' argument on this point consists only of a brief general assertion that this count improperly seeks administrative review of a legislative decision. We disagree. A municipality must follow its own valid ordinances. People ex rel. J.C. Penney [**596] [****464] Properties, Inc. v. Village of Oak Lawn, 38 Ill. App. 3d 1016, 1019, 349 N.E.2d 637 (1976). If a municipality violates its own valid ordinance, its action is illegal, and the courts may enjoin it. Tierney v. Village of Schaumburg, 182 Ill. App. 3d 1055, 1059, 538 N.E.2d 904, 131 Ill. Dec. 529 (1989). As we reject defendants' alternative basis for affirming it, we reverse the dismissal of count II.”

This Court finds the Paul decision is distinguishable for two reasons. First, the Second District Court in that case was reviewing an appeal where the trial court granted a motion to dismiss under section 2-615 for failure to state a claim. The Paul Court found the plaintiff had pled sufficient facts to state a claim. It did not decide the ultimate issue in the case, which was if the county ordinance would have been invalid for failing to follow its own zoning ordinance. Second, the Paul Court based its decision on the fact that the plaintiff alleged the county had approved a special use that was prohibited by its zoning ordinance because the zoning ordinance did not allow for the storage of dumpsters and did not allow vehicle maintenance on vehicles that are not owned by the property owner. In essence, the plaintiff alleged the county authorized a use that was expressly prohibited by the county's zoning ordinances.

The First District of the Illinois Appellate Court held in Tierney:

“ Also, we note that the Village's answer to the petition does not deny significant facts that are alleged in the verified complaint. [***3] These facts are as follows: (1) the roadway that the Village intends to construct is classified as a collector or secondary street as stated in the Village's own ordinance; (2) the roadway is to be 50 feet wide rather than the 80-foot width that is required by the Village's existing ordinance for collector or secondary streets; (3) the roadway will not have sidewalks on either side although the Village's existing ordinance requires that all streets have sidewalks on both

sides; (4) the 50-foot-wide collector or secondary street would be "extremely dangerous" because it "would * * * [subject] the plaintiffs, on a daily basis * * * to the hazards of an errant automobile"; and (5) the "plaintiffs will * * * [have] an unsafe road about their backyards." *Tierney*, 182 Ill. App. 3d at 1057.

"Here, if the Village had wished to change 0-1639, which establishes that a collector or secondary street must have a minimum right-of-way width of 80 feet and that all streets must have sidewalks on both sides, the Village should have strictly complied with the legal requirements for amending or repealing the ordinance, including notice and hearing. Since the Village did not legally amend or repeal 0-1639, the Village's action in constructing [***8] the Project is illegal, and the courts have jurisdiction to enjoin the Village's illegal action." *Id.* at 1059.

This Court also finds the *Tierney* decision is distinguishable. This case involved the village authorizing a 50 foot street with no sidewalks, which was expressly prohibited by the village zoning ordinances. The village zoning ordinances required a minimum of 80 feet and required sidewalks on both sides.

Both *Paul* and *Tierney* involve circumstances where the legislative body authorized a zoning ordinance that was expressly prohibited by current zoning ordinances of that governmental body. They did not involve allegations that those legislative bodies failed to comply with their internal standards.

Ms. Clark did not allege that the PUD and other zoning ordinances in this case authorized anything that was prohibited by Galena's zoning ordinances. Rather, she alleged violations involving procedural issues. Ms. Clark did not present any case law, statutes or other legal precedents to establish that a municipality's alleged failure to review special criteria, receive a recommendation from the zoning administrator, or consider the zoning ordinance concurrently with the preliminary plan, would result in the zoning ordinances being illegal and void.

Ms. Clark also alleged in Counts 4 and 10 of the Amended Complaint that Galena violated 65 ILCS 5/11-13-1 and Article VII, Sec. 7 of the Illinois Constitution. Ms. Clark alleged Galena did not provide "due allowance" for existing conditions and the conservation of property values.

Section 11-13-1 indicates, “In all ordinances passed under the authority of this Division 13, **due allowance shall be made for existing conditions, the conservation of property values**, the direction of building development to the best advantage of the entire municipality and the uses to which the property is devoted at the time of the enactment of such an ordinance. (Bold and underline emphasis added) 625 ILCS 5/11-13-1

It is important to note Ms. Clark did not cite a single case or precedent where an Illinois Appellate Court or the Illinois Supreme Court has found a municipality did not provide “due allowance” for these issues. This is a general provision that requires municipalities to take into account existing zoning conditions and any diminishment in property values that can occur from zoning ordinances. However, there is no statutory authority or case law precedent that defines “due allowance” or provides a standard of review for due allowance.

The Court finds these are factors that must be taken into account, which they are under the *LaSalle* and *Sinclair* factors, when the Court is determining if the zoning ordinance is arbitrary, unreasonable or capricious. This is not a separate or legally recognized cause of action.

Therefore, the Court finds Ms. Clark did not prove Counts 2, 4 and 10, alleging violations of state law and the Illinois Constitution, based on the findings and reasons previously listed, and the Court should find in favor of Galena for those counts.

However, the Court will consider the arguments made for Counts 2, 4 and 10 for the substantive due process claims that have been raised by Ms. Clark. As previously stated, a failure to comply with internal standards or a failure to provide “due allowance” are separate factors the Court can consider to determine if the zoning ordinances are arbitrary, unreasonable or capricious.

The Zoning Administrator’s memo (Exhibit C), dated February 1, 2022, to the Galena ZBA included the following language:

“Rezoning the entire site to a PUD is the most appropriate process to address some of the deviations related to bulk and density standards for the site and district.

As per the PUD section of the City Code, the city can allow deviations from the default district standards if certain amenities are provided in the plan by the applicant. The underlying district serves as a starting point to base the newly proposed PUD standards. Essentially, we are creating a new zoning district to fit the proposed project within the site. **This can possibly be approved by the City Council as a deviation from the**

default district standards with mitigation of items (a), (b), (c) and (e) as noted below in approval criteria under 154.301 (D)(5). It is my opinion that the proposed development would exceed the deviation requirements to an amount that justifies this mitigation.”

The Court finds this is a recommendation from the Administrator to the Galena ZBA. The language emphasized by this Court indicates the Administrator believes rezoning the site to a PUD is the most appropriate way to address deviations from normal standards. This language also indicates the City Council can approve the deviation with mitigation of the approval criteria and it is the opinion of the Administrator that the deviation from the standards will be justified by the mitigations contained in the PUD application.

Ms. Clark also alleged the ZBA members and City Council members only gave perfunctory consideration to the review criteria in section 154.923(C)(2). However, Ms. Clark does not dispute that the Galena ZBA and City Council referenced these criteria during the meetings and had an opportunity to consider these criteria as well as comment on each one if they wanted when they were reviewed. Ms. Clark’s allegations are essentially that they did not discuss or comment on these factors enough, which means they did not truly consider them. The problem with this argument is there is no statutory authority or case law precedents that establish how much they must discuss or comment on them.

The Court finds the Galena ZBA and City Council members reviewed and addressed the PUD criteria in section 154.923(C)(2) at each of the hearings and meetings. This Court will not independently reevaluate facts, assert independent judgment, or put itself in the shoes of the board members to determine if they made the best decision when reviewing those criteria or if they could have provided more comments on them. These board members had an opportunity to internally consider each individual criteria when it was addressed during the meeting. There is nothing to indicate each member had an obligation to comment on each criteria, even if that may be argued to be as a good idea or the best practice.

Therefore, the Court finds Ms. Clark did not prove her allegations that the ZBA nor the City Council undertook any discussion or analysis as required by section 154.923(C)(2) prior to passing the PUD Application or that the Zoning Administrator made no recommendation as to whether the PUD Application should be approved, in violation of section 154.923(C)(3).

Ultimately, Ms. Clark did not prove that anything about the process of how the ZBA or City Council considered the PUD applications and approved the zoning ordinances resulted in the enactment of zoning ordinances that are arbitrary, unreasonable or capricious.

Therefore, the Court finds Ms. Clark did not prove Counts 1, 3, or 9, alleging substantive due process violations, based on the findings and reasons previously listed, and the Court should find in favor of Galena for those counts.

Ms. Clark alleged a violation of contract zoning in Counts 6 and 7 of the Amended Complaint. The Fifth District of the Illinois Appellate Court discussed conditional or contract zoning in *Goffinet v. County of Christian*, 30 Ill. App. 3d 1089 (5th Dist. 1975). In *Goffinet*, the Fifth District Court held:

“In our view, the *Treadway* case and the appellate decisions alluded to do not [***13] compel the conclusion that any and every conditional rezoning ordinance adopted by a legislative zoning agency in Illinois will be invalid. *Treadway* stated that conditional rezoning ordinances have not fared well because they introduce an element of contract which has no place in the legislative process or because they constitute an [**736] abrupt departure from the comprehensive plan contemplated in zoning. Other faults assigned by courts in their disapproval of conditional rezoning are that the zoning authority might use the zoning power to further private interests in violation of public policy, that the zoning authority might improperly try to control the use of land, that the zoning authority may surrender its governmental powers and functions or inhibit the exercise of its police or legislative powers and that it furnishes an avenue for corruption of officials.

However, we do not believe it to be an absolute precept that any and all conditional rezoning in Illinois is forbidden. Without doubt there is a suitable and proper place for utilization of the process. Some conditional rezoning may be in the public good, subservient to a comprehensive plan, in the best interest [***14] of the public health, safety and welfare and enacted in recognition of changing circumstances. **Not all conditional rezoning is onerous, destructive or an abandonment of the power of the zoning agency, nor does it stem from improper motives.**” (Bold and underline emphasis added) *Id.* At 1095.

The First District of the Illinois Appellate Court discussed contract zoning in Andres v. Village of Flossmoor, 15 Ill.App.3d 655 (1973). In Anders, the First District Court held:

“In Hedrich v. Village of Niles (1969), 112 Ill.App.2d 68, 77, 250 N.E.2d 791, this appellate court adverted to the usual criteria of zoning validity -- that a zoning ordinance is valid if not arbitrary or unreasonable and bears a reasonable relation to the public health, safety and welfare -- **and found that the rezoning amendment there met these tests, but went on to hold that:**

"This long-established rule must, however, *9] be balanced against a more recent one: that zoning ordinances should not be subject to bargaining or contract."**

(Bold and underline emphasis added) *Id.* at 659.

The Second District of the Illinois Appellate Court discussed contract zoning in a case involving a CUD zoning, which is similar to a PUD zoning, in Rutland Environmental Protection Asso. v. Kane County, 31 Ill. App. 3d 82 (2nd Dist. 1975). The Rutland Court held:

“Plaintiffs allege that the ordinance which rezoned the 800 acres to CUD was the product of negotiations, bargaining, and concessions between FLC and the development committee and that it was therefore invalid as "contract zoning." Cases which plaintiffs cite in support of this assertion are inapplicable here. In those cases, ad hoc conditions or restrictions were attached to existing zoning ordinances, resulting in new zoning classifications not previously contained in the zoning ordinance or comprehensive plan. See, e.g., [***8] Andres v. Village of Flossmoor, 15 Ill.App.3d 655 (1973); Cederberg v. City of Rockford, 8 Ill.App.3d 984 (1972).

The Kane County ordinance regulating CUD zoning requires discussion and "bargaining" for CUD zoning classification. Thereunder an applicant for CUD zoning must, at an informal conference, submit to the plat officer a sketch plan describing existing conditions of the site and of the proposed development. After the preapplication conference, the plat committee reviews the proposal. Recommendations made by the plat officer or committee during the initial review may be incorporated into the development plan. After approval of the initial proposal by the plat committee, a detailed development plan is prepared which must include certain specified information, and this plan is then reviewed by the plat officer and committee with approval contingent upon the plan meeting specified criteria. Regulations require that a developer's final plan contain

approved provisions for such items as streets, utility easements, water distribution, lighting, and landscaping. It is only after the plat committee has approved the development plan that the applicant may first petition [***9] for CUD zoning.

Community unit development is a method of land use control designed to supplement existing master plans and zoning ordinances. **It permits combining different land uses on the same tract, is intended to apply to specific property, and meant to facilitate the development of an environmentally sound, and functional unit.** Flexibility is the advantage which CUD zoning enjoys over traditional euclidean zoning which divides a community into districts and requires segregated uses. [*87] See *Rudderow v. Township Committee*, 121 N.J. Super. 409, 297 A.2d 583 (1972).

Since the overall aims of CUD zoning cannot be accomplished without negotiations and because conferences are indeed mandated by the regulating ordinance, the conduct of the defendants herein cannot be read as contributing to contract zoning. The very term "contract zoning" is inappropriate to the facts herein. The conduct of FLC and the planning commission was [220] in compliance with the county's ordinance regulating CUD zoning.**” (Bold and underline emphasis added) *Id.* at 86-87.

The Second District Court of the Illinois Appellate Court discussed contract zoning further in *Thornber v. Vill. of N. Barrington*.

“In *Goffinet v. County of Christian*, 65 Ill. 2d 40, 2 Ill. Dec. 275, 357 N.E.2d 442 (1976), the Illinois Supreme Court found that conditional zoning is not invalid per se. *Goffinet*, 65 Ill. 2d at 48-51. Rather, the focus must be on the application of the traditional zoning factors enunciated in *La Salle* (*La Salle National Bank*, 12 Ill. 2d 40, 145 N.E.2d 65). See *Goffinet*, 65 Ill. 2d at 51-52; *Nolan v. City of Taylorville*, 95 Ill. App. 3d 1099, 1104, 51 Ill. Dec. 479, 420 N.E.2d 1037 (1981). We have already applied these factors to the ordinance at issue and determined that the trial court's finding of validity was not against the manifest weight of the evidence.” (Bold and underline emphasis added) *Thornber*, 321 Ill. App. 3d at 328.

The Second District court of the Illinois Appellate Court recently discussed contract zoning again in a Rule 23 opinion in *Lys v. Mettawa*, 2023 IL App (2d) 220255-U. The Court cites to this opinion not as a precedent. Rather, it cites to it for “persuasive purposes” under Illinois Supreme Court Rule 23(e).

“The complaint sought declaratory judgment pursuant to section 2-701 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-701 (West 2010)) and injunctive relief. See 65 ILCS 5/11-13-15 (West 2010). **Counts I and II, which were brought against the Village, alleged that the passage of the ordinance violated the Lyses rights to due process. Count I alleged that Ordinance 839 was facially unconstitutional and count II alleged that the ordinance was unconstitutional as applied.** U.S. Const., amend. XIV; Ill. Const. 1970, art. 1, § 2; see also 65 ILCS 5/11-13-25(b) (West 2020).” (Bold and underline emphasis added) *Id.* at ¶ 11.

“Spot zoning is a change [****13**] in zoning applied to a small area” and “is unlawful when the change violates a zoning pattern that is homogenous, compact, and uniform.” *Thorner*, 321 Ill. App. 3d at 328-29. **In such a situation, there has been a regulatory capture; that is, illegal contract zoning connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations as if it were a bilateral contract.** See generally *Goffinet v. Christian County*, 30 Ill. App. 3d 1089, 1098, 333 N.E.2d 731 (1975). **In this sense, municipal officials have been "captured" because they are contracting away governmental and public police powers for private purposes. As an example, in the case the Lyses rely on most heavily, Cederberg v. City of Rockford, 8 Ill. App. 3d 984, 291 N.E.2d 249 (1972)**” (Bold and underline emphasis added) *Id.* at ¶ 23.

“Here, simply put, this was not a case of illegal secret contract zoning, but rather an example of valid conditional zoning after a public hearing. The Lyses have yet to point out any sort of “side deal” between the Village and Grainger. Rather, the record of the annexation and the re-zoning demonstrate that Grainger and the Village jointly proposed permitted uses and variations for the property, with both parties working from the original county ordinance, which Grainger had been operating under for the preceding two decades. Moreover, the record shows that the ZPA and the Village gave significant consideration and heard evidence regarding the impact of the re-zoning on the relevant

standards of public health, comfort, morals, and welfare. **That Grainger and the Village may have been working together in this public process is unremarkable; this happens all the time in the modern era of zoning. Evidence of cooperation [**15] in this public process suggests responsible supervision of the utilization of the land by both the Village and Grainger, rather than any sort of illegal collusion.**” (Bold and underline emphasis added) *Id.* at ¶ 23.

It is important to note this opinion is not precedent. However, this Court has cited it for ‘persuasive purposes’ because it is clearly applicable to the issue before this Court, it is recent, it cites controlling precedent and it recognizes that contract zoning and spot zoning are still recognized as a valid cause of action after the Illinois legislature enacted 65 ILCS 5/11-13-25.

Ms. Clark argued that the approval of the Rezoning Ordinance and Ordinance Amending Zoning Map constituted contract zoning because they were not approved in compliance with Galena’s ordinance regulating planned unit development. However, Ms. Clark never presented any evidence to show that Galena undertook “reciprocal obligations as if it were a bilateral contract.” As in *Lys*, there was no evidence of a side deal or secret bargaining between the parties. Rather, True North submitted the application and the matter was addressed during public hearings and public meetings. That process “suggest responsible supervision” by both parties. Finally, the Illinois Supreme court found that conditional (i.e. contract) zoning is not invalid *per se*.

Ms. Clark did not submit or cite to any statutory authority or case law precedent that establishes that a municipalities failure to comply with its own zoning ordinances, in this case a failure to comply with an appropriate discussion and consideration of review criteria and other procedural requirements in Galena’s PUD ordinance, constitutes contract zoning.

Therefore, the Court finds Ms. Clark did not prove Counts 6 and 7, alleging impermissible contract zoning, based on the findings and reasons previously listed, and the Court should find in favor of Galena for those counts.

Ms. Clark alleged a violation of spot zoning in Count 5 of the Amended Complaint. The Fifth District of the Illinois Appellate Court discussed spot zoning in Goffinet v. County of Christian. In Goffinet, the Fifth District Court held:

“Though in several Illinois cases cited by plaintiffs the largest tract involved where the court found spot zoning was 14.6 acres, they argue that acreage is relative and that 236 acres out of a large agricultural area could nevertheless be the subject of spot zoning. **We agree that the size of tract involved is relative and that 236 acres might arguably [*1097] represent spot zoning. However, there are other factors involved -- though it appears that the 14.6 acres which represents the maximum in Illinois might be a record for the United States. Note, in *Spot Zoning and the Comprehensive Plan*, 10 Syr.L.Rev. 303 (1959), the author states that 125 cases were examined in which the term "spot zoning" was used, and that the largest area so designated was 13 acres. Prior to the case holding that 13 acres could constitute spot zoning (*Mathis v. Hannan*, 306 S.W.2d [***18] 278 (Ky.App. 1957), *Antieu on Municipal Corporation Law § 7.04 (1959)* stated that the largest tract so designated was 6 acres.** In *Spot Zoning and the Comprehensive Plan* the author suggests five tests in addition to size to determine if a particular ordinance constitutes spot zoning. These are: (1) Are the requirements of a comprehensive plan met by the ordinance; (2) What is the particular use for the "spot"; (3) Are there changes in conditions in the zoning district; (4) Where is the "spot" located; (5) Is a hardship created on any individual?” (Bold and underline emphasis added) Goffinet, 30 Ill. App. 3d at 1096-1097.

“Zoning is not an exact science. Neither is the art of planning for zoning. Economic and social considerations not cognizable at the time will arise in the future. There must be flexibility to meet needs. This implies study and wise action by the legislative bodies concerned. The courts do not zone. **In the classic case, *Village of Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303, 311, the court said: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."** **In *Reskin v. City of Northlake*, 55 Ill.App.2d 184, 189, 204 N.E.2d 600, the court said: "To constitute spot zoning * * * the two requisites which must coexist are: a change of zone applicable only to a small area, and a change which is out of harmony with**

comprehensive planning for the [*21] good of the community as a whole." From the record before us we cannot say as a matter of law that the rezoning ordinance involved is out of harmony with the comprehensive planning for the good of Christian County.**" (Bold and underline emphasis added) *Id.* at 1098.

The Fourth District Court also discussed spot zoning in *Bossman v. Village of Riverton*, 291 Ill. App. 3d 769 (4th Dist. 1997). In *Bossman*, the Fourth District Court held:

"Spot zoning" is a change in zoning applied only to a small area, which is out of harmony with [*11] comprehensive planning for the good of the community; zoning that would violate a zoning pattern that is homogeneous, compact and uniform.** *Chicago Title & Trust Co. v. Village of Skokie*, 60 Ill. App. 3d 221, 235, 376 N.E.2d 313, 324, 17 Ill. Dec. 314 (1978). **This does not mean that every reclassification of a single tract is void ipso facto; rather, it must be determined whether such change is in harmony with a comprehensive plan for orderly utilization of property in the locality. The size of the rezoned tract or area is merely one factor to consider.** *Fifteen Fifty North State Building Corp. v. City of Chicago*, 15 Ill. 2d 408, 418, 155 N.E.2d 97, 102 (1958) ("it is true that inconsistent zoning of small parcels is not to be encouraged"). Sometimes the original zoning ordinance has made a mistake [*775] with regard to a single tract. Bringing that tract into harmony with the surrounding property is not spot zoning, or said another way, is not illegal spot zoning. However, the power to zone or rezone cannot be exercised to satisfy the individual desires of a few. *Cosmopolitan National Bank v. City of Chicago*, 27 Ill. 2d 578, 584-85, 190 N.E.2d 352, 356 (1963) (amendatory ordinance [***12] void where no change in general character or existing uses in neighborhood).

It would be difficult to find spot zoning in an area where conflicting uses were haphazardly mixed. Such mixing may exist either because little thought was given to the establishment of the districts or because other uses over time have been allowed to invade the districts. Nevertheless, the existence of a formal comprehensive plan is not essential to a finding of spot zoning. What is important is that the community in question has given care and consideration to the use and development of the land within its boundaries. *First National Bank v. Village of Vernon Hills*, 55 Ill. App. 3d 985, 990, 371 N.E.2d 659, 664, 13 Ill. Dec. 724 (1977). Of paramount importance is whether the subject property is

zoned in conformity with surrounding existing uses and whether those uses are uniform and established. *Truchon v. City of Streator*, 70 Ill. App. 3d 89, 93, 388 N.E.2d 249, 252, 26 Ill. Dec. 625 (1979). The existence of a comprehensive plan may justify what would otherwise be spot zoning. If the Village here had a comprehensive plan that looked to the construction of a convenience store and gas station in [***13] the area of Lincoln and South Seventh Street, this rezoning may not have been spot zoning. However, there clearly was no such plan and the actual zoning pattern in the area was uniformly residential. *Id.* at 774-775.

The Second District of the Illinois Appellate Court also discussed spot zoning in *Thorner v. Vill. of N. Barrington*. In *Thorner*, the Second District Court held:

“Spot zoning is a change in zoning applied to a small area. Spot zoning is unlawful when the change violates a zoning pattern that is [*329] homogenous, compact, and uniform. *Bossmann v. Village of Riverton*, 291 Ill. App. 3d 769, 775, 225 Ill. Dec. 742, 684 N.E.2d 427 (1997). However, not every reclassification of a single tract of land is void. The test for determining unlawful spot zoning is whether the change is in harmony with a comprehensive plan for use of property in the locality. *Goffinet*, 65 Ill. 2d at 54. **To invalidate the zoning ordinances, the plaintiffs were required to present clear and convincing evidence that the amendments to the zoning ordinances violated a comprehensive plan for use of the property in the locality.**” (Bold and underline emphasis added) *Thorner*, 321 Ill. App 3d at 328-329.

The Court finds Ms. Clark did not prove Count 5, alleging a violation of spot zoning, and that it should find in favor of Galena for that count, based on the following findings and reasons:

- As recognized in *Goffinet*, it is possible for a PUD of this size (97.3 acres) to be considered small enough to constitute spot zoning. However, the Court in *Goffinet* also noted 14.6 acres was largest property in Illinois, and possibly the United States, that had previously been found by a court to constitute illegal spot zoning in Illinois; and
- The Court has previously found the PUD that was approved by Galena is in harmony with the comprehensive plan overall. The only part of the comprehensive plan it is not in harmony with is the land map, which is outweighed by conformance with other parts of the comprehensive plan.

Finally, Ms. Clark alleged procedural due process violations in Count 8. Specifically, Ms. Clark alleged Galena conducted a series of public hearings wherein Clark and others were not offered or permitted the right to cross-examine witnesses. As previously noted in this opinion, the Illinois Supreme Court in *Klaeren* found that municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special use petition. As a result of that, interested parties whose property rights are at issue must be afforded the due process rights normally granted to individuals whose property rights are at stake. The Court held it was a denial of due process when those interested parties were not given the opportunity to cross-examine adverse witnesses when the hearing involves a special use request.

Galena argued the Court may consider procedural due process as an element of reasonableness, but the actual decision of the City must stand or fall as a matter of substantive due process. However, it is evident from Illinois statutes and precedents established by the Illinois Appellate Court and Supreme Court, that this is in incorrect argument.

Subsection (b) of section 11-13-25 states, “The principles of substantive **and procedural due process** apply at all stages of the decision-making and review of all zoning decisions. (Bold and underline emphasis added) (65 ILCS 5/5-11-13-25) In addition, as previously discussed in this opinion and *Millineum*, comments about legislative intent were read into the record in both the Illinois House Illinois Senate. Those comments included the following:

- “Senate Bill 94 is not intended to question the essential conclusions in *Klaeren* regarding the legal character of special use permit decisions or due process, but it provides that any special use decision made by a municipality or--county shall be treated as legislative decisions subject to de novo judicial review”; *Millineum*, 384 Ill. App. 3d at 646.
- “In conclusion,--Section (b) of Senate Bill 94 is inserted merely to reflect the existing due process protections that have been--an integral part of the zoning process for the past forty years”; *Id.* at 646.
- “Nothing in Senate Bill 94 is intended to excuse municipalities and counties from conducting their proceedings in a fundamentally fair manner consisten[t] with principles of due process.” *Id.* at 647.

Therefore, it is clear from the language of the statute, and the legislative history, that this statute recognizes that substantive due process claims and procedural due process claims are two distinct issues and causes of action.

Even if the language of the statute was intended to limit a party's procedural due process rights, the legislature would have no authority to enact such a statute. This was discussed by the Second District Court in *Millineum*. As previously discussed and cited in this opinion from *Millineum*, the Second District held and explained:

“As indicated above, even if the legislature can proscribe direct judicial review [**862] [****836] of administrative decisions, it oversteps its constitutional authority where it usurps the judiciary's power to interpret the law in cases the courts have the power to hear. Therefore, the legislature has no power to declare a particular procedure legislative or administrative where its true nature, as [***38] determined by the courts, shows the legislature's label to be incorrect. **More importantly, the legislature does not have the power to use such labels to limit by statute the reach of constitutional due process protections. Since the legislature has no power to limit due process via statute, to the extent section 5--12012.1 was intended to shield the listed zoning decisions from the constitutional requirements of due process, it would offend separation of powers principles. We therefore do not adopt that interpretation, and we instead hold that section 5--12012.1 limits only the mode of direct judicial review over the listed zoning decisions, not the application of [*655] due process to any of those zoning decisions.**” (Bold and underline emphasis added) *Millineum*, 384 Ill. App. 3d at 654-655.

Therefore, the legislature had the authority to direct courts to review zoning decisions with a standard of review as legislative decisions, instead of administrative decisions, but it does not have any authority to limit an individual's constitutional substantive or due process rights, or the Court's ability to address claims based violations of those rights.

The Illinois Supreme Court also recognized in Passalino v. City of Zion, 237 Ill. 2d 118 (IL Sup. Ct. 2009) that procedural due process claims are distinct and separate from substantive due process claims and they are still a recognized cause of action after 65 ILCS 5/5-11-13-25 was enacted. In Passolino, the Illinois Supreme Court held:

“Procedural due process is founded upon the notion that prior to a deprivation of life, liberty or property, a party is entitled to "notice and opportunity for [a] hearing appropriate to the nature of the case." Jones v. Flowers, 547 U.S. 220, 223, 164 L. Ed. 2d 415, 423, 126 S. Ct. 1708, 1712 (2006), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 94 L. Ed. 865, 873, 70 S. Ct. 652, 656-57 (1950).” (Bold and emphasis added) Id. at 124.

“Plaintiffs' entitlement to procedural due process arises out of plaintiffs' property interest, which is affected by the zoning map amendment. See Chicago Title & Trust Co. v. Village of Palatine, 22 Ill. App. 2d 264, 269, 160 N.E.2d 697 (1959) (“persons interested [in zoning changes must be] afforded an opportunity to be heard”)” Id. at 124.

“Accordingly, due process requires that plaintiffs be apprised of the pendency of the zoning map amendment and afforded the opportunity to present their objections. Jones v. Flowers, 547 U.S. at 226, 164 L. Ed. 2d at 425, 126 S. Ct. at 1713-14, citing Mullane, 339 U.S. at 314, 94 L. Ed. at 873, 70 S. Ct. at 657.” (Bold and emphasis added) Id. at 125.

The Second District court of the Illinois Appellate Court recently discussed a procedural due process claim contesting a zoning ordinance in a Rule 23 opinion in Schreiner v. Cnty. of Logan, 2021 IL App (4th) 210173-U. The Court cites to this opinion not as a precedent. Rather, it cites to it for “persuasive purposes” under Illinois Supreme Court Rule 23(e). In Schreiner, Second District Court discussed and explained:

“After the decision in Klaeren and Gallik, the legislature enacted Public Act 94-1027 (Pub. Act 94-1027, eff. July 14, 2006), which added section 5-12012.1 to the Illinois Counties Code (55 ILCS 5/5-12012.1)” Id. at ¶ 18.

“Originally, section 5-12012.1 began, “Any special use, variance, rezoning, or other amendment to a zoning ordinance adopted by the county board of any county, home rule or non-home rule, shall be subject to *de novo* judicial review as a legislative decision.” 55 ILCS 5/5-12012.1 (West 2006). The Second District held the original

language of section 5-12012.1 applied only when a board adopted a special use and not when it denied one. *Millineum*, 384 Ill. App. 3d at 648. The legislature's subsequent amendment providing that "[a]ny decision by the county board of any county, home rule or non-home rule, in regard to any petition or application for a special use, variance, rezoning, or other amendment to a zoning ordinance shall be subject to *de novo* judicial review as a legislative decision" **indicates the legislature intended to limit review of zoning decisions for arbitrariness as a matter of constitutional [**14] substantive due process under the rational basis test and the La Salle factors.** *Conaghan v. City of Harvard*, 2016 IL App (2d) 151034, ¶ 53, 406 Ill. Dec. 436, 60 N.E.3d 987 ("Even with the addition of *de novo* review, the intent of section 5-12012.1 was to narrow the range of judicial inquiries into municipal zoning decisions."); *Millineum*, 384 Ill. App. 3d at 652-53" (Bold and underline emphasis added) *Id.* at ¶ 18.

"Based on our review of the relevant law, we conclude judicial review of the Logan County Board's zoning decision is limited to arbitrariness as a matter of constitutional substantive due process under the rational basis test and the La Salle factors **or a violation of constitutional procedural due process.** *Conaghan*, 2016 IL App (2d) 151034, ¶ 53, 406 Ill. Dec. 436, 60 N.E.3d 987." (Bold and underline emphasis added) *Id.* at ¶ 19.

"Here, the trial court properly concluded that the zoning decision by the Logan County Board was subject to *de novo* review as a legislative decision under section 5-12012.1 of the Illinois Counties Code, which was limited to a claim of constitutional substantive due process under the rational basis test and the La Salle factors. **Based on plaintiffs' claims of alleged procedural violations of the Illinois Counties Code and the Logan County zoning ordinance, the Logan County Board's zoning decision could only be held void if plaintiffs demonstrated by clear and convincing evidence a violation of constitutional substantive due process.**" (Bold and underline emphasis added) *Id.* at 19.

"The trial court further concluded plaintiffs offered no evidence to support a finding that they were denied notice or an opportunity to be heard. We agree that, to the extent that plaintiffs raised a violation of procedural due process, plaintiffs failed to demonstrate such a violation by clear and convincing evidence. Plaintiffs

offered no evidence at trial to support a finding that they were denied notice or an opportunity to be heard. The documentary evidence included in the limited trial stipulation cannot be used by plaintiffs to support a claim for a violation of procedural due process. Moreover, plaintiffs stipulated they attended all relevant public hearings and meetings related to the rezoning application. **[**17]** Finally, at trial defendants called plaintiff Stephen Schreiner, who testified plaintiffs were present at the Regional Planning Commission meeting and the ZBA public hearings and had the opportunity to make statements, which supports a finding that plaintiffs had notice and the opportunity to be heard.” (Bold and underline emphasis added) *Id.* at ¶ 21.

“Because we conclude that judicial review of the Logan County Board's zoning decision is limited to arbitrariness as a matter of constitutional substantive due process under the rational basis test and the La Salle factors or a violation of constitutional procedural due process, we decline to address plaintiffs' claims regarding alleged violations of the Illinois Counties Code or the Logan County zoning ordinance by the ZBA. *Conaghan*, 2016 IL App (2d) 151034, ¶ 53, 406 Ill. Dec. 436, 60 N.E.3d 987. Plaintiffs do not argue these alleged violations of the Illinois Counties Code or the Logan County zoning ordinance deprived them of substantive or procedural due process. Accordingly, those claims are not within the scope of judicial review available to them. Moreover, plaintiffs do not challenge the ultimate decision of the Logan County Board to allow the rezoning of defendants' property. Instead, they argue the alleged violations by the ZBA rendered the rezoning void, **[**18]** but the ZBA ultimately made no recommendation to the Logan County Board and the Logan County Board granted the rezoning request. See *Schroeder v. Winnebago County*, 58 Ill. App. 3d 207, 209, 374 N.E.2d 24, 25-26, 15 Ill. Dec. 731 (1978) (The issuance of a special use permit by the Board of Supervisors was valid where the Zoning Board of Appeals made improper findings of fact but did not have ultimate authority to grant or deny the request for a special use permit.). (Bold and underline emphasis added) *Id.* at ¶ 22.

“As discussed above, we conclude the trial court properly determined that review of the Logan County Board's zoning decision in this case was limited to arbitrariness as a matter of constitutional substantive due process under the rational basis test and the La Salle factors or a violation of constitutional procedural

due process and plaintiffs failed to establish by clear and convincing evidence a violation of substantive or procedural due process.” (Bold and underline emphasis added) *Id.* at ¶ 23.

Once again, it is important to note this opinion is not precedent. However, this Court has cited it for ‘persuasive purposes’ because it is clearly applicable to the issue before this Court, it is recent and it cites controlling precedent. The case is cited to further illustrate that substantive and procedural due process are two distinct causes of actions and separate issues the courts must address under either claim.

The Second District court of the Illinois Appellate Court recently discussed the distinction that part of the zoning action can be considered administrative and part can be considered legislative in a Rule 23 opinion in *Cahn v. City of Highland Park*, 2021 IL App (2d) 191092-U. This Court cites to that opinion not as a precedent. Rather, it cites to it for “persuasive purposes” under Illinois Supreme Court Rule 23(e). In *Cahn*, the Second District Court discussed and explained:

“Plaintiff filed an amended complaint and then amended it a second time. The dismissal (with prejudice) of the second-amendment complaint is at issue in this appeal. In it, plaintiff set forth three counts. The (...) third a deprivation of due process.” *Id.* at ¶ 8.

“However, *Klaeren* concerned the process an interested party was due in such a proceeding, not the [**7] manner in which such a decision could be reviewed. *Ashley*, 378 Ill. App. 3d at 663. Indeed, “neither *Klaeren* itself nor the appellate court opinion in the matter mentions the Administrative Review Law.” *Id.* In fact, *Klaeren* was an action for an injunction rather than an action for administrative review. *Klaeren*, 202 Ill. 2d at 177.” *Id.* at ¶ 14.

“Furthermore, even if we were to assume that *Klaeren* had some application here and determined the procedural rights to which plaintiff was entitled in the proceedings before the City Council and the Commission, it does not follow that the Council's decision was subject to administrative review.” *Id.* at ¶ 15.

“In fact, section 11-13-25 of the Illinois Municipal Code (65 ILCS 5/11-13-25 (West 1998)), a statute relied on by the trial court in rejecting plaintiff's reliance on *Klaeren*, states, “Any decision by the corporate authorities of any municipality, home rule or non-home rule, in regard to any petition or application for a special use, variance, rezoning, or other

amendment to a zoning ordinance shall be subject to *de novo* **[**8]** judicial review as a legislative decision, *regardless of whether the process in relation thereto is considered administrative for other purposes.*" (Emphasis added.) **Thus, the legislature has recognized that a municipal action may be considered administrative for some purposes (such as due process) and legislative for others (such as the nature of judicial review).**

Parenthetically, we note that, as was the case in *Ashley*, 378 Ill. App. 3d at 666, section 11-13-25 is not relevant to this case because the City Council's enactment of an ordinance was a legislative act from the outset." *Id.* at ¶ 15.

Once again, it is important to note this opinion is not precedent. However, this Court has cited it for 'persuasive purposes' because it cites controlling precedent and it is cited to further illustrate that 65 ILCS 5/11-13-25 does not have any effect on an individual's due process rights.

Finally, neither party cited any authority, and the court could not find any authority that establishes the precedent set in *Klaeren*, which is that it is a denial of due process when an interested party was not given an opportunity to cross-examine adverse witnesses when the hearing involves a special use request, was overturned by 65 ILCS 5/11-13-25, or any other Illinois Appellate Court or Supreme Court opinion.

Therefore, this Court finds Ms. Clark was an interested party whose property rights were at issue so she must be afforded the due process rights normally granted to individuals whose property rights are at stake. Therefore, she must be afforded the opportunity to cross-examine adverse witnesses if the hearing involves a special use request.

The case before this Court involves rezoning a property from limited agriculture to a PUD with a commercial primary underlying district. This was not a *per se* special use request. However, the PUD application requested that Galena grant five special uses as a matter of right, which were ultimately incorporated into the rezoned PUD district and the annexation agreement. These five special uses included the construction of a 50,000 square foot building, accommodations-hotel/motel, outdoor dining that exceeds 15% of interior areas permitted as a matter of right, outdoor entertainment, and an outdoor pool. In addition, the property interests and rights involved in this PUD district request are similar to a special use permit hearing.

Even though the Galena ZBA did not make a positive recommendation to the Galena City Council, the City Council members all reviewed and relied on the facts that were presented at the ZBA hearings as part of their ultimate decision. Therefore, the Court finds this was the

equivalent of a special use request and Ms. Clark was entitled to an opportunity to cross-examine adverse witnesses at the Galena ZBA public hearings.

Galena argued that even if Ms. Clark was entitled to cross-examine witnesses at the public hearings, she waived this right by not attempting to cross-examine or asking the Galena ZBA to be permitted to cross-examine the witnesses. The Illinois Supreme Court also addressed this issue in *Klaeren*. The Illinois Supreme Court held:

“Before we engage in this discussion, we must, however, address defendants' contention that plaintiffs waived any objection to the lack of cross-examination by failing to object to the joint hearing procedures. As we stated in *Balmoral Racing Club, Inc. v. Illinois Racing Board*, 151 Ill. 2d 367, 397, 177 Ill. Dec. 419, 603 N.E.2d 489 (1992), **formal objections go hand in hand with formal proceedings. It is disingenuous for defendants [***20] to maintain on the one hand that the municipal boards properly used informal proceedings at the joint hearing while, on the other hand, arguing that a formal objection was necessary to preserve plaintiffs' claim of error.**

More importantly, we agree with the appellate court that there is no need to object when it is apparent that an objection would be futile. See *Bianchi v. Mikhail*, 266 Ill. App. 3d 767, 776, 204 Ill. Dec. 21, 640 N.E.2d 1370 (1994). **Mayor Ghilardi's preliminary statements regarding the procedures to be employed at the hearing were unequivocal.** He made clear that "there [would] be no attempt at [the] hearing to answer any question raised by the audience [members]" and that he would not consider any procedural objections raised by [*179] the public. In such a situation, we believe a formal objection is not required to preserve allegations of error. We therefore hold that plaintiffs did not waive any error resulting from the denial of their right to cross-examination. *Klaeren*, 202 Ill. 2d at 178-179.

The parties agree Ms. Clark never attempted to ask questions or asked to be permitted to cross-examine any witnesses at the public hearings, and Galena never denied such a request. The parties also agree Galena never offered Ms. Clark, or anyone else except board members, the opportunity to ask any questions or cross-examine any witnesses.

Ms. Clark argued that she did not waive her right to ask questions and cross-examine adverse witnesses by her failure to object because it was clear that any objection would be futile based on the comments and actions of the board members and the Galena attorney.

The Galena ZBA Chairman made a statement at the beginning of the February 9, 2022 public hearing. He said:

“Just so everyone knows, the applicant will go first in the public hearing. Then the board can ask questions of him. And after that those in favor will speak. Questions will be asked. And then people in opposition will speak. And then the applicant also has a right to come back and answer any of those questions we may have, alright? And then after that, we’ll close the public hearing.”

There was nothing in the minutes from the November 9, 2022 Galena ZBA meeting to indicate that any similar comments, or any comments about procedures, were stated at that meeting. However, it is evident from the minutes that they followed the same process that was used at the February 9, 2022 meeting.

This Court finds, as discussed in *Klaeren*, it is disingenuous to maintain that a formal objection at the hearing was necessary to preserve Ms. Clark’s claim of error for a procedural due process claim. In addition, the Court finds the comments made by the Galena ZBA Chairman, as well as other comments made by board members and the City attorney about procedures during the February 9, 2022 hearing, would indicate to a party that any objection would be futile. The statements made in this case are not as unequivocal as those made in *Klaeren*, such that no comments were made that no attempts to ask questions by the public or to raise procedural objections by the public would be considered. However, it was clear from the comments made at the meetings, and the procedures that were used, that the public would not have the opportunity to ask questions or raise procedural objections.

The Court would note that Ms. Clark, and other members of the public, were given unlimited time to address their concerns and present evidence. However, as noted in *Klaeren*, this is not a sufficient substitute for cross-examination because cross-examination is the “most efficacious test for the discovery of the truth.” *Klaeren* at 185 citing *Balmoral Racing Club*, 151 Ill. 2d at 410-11.

Therefore, the Court finds Ms. Clark did not waive any claim of errors for a violation of her procedural due process rights by her failure to object at the hearings.

The Court finds Ms. Clark proved, by clear and convincing evidence, that Galena violated her constitutional procedural due process rights, in that Ms. Clark was an interested party whose property rights were at issue, and she was not afforded the opportunity to cross-examine adverse witnesses at the public hearings held on February 9, 2022 and November 9, 2022, that involved special use requests.

Finally, the Court must decide the appropriate relief based on the violation of Ms. Clark's procedural due process rights. This case does not involve a zoning ordinance that places any restrictions on Ms. Clark's property, which means it is distinguishable from Passalino v. City of Zion. In that case, the Lake County Circuit Court granted a motion for summary judgment, finding the city's zoning amendments were unconstitutional as applied, and declared the ordinance amendment as void only as to plaintiff's parcel because it prohibited plaintiff from using their land to build multifamily buildings, which the Illinois Supreme Court affirmed. However, the case before this Court does not involve a restriction on Ms. Clark's property such that it could declare the zoning amendments or ordinances void only as they apply to her property. This case is also distinguishable from Klaeren because the Illinois Supreme Court in that case granted a preliminary injunction. That case did not involve a request for declaratory relief.

Ms. Clark did not seek injunctive relief under count 9. The Court finds the only appropriate relief for the violation of Ms. Clark's constitutional procedural due process rights is to declare void all of the zoning amendments, enactments or ordinances that resulted from the public hearings.

Therefore, the Court finds all of Galena's zoning ordinances, enactments or amendments that resulted from the public hearings held on February 9, 2022, and November 9, 2022, which includes those ordinances, enactments or amendments that were approved based on review and consideration of the record from those hearings are void.

The Court finds those ordinances, enactments or amendments include the following:

- The "Preliminary Approval and Rezoning from Limited Agriculture to a Planned Unit Development with an underlying district of Planned Commercial upon annexation into the corporate boundaries of the City of Galena" that was approved by the Galena City Council on February 28, 2022 and formalized as part of the ordinances that were approved on May 9, 2022 and May 23, 2022;

- The “Ordinance Authorizing the Execution of an Annexation Agreement with True North Quality Homes, LLC for 56.17 Acres South of Rives Street and Blackjack Road in East Galena Township, Jo Daviess County, Illinois” that was approved by the Galena City Council on May 9, 2022;
- The “Ordinance Amending the Zoning Map of the City of Galena for Approximately 80.02 acres owned by True North Quality Homes, LLC from Limited Agricultural to Planned Unit Development with an Underlying District of Planned Commercial” that was approved by the Galena City Council on May 23, 2022;
- The “Amendment to an Annexation Agreement between the City of Galena and True North Quality Homes, LLC” that was approved by the Galena City Council on November 14, 2022; and
- The “Amendment to the Planned Unit Development Plan” that was approved by the Galena City Council on November 14, 2022.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court finds in favor of the Defendant, City of Galena, and against the Plaintiff, Wendy Clark, for the claims alleged in Counts 1 through 7, as well as Counts 9 and 10 of the Amended Complaint;
2. The Court finds in favor of the Plaintiff, Wendy Clark, and against the Defendant, City of Galena, for the claim of a violation of procedural due process in Count 8 of the Amended Complaint;
3. Therefore, the Court finds all of the Galena zoning ordinances, amendments or enactments that resulted from the public hearings held on February 9, 2022, and November 9, 2022, which includes those ordinances, amendments or enactments that were approved based on review and consideration of the record from those hearings, are void;
4. Those ordinances, amendments or enactments include the following:
 - a. The “Preliminary Approval and Rezoning from Limited Agriculture to a Planned Unit Development with an underlying district of Planned Commercial upon annexation into the corporate boundaries of the City of Galena” that was approved by the Galena City Council on February 28, 2022 and formalized as part of the ordinances that were approved on May 9, 2022 and May 23, 2022;

- b. The “Ordinance Authorizing the Execution of an Annexation Agreement with True North Quality Homes, LLC for 56.17 Acres South of Rives Street and Blackjack Road in East Galena Township, Jo Daviess County, Illinois” that was approved by the Galena City Council on May 9, 2022;
 - c. The “Ordinance Amending the Zoning Map of the City of Galena for Approximately 80.02 acres owned by True North Quality Homes, LLC from Limited Agricultural to Planned Unit Development with an Underlying District of Planned Commercial” that was approved by the Galena City Council on May 23, 2022; and
 - d. The “Amendment to an Annexation Agreement between the City of Galena and True North Quality Homes, LLC” that was approved by the Galena City Council on November 14, 2022.
 - e. The “Amendment to the Planned Unit Development Plan” that was approved by the Galena City Council on November 14, 2022.
- 5. The Clerk of the Court is directed to transmit a copy of this order to all parties;
 - 6. Each party is responsible to pay their own court costs and their own attorney’s fees;
 - 7. This matter is next set on January 23, 2023 at 3:30 p.m. for a status hearing on count 11.

DATED THIS 22nd day of January, 2024

ENTERED:



Associate Judge John D. Hay