BENSENVILLE
VILLAGE CLERK'S OFFICE

12 South Center Street
Bensenville, IL 60106

Office: 630.350.3404
Fax: 630.350.3438
www.bensenville.il.us



January 21, 2020

Mr. James Brill
White Pines Community Alliance

Re: January 21, 2020 FOIA Request

Dear Mr. Brill:

I am pleased to help you with your January 21, 2020 Freedom of Information Act ("FOIA"). The Village of Bensenville received your request on January 21, 2020. You requested copies of the items indicated below:

*"Any document submitted, written or received related to the case of Gina Mellenthin vs The Village of Bensenville or any of its employees, trustees or board members, between the dates of January 01, 2020 and this present date that have not already been sent to the White Pines Community Alliance in response to previous FOIA requests."*

After a search of Village files, the following information was found responsive to your request:

1) DuPage County Circuit Court No. 2018CH001065 – Plaintiff's Motion to Reconsider and Motion to Extend Appeal Filing Deadline. (10 pgs.)

These are all the records found responsive to your request.

Do not hesitate to contact me if you have any questions or concerns in connection with this response.

Very truly yours,

Corey Williamsen
Freedom of Information Officer
Village of Bensenville

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL DISTRICT
DUPAGE COUNTY, WHEATON, ILLINOIS



| | |
|---|---|
| GINA MELLENTHIN, KURT IGLEMAN, CELESTE SHAW, AND PHIL ADCOCK,<br><br>Plaintiffs,<br><br>v.<br><br>VILLAGE OF BENSENVILLE,<br><br>Defendants. | No.: 18 CH 001065<br><br>Judge Bonnie Wheaton |

**PLAINTIFFS' MOTION TO RECONSIDER AND MOTION TO EXTEND APPEAL FILING DEADLINE**

NOW COME, the Plaintiffs, GINA MELLENTHIN, KURT IGLEMAN, CELESTE SHAW, AND PHIL ADCOCK, by and through their attorneys, Matton and Werwas, P.C., pleading in the alternative pursuant to 735 ILCS 5/2-613(b), present their Motion to Reconsider and Motion to Extend Appeal Filing Deadline pursuant to 735 ILCS 5/2-1202, Illinois Supreme Court Rule 303, Illinois Supreme Court Rule 183, and in support thereof state as follows:

**INTRODUCTION**

This matter is brought by Plaintiffs, GINA MELLENTHIN, KURT IGLEMAN, CELESTE SHAW, and PHIL ADCOCK, (collectively "Plaintiffs"), who are unincorporated property owners and taxpayers within the unincorporated Village of Bensenville. Plaintiffs allege that Defendant, the Village of Bensenville, breached its fiduciary duty of loyalty, good faith, and independence or in the alternative breached its contract with Plaintiffs or was unjustly enriched, since approximately $300,000.00 contributed to the Unincorporated Utility Fund (hereinafter the "Fund") between 2013 and 2017 is missing. This is evidenced by the receivables showing zero dollars during 2013 to 2017. On August 30, 2019, Plaintiffs filed their Second Amended Complaint. On September 30, 2019, Defendant filed their Section 2-615 and 2-619 Motion to Dismiss Plaintiffs' Second Amended Complaint. On December 18,

2019, the Court granted Defendant's Motion. The Plaintiffs now bring this Motion to Reconsider that ruling or in alternative their Motion to Extend Time to File an Appeal. Because Plaintiffs are bringing the instant Motion to Reconsider for good cause, they request an extension on the deadline to file an appeal if the Motion to Reconsider is denied.

## LEGAL STANDARDS

One of the purposes of a motion to reconsider is to make the court aware of "... errors in the court's previous application of existing law." *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 522, 865 N.E.2d 492, 498 (1st Dist. 2007). When a party seeks reconsideration based on errors in the court's previous application of existing law, the party "in effect, asks the court to rethink what it already thought." *O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 838, 781 N.E.2d 1114, 1118 (1st Dist. 2002). The party "simply asserts error on the part of the trial court in its application of existing law." *Sacramento Crushing Corp. v. Correct/All Sewer*, 318 Ill. App. 3d 571, 577, 742 N.E.2d 829, 835 (1st Dist. 2000). When a court rules on motion to reconsider, that ruling is generally reviewed on appeal for abuse of discretion. *Kyles v. Maryville Acad.,* 359 Ill. App. 3d 423, 433, 834 N.E.2d 441, 449 (1st Dist. 2005). But when a motion to reconsider is based on a court's previous application of existing law, the question on appeal always remains a question of law subject to a *de novo* review with no deference given to the trial court. *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991).

This Court is bound by precedent, and, therefore should follow the decisions of the Supreme Court and the Appellate Court. *Charles v. Seigfried*, 651 N.E.2d 154, 159 (1995). This doctrine "is the means by which courts ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Chicago Bar Ass'n v. Illinois State Bd. of Elections*, 641 N.E.2d 525, 529 (1994).

A motion to dismiss filed under section 2-619 admits the legal sufficiency of the claim, but asserts affirmative matters outside of the pleading that defeats the claim. *Wallace v. Smith*, 203, Ill. 2d 441, 447 (2001). Subsection (a)(9) permits the dismissal of an action where "the claim asserted against the defendant is barred another affirmative matter avoiding the legal effect or of defeating the claim." 735 ILCS 5/2-619(a)(9). An "[a]ffirmative matter" is some kind of defense "*other than a negation of the essential allegations of the plaintiff's cause of action.*" *Kedzie & 103rd Currency Exchange v. Hodge*, 156 Ill. 2d 112, 115 (1993). (emphasis added). Where the non-moving party's well-pleaded facts and inferences drawn therefrom raise the possibility that the party raising the issue will prevail, the motion to strike should not be granted. Long v. Kemper Life Insurance Co., 553 N.E.2d 439 (1990).

A motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615) attacks the legal sufficiency of a pleading by alleging defects on the face of the complaint. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). When ruling on a section 2-615 motion, the relevant question is whether the allegations in the complaint, construed in a light most favorable to the nonmoving party, are sufficient to state a cause of action upon which relief may be granted. *Canel v. Topinka*, 212 Ill. 2d 311, 317 (2004). In ruling on a section 2-615 motion to dismiss, the court must accept all well-pleaded facts, as well as any reasonable inferences drawn therefrom, as true. *Buzzard v. Bolger*, 117 Ill. App. 3d 887, 889-90 (1983). "Where the well-pleaded facts of a complaint raise the possibility that the party asserting them will prevail, the defense should not be stricken." *International Insurance Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 631 (1993).

Finally, Illinois Supreme Court Rule 303 provides that a notice of appeal must be filed within thirty (30) days after the entry of the final judgment appealed from, or within thirty (30) days after the entry of an order disposing of the last pending post-judgment motion or order

directed against that judgment or order. Ill. S. Ct. R. 303(a)(1). Further, Illinois Supreme Court Rule 183 provides that "[t]he court, for good cause shown on motion after notice to the opposite party, may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited period, either before or after the expiration of the time." Whether good cause exists is fact intensive and rests within the sound discretion of the circuit court. *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 353-54, 875 N.E.2d 1065, 1078-79 (2007). In determining whether good cause exists, the circuit court may consider all objective and relevant evidence presented by the moving party. *Vision Point of Sale*, 226 Ill. 2d at 353, 875 N.E.2d at 1078.

## ARGUMENT

### A. Plaintiffs have standing to bring this action or in the alternative should be allowed to replead to address the concern.

First, Plaintiffs would like the Court to reconsider its ruling that Plaintiffs do not have standing. Again, a party with an injury in fact to a "legally cognizable interest" has standing to bring a claim for that injury. *Village of Chatham v. County of Sangamon*, 216 Ill.2d 402, 419, 297 Ill.Dec. 249, 837 N.E.2d 29 (2005). The injury, threatened or actual, must be "(1) distinct and palpable; (2) fairly traceable to defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." *Wexler v. Wirtz Corp.*, 211 Ill.2d 18, 23, 284 Ill.Dec. 294, 809 N.E.2d 1240 (2004). Under Illinois law, a plaintiff need not allege facts establishing standing. *Wexler v. Wirtz Corp.*, 211 Ill.2d 18, 22, 284 Ill.Dec. 294, 809 N.E.2d 1240 (2004); *Chicago Teachers Union, Local 1 v. Board of Education of the City of Chicago,* 189 Ill. 2d 200, 206, 244 Ill.Dec. 26, 724 N.E.2d 914 (2000). Rather, it is the defendant's burden to plead and prove lack of standing. *Chicago Teachers Union,*189 Ill.2d at 206, 244 Ill.Dec. 26, 724 N.E. 2d 914; *Greer v. Illinois Housing Development Authority,* 122 Ill.2d 462, 494, 120 Ill.Dec. 531, 524 N.E.2d 561 (1988). Where standing is challenged by way of a motion to dismiss, a court

must accept as true all well-pleaded facts in the plaintiff's complaint and all inferences that can reasonably be drawn in the plaintiff's favor. *Schlenker*, 209 Ill.2d at 461, 283 Ill.Dec. 707, 808 N.E.2d 995.

It has long been the rule in Illinois that citizens and taxpayers have a right to enjoin the misuse of public funds, and that this right is based upon the taxpayers' ownership of such funds and their liability to replenish the public treasury for the deficiency caused by such misappropriation. *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 160, 139 N.E.2d 227, 229 (1956). The misuse of these funds for illegal or unconstitutional purposes is a damage which entitles them to sue. *Krebs v. Thompson*, 387 Ill. 471, 56 N.E.2d 761; *Fergus v. Russel*, 270 Ill. 304, 110 N.E. 130. The taxpayer must allege that the acts complained of would result in financial loss or other injury to himself or the taxpayers as a whole, through increased taxation, or in some financial injury or other harm to the governmental body involved. *Lynch v. Devine*, 45 Ill. App. 3d 743, 749, 359 N.E.2d 1137, 1141 (1977).

The mere fact that the same kind of damage is alleged for multiple property owners does not preclude the damage from being separate and distinct for each owner. *Davis v. Dyson*, 387 Ill. App. 3d 676, 690, 900 N.E.2d 698, 711 (2008). Ownership of individual property is separate, and each individual property owner is therefore entitled to relief. *Id.*

Defendant argues in its Motion that the Plaintiffs do not have any representational relationship nor was this action brought as a class action pursuant to Section 2-801 of the Illinois Code of Civil Procedure. Under the rulings of *Wright* and *Thompson*, the Plaintiffs are entitled to sue for the misuse of public funds, and therefore have standing in this action. Furthermore, the law only requires that each Plaintiff's injury be separate and distinct, not unique. *Davis v. Dyson*, 387 Ill. App. 3d 676, 690, 900 N.E.2d 698, 711 (2008). That is the case here. Each Plaintiff is similarly situated as they are all resident-payers into the Fund, who have the

longstanding right under Illinois law to bring suit to enjoin the misallocation of funds. *See Wright*, 10 Ill. 2d 157 at 160. Thus, Defendants' claim that Plaintiffs do not have standing is without merit and should be disregarded and the December 18, 2019 Order should be vacated.

If the Court still holds the position that Plaintiffs do not have standing, then Plaintiffs would like the Court to reconsider its ruling dismissing the matter with prejudice so that Plaintiffs can address and rectify the Court's concern. At the December 18, 2019 hearing on Defendant's Motion to Dismiss, the main reason it appeared that the Court dismissed Plaintiffs' Second Amended Complaint was because the Court held the position that it didn't think that Plaintiffs had standing to bring the instant lawsuit. However, at the previous hearing on Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint, the Court seemingly didn't take that position. At the hearing on Defendants' Motion to Dismiss the First Amended Complaint, the Court stated that the Defendants named in the lawsuit were not proper so Plaintiff addressed that concern in the Second Amended Complaint. Had it been determined that the Plaintiffs were not proper at the hearing on the Motion to Dismiss the First Amended Complaint, Plaintiff would have also addressed that concern in the Second Amended Complaint. Therefore, Plaintiffs would ask that this Court reconsider its ruling dismissing the matter with prejudice and allow Plaintiffs a chance to amend the complaint to address the Court's standing concern.

**B. Plaintiffs have plead a clear, protectable interest, irreparable injury and are likely to succeed on the merits.**

If the Court reconsiders its position on the standing issue or allows Plaintiffs to amend their complaint to address the concern, it is likely Plaintiffs are likely to succeed on the merits. Evidence need not be laid out in the complaint, only the ultimate fact(s). *People ex rel. Fahner v. Carriage Way W., Inc.*, 88 Ill. 2d 300, 310, 430 N.E.2d 1005, 1009 (1981). The trial, not the

pleadings, is the proper place to look for evidence of how and when the illegal conduct took place. *Id.* Also, Plaintiffs also need not set out every evidentiary fact in their Complaint, only the ultimate facts. The pleading must contain enough facts that lead to an inference of a plausible claim for relief, which is the case in the Plaintiffs' Second Amended Complaint as discussed *supra*. *See Fahner v. Carriage Way W., Inc.*, 88 Ill. 2d 300 at 310.

Plaintiffs have plead a clear and protectable interest because as stated above, they have standing to bring the pending lawsuit. Defendant claims Plaintiffs' pleaded injury as "conclusory." However, Plaintiffs' allege that there is at least $300,000.00 missing from a public utility fund. The injury sustained by Plaintiffs is not merely the lost monies, but the entire economic loss of the Village's water infrastructure's now inability to be improved. Plaintiff's are not praying that the money be returned to them in their individual capacity as residents, but they seek the Village to replenish the Fund. In direct contravention to the Defendant's argument, the injury is in fact irreparable. Again, the injury is separate and distinct, albeit not unique: the resident payers detrimentally relied on the Village to use these contributed monies to improve an aspect of the infrastructure, and thus improve the livelihood, health, and safety of the residents of unincorporated Bensenville.

To state a claim for breach of fiduciary duty, it must be alleged and ultimately proved: (1) that a fiduciary duty exists; (2) that the fiduciary duty was breached; and (3) that such breach proximately caused the injury of which the party complains. *Lawlor v. N. Am. Corp. of Illinois*, N.E.2d 414, 433 (2012). Illinois courts have repeatedly affirmed the principle that public officials are trustees with a fiduciary duty to the people. *Chicago Park District v. Kenroy, Inc.*, 78 Ill.2d 555 (1980); *Brown v. Kirk*, 64 Ill.2d 144 (1976); *City of Chicago ex rel. Cohen v. Keane*, 64 Ill.2d 559 (1976).

As applied to the Plaintiffs' Amended Complaint, all of these elements are properly plead. The Defendant owed a duty to the residents of Unincorporated Bensenville. Second, that duty was breached since approximately $300,000.00 owed to the Fund is missing, and Defendant is solely in control of this account, which leaves it responsible for the Fund's monies and contributions. Third, this breach proximately caused the injuries of the Plaintiffs, since increased taxation is a proximate injury of the Defendant's breach that caused missing tax revenues owed to a public fund for capital improvements to the Plaintiffs' water infrastructure, as well as the decrease in livelihood, health, and safety of the residents of Bensenville that would result from not improving the water infrastructure. Therefore, Defendant's Motion to Reconsider should be granted and the Order of December 18, 2019 should be vacated or in the alternative the court should reconsider its dismissal with prejudice and allow the Plaintiffs to amend their complaint.

**C. Plaintiffs have properly plead claims.**

If the Court reconsiders its position on the standing issue or allows Plaintiffs to amend their complaint to address the concern, then Plaintiffs state a proper claim for Breach of Contract or Unjust Enrichment. For a claim for breach of contract, a party must allege: (1) the existence of a valid, enforceable contract; (2) performance of the contract; (3) a breach of the contract; and (4) damages resulting from the breach. *Gore v. Indiana Insurance Co.*, 376 Ill. App. 3d 282, 286 (2007).

Illinois Courts are bound to strictly interpret contractual provisions. When the terms of the contract are clear and unambiguous, they must be enforced as written and no court can rewrite a contract to provide a better bargain to suit one of the parties. *Resolution*, 618 N.E.2d at 418, citing *Continental Mobile Telephone Co. v. Chicago S M S A Ltd. Partnership*, 587 N.E.2d 1169 (1st Dist. 1992). A court will only find contract language ambiguous when it "is reasonable susceptible to more than one meaning[...]" *Morningside North Apartments I, LLC v. 1000 N.*

*LaSalle, LLC*, IL App (1st) 162274, ¶ 15. In determining ambiguity, a Court's interpretation is bound by definitions the contract has provided. *J.M. Beals Enterprises, Inc. v. Industrial Hard Chrom, Ltd.*, 194 Ill.App.3d 744, 748 (1st Dist. 1990). A "...court does not have the authority to rewrite the contract into one which the parties did not enter into." *UIDC Management, Inc. v. Sears Roebuck & Co.*, 490 N.E.2d 164 (1st Dist. 1986). Furthermore, any ambiguity in the terms of the contract is to be construed against the interests of the contract's drafter. *Zwayer v. Ford Motor Credit Co.*, 665 N.E.2d 843 (1st Dist. 1996).

Here, Plaintiffs have plead that (1) they were required to pay into the Unincorporated Utility Fund by the Village of Bensenville; (2) that they fully performed by paying their share into the Unincorporated Utility Fund; (3) that Defendant breached by misallocating the money; and (4) damages of at least $300,000.00 was incurred. Plaintiffs have properly plead the elements of a breach of contract or at the very least the elements for Unjust Enrichment/Quasi Contract. Therefore, Defendant's Motion to Reconsider should be granted and the Order of December 18, 2019 should be vacated or in the alternative the court should reconsider its dismissal with prejudice and allow the Plaintiffs to amend their complaint.

**D. If the Court denies the Motion to Reconsider, it should grant Plaintiff's request for Extension of Time to File an Appeal**

Because Plaintiffs filed the Motion to Reconsider for good cause shown as demonstrated in the above arguments, if this Court denies the Motion to Reconsider the December 18, 2019 ruling, then Plaintiffs request an extension of time to file an appeal pursuant to Illinois Supreme Court Rules 183 and 303 respectfully.

WHEREFORE, Plaintiffs, GINA MELLENTHIN, KURT IGLEMAN, CELESTE SHAW, and PHIL ADCOCK, pray that this Court enter an Order vacating the Order entered December 18, 2019 and proceed with the lawsuit or in the alternative ask that this Court allow Plaintiffs to amend their complaint or if those are both denied that Plaintiffs are granted an extension of time to file an appeal, and for any and all other relief this Court deems just and proper.

Respectfully submitted,

/s/ Keith H. Werwas

Keith H. Werwas

Matton and Werwas, P.C.
Attorneys for Plaintiffs
134 N. LaSalle Street
Suite 1040
Chicago, IL 60602
(312)236-6800
kwerwas@mattonandwerwas.com
DuPage Attorney No.: 328992