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IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES J. DRURY III, as agent of the Peggy D. Drury Declaration of Trust U/A/D 02/04/00, Jack E. Reich and James T. O'Donnell, Plaintiffs-Appellants, v. VILLAGE OF BARRINGTON HILLS, an Illinois Municipal Corporation, Defendant-Appellee, and BENJAMIN B. LECOMPTE III, CATHLEEN B. LECOMPTE, JOHN J. PAPPAS, SR., BARRINGTON HILLS POLO CLUB, INC. and VICTORIA KELLY Intervenors-Defendants-Appellees.	Appeal from the Circuit Court of Cook County, County Department, Chancery Division Circuit Court Case No. 15 CH 3461 Trial Judge: David B. Atkins Date of Notice of Appeal: 05/15/23 Date of Post Judgment Motion Order: None Date of Judgment(s): 12/16/21 and 04/24/23

BRIEF OF PLAINTIFFS-APPELLANTS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

I. INTRODUCTION

Appellants' claim is not the typical zoning challenge that this Court is historically called upon to review. Instead of an "as applied" challenge it involves a substantive due process facial challenge to Ordinance No. 14-19 **(Pls. Ex. 2)**[1] ("Ordinance"), a copy included in Appendix at Tab 1, passed by the Defendant, Village of Barrington Hills ("Village"), on February 23, 2015. Appellants' claim is that the Ordinance, which permitted large-scale commercial horse boarding operations on residential property and made the rezoning retroactive to June 26, 2006, violated due process and is *void ab initio* because the Ordinance was passed for the benefit of the Intervenors, Benjamin B. LeCompte III and Cathleen B. LeCompte ("LeCompte") and was unrelated to the public health, safety, and welfare of the Village.[2]

Another a-typical fact is that the Village has admitted in its Answer that the Ordinance is unconstitutional. (**Pls. Ex. 4, ¶¶** 2, 9, 102-103, 109-110, 115-117, 120, 122-125, 136-137, 140-151). It has consistently held that position since 2015. It has attempted to settle this matter but this Court held that the Village could not declare its own ordinance unconstitutional thus leaving LeCompte with a vested rights claim which he has availed himself of. The Village has repealed the Ordinance, a fact this Court took especial note. *Drury v. Village of Barrington Hills*, 2018 IL App (1st) 173042 ("*Drury*").

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[1] Where appropriate, references to the parties' trial exhibits herein will be as follows: Pls. Ex.__, Ints. Ex. __, Vil. Ex. ___ or Pappas Ex. __.

[2] This matter came before the Court for a bench trial on Appellants' First Amended Verified Complaint for Declaratory Judgment, Injunction, and Other Relief ("Complaint"). Trial commenced on August 1, 2022. The Court heard 21 days of testimony which concluded on January 5, 2023, at which time the evidence was closed. The Court heard testimony from 21 witnesses.

Furthermore, the Village has maintained the unconstitutionality of the Ordinance throughout the length of this case over a period of seven years.

A third unique fact is that this is the fourth appeal this Court will hear concerning this use. On all of the three other appeals this Court has ruled adverse to the LeCompte position. Most notably, on two separate occasions, this Court has proclaimed, "This court, however, held that Oakwood Farm was not a permitted use because it did not comport with the Village's zoning code overall intent and purpose." *LeCompte v. Zoning Board of Appeals for Barrington Hills*, 2011 IL App (1st) 100423, ¶ 34 (known as "*LeCompte I*") and *Drury v. LeCompte,* 2014 IL App (1st) 121894-U, ¶ 41 (known as "*LeCompte II*"). (**Pls. Ex. 32**)

A fourth unrivalled fact is that each and every one of the expert planning and real estate appraisal witnesses are unanimous in their testimony and opinions that in the history of zoning in Illinois, except for the Ordinance, there is not one other zoning ordinance adopted by a municipality in the State of Illinois that contains a retroactivity provision (let alone one that reached back eight years). See the testimony of Jacques Gourguechon, Michael Marous, Kon Savoy, James Plonczynski and Dale Kleczynski whose professional careers comprise more than 150 years. ("Gourguechon") (R1566, L12-24); ("Marous") (R596, L6-13); ("Savoy") (R1777, L23-24); ("Plonczynski") (R2610, L12-15); and ("Kleczynski") (R1915, L24).

II. ISSUES PRESENTED FOR REVIEW

Whether the trial court erred in its order entered on December 16, 2021 in denying Appellants' Cross Motion for Partial Summary Judgment on the issue of the facial invalidity of the retroactive provision in the Ordinance. A copy of that Order (C 8576-78) is included in the Appendix at Tab 2.

Whether the trial court erred in its order entered on April 24, 2023, in applying the wrong standards in ruling on the Complaint and the facial invalidity of the retroactivity provision and the Ordinance as a whole. A copy of that Order (C 10273-80) is included in the Appendix at Tab 3.

Whether the trial court erred in its order entered on April 24, 2023, in not ruling that the Ordinance was barred by Section 1-2-3 of the Village Ordinance which prohibits the adoption of an ordinance repealing a former ordinance where an offense has been found to have been committed under the former ordinance.

Whether the trial court erred in its order entered on April 24, 2023, in entering judgment in favor of the Intervenor and against the Appellants.

III. STATEMENT OF JURISDICTION

This appeal is taken pursuant to Supreme Court Rule 301 which provides in relevant part:

> Rule 301. Method of Review. Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding.

Both the Order entered on December 16, 2021, denying Appellants' Motion for Partial Summary Judgment and the Order entered on April 24, 2023, granting judgment in favor of the Intervenors and against the Appellants on Appellants' Corrected First Amended Verified Complaint are reviewable per Rule 301.

IV. ORDINANCE INVOLVED

The Constitutional Provisions and Ordinances to be considered are:

5th Amendment to US Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14th Amendment to US Constitution: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article1, Section 2 of the Illinois Constitution: No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Ord 14-19 (Tab 1)

Ord 06-12 (Tab 5)

Section 1-2-3 of the Village Code (Tab 10)

V. STATEMENT OF FACTS

Because the facts in this case have been oft-repeated in three separate decisions of this Court concerning the LeCompte's commercial horse boarding operations at Oakwood Hills, Appellants adopt and incorporate the statement of facts most recently stated in *Drury,* ¶¶ 12-51; the statement of facts found in *LeCompte* II, ¶¶ 6-31 in 2014 and the statement of facts found in *LeCompte I,* ¶¶ 3-13. Appellants also adopt and incorporate the two lengthy Joint Stipulation of Facts (C 9643-47; C 9680-91) which are included in the Appendix at Tab 4.

VI. ARGUMENT

I. THE JUDGMENT IN FAVOR OF THE INTERVENORS WAS IN ERROR

A. Legal Standards.

Not often have courts in Illinois conducted an evidentiary trial on a facial challenge to a zoning ordinance. *Lou Owen, Inc. v. Village of Schaumburg,* 279 Ill. App. 3d 976 (1st Dist. 1996), is one example. It involved a facial challenge to an ordinance and evidentiary hearing on plaintiff's claim. The First District in the *Schaumburg* case clarified the court's

role as determining whether the record established that the ordinance was arbitrary and capricious and did not have a rational relationship to a legitimate government interest. 279 Ill. App. 3d at 984. "[W]hen an attack is made upon the validity of an ordinance, it is the duty of the court to review it; and the application of the ordinance must be decided by the court from the facts and circumstances in evidence." *Id*. at 985. In the *Schaumburg* case, the court concluded that "review of the 'facts and circumstances' that were presented to the trial judge" supported the conclusion that "the Ordinance was arbitrary and capricious and did not have a rational relationship to a legitimate governmental interest." *Id*.

The second reported decision is in the earlier appeal in this case where this Court fixed the criteria to be used in determining the facial validity of a challenged ordinance. *Drury*, ¶ 111 n.2.

B. The Final Judgement Order Contains Several Errors Which Support Its Reversal.

1. The trial court failed to apply the controlling legal standards.

2. The trial court evidences a serious misunderstanding on a number of significant issues central to the resolution of this case including i) the Schuman letter (**Pl. Ex. 18**) ("Schuman Letter") which the trial court characterized as lacking an apparent legal effect; ii) the failure to give the Village's position as to the unconstitutionality of the Ordinance (a position it has consistently held for more than seven years) any weight whatsoever; iii) the failure to consider Intervenors' failure to disclose several prejudicial emails all of which were within the purview of the document production request propounded by the Appellants.

3. The trial court should have awarded relief to Appellants on the basis of Section 1-2-3 of the Village Ordinance which prohibits the adoption of an ordinance

repealing a former ordinance where an offense has been found to have been committed under the former ordinance.

4. In the alternative, the Court should have entered partial summary judgment finding the retroactivity provision unconstitutional.

II. THE TRIAL COURT FAILED TO APPLY THE STANDARDS DEEMED CONTROLLING BY THIS COURT.

This Court in this specific case expressly identified the factors relevant to the unconstitutionality of the Ordinance which is the central issue in this case. In reinstating the Complaint, the Appellate Court found that the "subjects of proper inquiry" in determining "whether a legislative body acts for a certain (impermissible) reason" include: a. the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes; b. departures from the normal procedural sequence; c. substantive departures from the normally accepted decisional criteria, "particularly if the factors usually considered important by the decision-maker strongly favor decision contrary to the one reached"; and d. the specific sequence of events leading up the challenged decision, such as, for example, a change to a longstanding zoning policy immediately after a disfavored group attempts to avail itself of the existing policy.

Drury, ¶ 111 n.2, *citing Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-268 (1977).

Here, it is evident from an examination of the trial court order that the court conducted no such analysis. Certainly, the court's opinion does not evidence that "sensitive inquiry into such circumstantial and direct evidence of intent as may be available" citing to the *Arlington Heights* case referenced in this Court's footnote 2.

Instead, the trial court identified the controlling standard as, "the sole issue at trial was whether there is a rational basis for its adoption, in particular whether there was *not* because it was instead adopted for only one person's benefit." See footnote 1 in Final Judgment Order. (C 10273) He arrived at that conclusion without conducting the type of careful analysis that this Court prescribed.

The standard of review on this issue is *de novo* and this Court may apply the facts to the standards and legal criteria that it prescribed. In *Shulte* v. *Flowers,* 2013 IL App (4th) 120132, in the context of a motion for reconsideration, the court stated with respect to the abuse of discretion standard, "a trial court can abuse its discretion not only by making, or adhering to, factual findings that are against the manifest weight of the evidence but also by applying the wrong legal standard [citations omitted] or by using the wrong legal criteria [citations omitted]." *Schulte, Id* ¶ 23. "[T]he question of whether the circuit court applied the correct legal standard is one of law, which we review *de novo." Id. citing, 1350 Lake Shore Associates* v. *Randall,* 401 Ill. App. 3d 96, 102 (1st Dist. 2010). Likewise, identifying the correct legal criteria is a task that is performed on a *de novo* basis. *Id.*

The foregoing legal principles and facts relevant to the factors established by this Court establish the unconstitutionality of the Ordinance and that the Final Judgment Order should be reversed.

III. APPLICATION OF THE FACTORS ENUNCIATED BY THIS COURT IN ITS *DRURY* DECISION ("DRURY FACTORS") SUPPORTS REVERSAL OF THE TRIAL COURT'S FINAL ORDER AND JUDGMENT IN FAVOR OF APPELLANTS

A. The Historical Background of the Decision to Adopt the Ordinance and the Series of Official Actions Taken for Invidious Purposes.

The historical background of the Ordinance "is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *See Drury, supra* at ¶

11, n2. In a pretrial order, the trial court ruled that the relevant time frame in this case for purposes of the parties presenting evidence is 2005-2015.[3] (C 9651-52) While Appellants argued that the time frame established by the Court was overly broad, it assigns no error to that order. In fact, going back to 2005 only puts an explanation point on Appellants' position that the Village was never motivated to act, there was never a problem until LeCompte was in legal peril.

The uncontradicted testimony of all of the real estate expert witnesses called in this case as to the non-existence of any retroactivity in any zoning ordinance is historic background of great note.

Ordinance 06-12 (**Pls. Ex. 1**), included in the Appendix at Tab 5 (known as the Home Occupation Ordinance ("HOO")), was adopted on June 26, 2006. It was not until 2014 (eight years after its adoption) that the dispute about the meaning and intent of the HOO arose not coincidentally after the Appellate Court rendered its decision in *LeCompte II* in which the court, for the second time in three years, confirmed that LeCompte's large scale commercial horse boarding *did not comport with the Village's zoning code*. (*See LeCompte I*, ¶ 33, *LeCompte II*, ¶38-39)

In direct conflict with the Intervenors' claim that a dispute did not arise until 2014 is the undisputable fact that the Appellate Court in *LeCompte I*[4] clearly found that all of the subsections in the HOO were relevant, applied in the context of commercial horse

[3] Going back to 2005 only puts an explanation point on Appellants' position that the Village was never motivated to act, there was never a problem until LeCompte was in legal peril.

[4] The published decision in *LeCompte I* is dated September 21, 2011. The decision was originally released on June 30, 2011, as an unpublished opinion at 2011 Ill. App. Unpub. LEXIS 1559.

boarding, not just the hours of operation requirements in subsection (g) as Intervenors claim. *See LeCompte I*, ¶¶ 33-39. In *LeCompte II*, the Appellate Court unmistakably reiterated its ruling in 2011 in *LeCompte I* that one qualifying as a home occupation must comply with all of the relevant provisions in 5-3-4(D), not just the hours of operation. *See LeCompte II* at ¶ 38, where this Court emphasized that a court is to view the zoning code in its entirety and identified the several provisions in the home occupation ordinance itself that applied including the Intent and Purpose provisions. Such a sound approach is contrary to the one taken by Schuman in response to LeCompte's solicitation in permitting LeCompte to cherry pick one requirement at the exclusion of all of the others contained in the HOO.

This Court in *LeCompte II* also recognized that "when subsection 5-3-4(D)(3)(g) was added to the home occupation section, it permitted horse boarding and training subject to compliance with the various conditions set forth in section 5-3-4(D) of the zoning code." *LeCompte II* at ¶11. Again, the Court in *LeCompte II*, in reiterating its 2011 opinion in *LeCompte I* made clear that this analysis was not *obiter dicta* and that Oakwood Farms needed to be a subordinate use, not a principle use and thus, the Schuman Letter's reliance on a change in the hours of operation was unreconcilable with the court's analysis requiring consideration of the overall intent and purpose of the ordinance. See *LeCompte II* at ¶ 41.

LeCompte's previous sworn testimony and his representations to this Court and the circuit court are part of the historic record that support judgment in favor of Appellants. In LeCompte's appeal to the ZBA in 2008 of the cease-and-desist order and in written representations to the circuit court on administrative review, and in their brief to this Appellate Court, LeCompte testified and represented under oath that he could never comply with HOO. (**Ints. Ex. 81,** p. 6, L9-12) and Village Attorney Wambach's letter dated 2/15/11

(**Pls. Ex. 12)** and *LeCompte II* at ¶¶ 9, 52, where this Court held that LeCompte had formally waived the home occupation issue during the 2008 administrative proceedings.

Of particular historic significance is the timing of LeCompte's request for what became the Schuman Letter in relationship to the large campaign contributions he made. A timeline of these events (**Pls. Ex. 151**) is included in the Appendix at Tab 6. The letter request for assistance to the individuals he had delivered the campaign contributions was made on February 14, 2011, four days after he made $5,000 contributions to each of the four candidates running for the three open seats on the Village Board. The contributions to Joseph Messer, Patty Meroni and Karen Selman were handed to Steve Knoop (**Pls. Ex. 11**). These contributions are what Appellants have referred to in this case as "pay for play".

Instead of initiating an appeal from the Village Attorney's letter as he did in the administrative appeal proceedings three years earlier LeCompte began solicitation efforts to the former Village President efforts that ultimately culminated in the "Schuman Letter". Less than a week following Attorney Wambach's letter, on February 20, 2011, LeCompte sent emails to Steve Knoop and David Stieper, Village officials at the time, addressed to their personal/business emails. (**Pls. Exs. 13** and **14)** LeCompte admitted he did not produce these emails dubiously claiming he sent these emails from the Four Seasons Resort in Scottsdale and could not find them.[5] (See Appendix at Tab 12, Trscpt of 12-28-2022, pp. 22–28).

Yet the face of the email indicates he sent a copy to his wife's email address. His excuse does not add up. Mrs. LeCompte's emails were the subject of the same document

[5] The transcript of 12-28-22 will be included in the supplemental record to be filed with the Court. The referenced excerpt is included in the Appendix at Tab 12.

production request. He regularly used her email address in all of his *ex parte* communications to the Village officials. (**Pl. Ex. 14,** p. 3)

LeCompte's correspondence includes a draft of the prototype letter on faux Village stationery to be signed by the then Village President Robert Abboud ("Abboud"). The correspondence contained LeCompte's statement that the letter would put "significant pressure" on Drury and McLaughlin (not the Mayor) to dismiss their lawsuit against him or risk sanctions. LeCompte's correspondence acknowledges that the day prior – Saturday, February 19 – the Village President met Paddy McEvitt, an ally of LeCompte. The record further establishes that the day after this correspondence – on Monday, February 21 – which was President's Day, when the Village's offices were closed – LeCompte met with Abboud, Paddy McEvitt and Dan Lundmark. LeCompte acknowledged on direct examination that the prototype letter was discussed. (R3429, L12-22)

The evidence is irrefutable that LeCompte engaged in covert actions to influence the Village President and other Village officials to find Oakwood Farm's operations compliant with the HOO. LeCompte freely admitted on several occasions during his testimony that the initiation of the lawsuit by Drury on January 31, 2011, set in motion the events in this 13-day period that led him to disclaim his inability to meet the requirements of the HOO and ultimately, solicit what became the Schuman Letter. LeCompte admitted that the filing of the Drury lawsuit had a direct effect on him having the meeting with Abboud; motivated his solicitation of the Schuman Letter; and motivated him to initiate the text amendment with retroactivity.[6] See Appendix at Tab 13. (Trscpt of 12-28-2022, pp. 39-43)

[6] The transcript of 12-28-22 will be included in the supplemental record to be filed with the Court. The referenced excerpt is included in the Appendix at Tab 13.

LeCompte's persistent efforts were successful. On March 1, 2011, LeCompte received an email from Dan Lundmark telling him "[h]ere is the exact language Bob used as to what needs to be in your affidavit." (**Pls. Ex. 15**) LeCompte's affidavit followed three days later on March 4th (**Pls. Ex. 16**) and the Schuman Letter less than two weeks later on March 15, 2011 (**Pl. Ex. 18**). The Schuman Letter stated: "Based on the information in your affidavit, it appears that the use of Oakwood Farm is a Home Occupation."[7]

On direct exam, when asked why he did not consider a text amendment in 2011 instead of going the route of the Schuman Letter, LeCompte testified that he did not feel there was a need for a text amendment at the time. Yet, another fact of historic significance is that the same time LeCompte was working with Abboud, Paddy McEvitt and Dan Lundmark, he wrote to Karen Rosene, a ZBA member at the time, to her home email address, with proposed text amendment changes that he asked her to support in the form of a motion at the next ZBA meeting.[8] (R3608, L17-23)

He admitted that he was very concerned that nothing would be done before the next election and "God forbid, Common Sense[9] candidates win control". (**Vil. Ex. 6**) LeCompte testified at trial that he did not remember the letter to Ms. Rosene but acknowledged that he did write it and also admitted that politics absolutely played a role in him writing to her.

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[7] On redirect, LeCompte attempted to rely on executive session minutes dated February 23, 2011 (**Ints. Ex. 206**) to suggest the Village Board was somehow aware of the discussion about the affidavit or what became the Schuman Letter. This testimony is not credible. The minutes mention nothing about Oakwood Farms, LeCompte's prototype letter, or Abboud's meetings with LeCompte and his allies the week before.

[8] Once LeCompte secured the Schuman Letter he no longer had the concern for the other barn owners that became latent three years later when it became a convenient pretext for his text amendment.

[9] LeCompte's letter to Rosene identifies the Common Sense Party as opponents to the agenda of the equestrians.

He also acknowledged on cross that it was a few weeks prior that he provided campaign contributions to Messer, Meroni, and Selman—who were opposed to the Common Sense candidates. LeCompte too acknowledged that his proposed amendment at that time did not change the "notwithstanding" clause and that he did not think at that time there was any confusion that needed to be clarified. (R 3613, L1-2; L8-24)

In light of this historic evidence, it cannot be ignored and is highly relevant that the three candidates who LeCompte supported and who were ultimately elected (Messer, Meroni and Selman) participated in several official actions as Village trustees following the Schuman Letter that favored LeCompte. They voted to reject the Village Attorney's advice to the Village Board on July 25, 2011, following the *LeCompte I* ruling, to withdraw the Schuman Letter. (**Pls. Ex. 27**) Following ZBA Chairman Freeman's ("Chairman") letter to the Village Board (in response to the *LeCompte I* ruling) in which she recommended the Village Board consider amendments to require a special use permit for large horse boarding operations **(Pls. Ex. 26)** ("Freeman Letter"), on August 22, 2011, it was these three trustees who voiced the opposition to taking any action at the time, indicating that there were no problems and that special use, an approach LeCompte admittedly opposed, was too restrictive and unnecessary. (**Pls. Exs. 28** and **132**) The following month, on September 26, 2011, they also rejected action discussed by the Village Attorney to pursue fines against LeCompte (**Pls. Ex. 30**) and again, on January 23, 2012, voted against a motion to fine LeCompte $50,000 (**Pls. Ex. 179**). They refused to enforce the cease-and-desist order that the record establishes the Village had spent in excess of $163,000.00 prosecuting. (R1092, L4-22)

A year after the Freeman Letter, on July 23, 2012, the Village had another opportunity to consider amendments, but Trustee Messer, then the liaison to the ZBA,

reported to the Village Board that it was agreed that the home occupation ordinance would "stand as it currently exists." (**Ints. Ex. 147**). Nothing happened, no actions were taken to try to amend the Zoning Ordinance until after *LeCompte II*. See Appendix at Tab 6.

In comparison, examine how the same Village Board acted in connection with the boarding violations at Deerwood. **(Ints. Ex. 33)** The Village demanded that Deerwood cease all commercial boarding operations that were in violation of the HOO and that Deerwood execute a restrictive covenant that carried with it substantial penalties for violating it.

The Schuman Letter was found by this Court to be contrary to the Village's longstanding interpretation of the HOO. LeCompte's reliance on the Schuman Letter came to a halt when *LeCompte II* was decided on March 28, 2014. At that time, LeCompte was faced with the reality of these words of the Appellate Court: "This court's 2011 opinion remains in force and defendants cannot evade the effect of that ruling by using their subsequent solicitation of the Schuman Letter as a fait accompli-shield to justify their noncompliance with the zoning code or to deprive plaintiffs of relief." *LeCompte II*, ¶54.

It was only then that LeCompte took the position in contradiction to his position in his letter to Karen Rosen *infra* that there was confusion due to the "notwithstanding" language in the HOO and that other large barns in the Village were at risk. (Trscpt of 12-28-2022, p. 164, L17-22) included in the Appendix at Tab 15. It was also then that LeCompte went to work in earnest to get a text amendment passed that would serve as a defense to Drury's lawsuit. This Court recognized in 2014 that the Schuman Letter was for the purpose of depriving Drury of relief by attempting to legalize LeCompte's use.

LeCompte was the first to file a petition for a text amendment in June 2014, followed by petitions for text amendment(s) from the Barrington Hills Riding Club, James

Hammond and James Drury. (**Ints. Exs. 18-21; Pls. Exs. 33** and **34**). The evidence disclosed that, prior to officially filing a petition for a text amendment with the Village, LeCompte had *ex parte* communications with the Chairman. The communication was to her personal email, not to her Village email. The communication sought her support for a text amendment that included retroactivity and permitted large-scale commercial horse boarding as a matter of right. Based on the statements LeCompte made in his email, it appears that he had provided at least two earlier versions of a draft amendment to the Chairman before formally filing one with the Village. (**Pls. Ex. 180**)[10] LeCompte stated in his June 1, 2014, email to the Chairman that he did not want "this amendment to get bogged down in a lengthy debate over modifications, like happened last time" and asked her to "support [his amendment] and [he thought] at least three others on the ZBA" would support it as well. (E 715-20)

The evidence pertaining to the historical background preceding the adoption of the Ordinance and the procedural and substantive departures described in Sections 2 and 3 in the analysis below demonstrates a series of official actions taken for invidious purposes -- the adoption of an ordinance for LeComptes' benefit not for the public benefit. The Ordinance is constitutionally invalid on its face and is *void ab initio*.

[10] Prior to being shown **Pls. Ex. 180** on cross, LeCompte testified on direct that he had no recollection of talking to the Chairman about his text amendment; he recalled talking to her *only twice*, once after the appellate court ruling came out to give her a copy and a second time in May about the procedure to submit an amendment. This testimony is not credible in light of this and other written communications that have surfaced in the case from LeCompte. Further **Pls. Ex. 180** and other evidence and testimony demonstrated that LeCompte knew what the procedure was regarding amendments.

B. The Specific Sequence of Events Leading up to the Passage of the Ordinance.[11]

Regarding this factor, the courts have focused on the timing of the decision and the relevant sequence of the events. The Supreme Court in the *Arlington Heights* case cited by this Court in *Drury*, ¶ 111 n.2, further noted that "[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." *Village of Arlington Heights*, 429 U.S. at 267. This Court in *Drury* likewise noted that the timing of the ordinance is relevant in determining whether it was passed to promote the public welfare or whether it was passed to favor a particular individual. *Drury*, ¶ 96. The Appellate Court delineated the particular facts alleged in Appellants' Complaint it considered as the relevant sequence of events leading up to the Ordinance at *Drury*, ¶¶ 16-40 and concluded as follows regarding the timing of the Ordinance:

> Here, the complaint alleges, it was only after his legal prospects in court were dimming that, in August 2014, LeCompte sought a legislative solution via the LeCompte text amendment. That amendment, the complaint alleges, was the predecessor of Ordinance 14-19 that was ultimately adopted by the Board. The fact that the Village acted only at that particular time, considering the years-long court battles over its horse boarding ordinance, is at least a relevant consideration that the ordinance was adopted with LeCompte's particular interests, not the public's at large, in mind." *Drury*, ¶ 96.

Applying the uncontradicted evidence at trial, the exhibits and the stipulations to this factor, the relevant timing and sequence of events convincingly demonstrate that the Ordinance was adopted for the benefit of LeCompte. Despite LeCompte's denial it is apparent that Drury's lawsuit to enforce the Zoning Ordinance triggered the four (4)

[11] While the Appellate Court took the four factors in a particular order, for purposes of this filing, Appellants believe that reviewing the sequence of events leading up to the passage of the Ordinance should be discussed before the analysis of departures from the normal procedural sequence and substantive departures from normally accepted decisional criteria.

$5,000.00 campaign contributions (**Pls. Ex. 11** and **Ints. Ex.16**) the ensuing election law complaint and finding of a violation.[12] (R 3446, L14-24)

LeCompte followed a similar pattern after this Court reinstated the *Drury* lawsuit in March 2014. This time LeCompte solicited the assistance of the then Chairman (**Pls. Ex 108**)[13] for her support of his proposed text amendment (apparently the third he had submitted to her) and for a speedy consideration of his text amendment without the debate that occurred the last time a text amendment was considered. Such an *ex parte* communication was in direct conflict with the rules of the Zoning Board contained in the "Overview of the Barrington Hills Zoning Board of Appeals (ZBA)" ("Overview") posted on the Village's website. That Overview requires all communications be submitted through the Village Clerk to avoid *ex parte* communication **(Pls. Ex 200**). See Appendix at Tab 9.

The sequence of events favoring LeCompte is also apparent in the pace of the public hearings and vote on his text amendment. That pace demonstrates that the Chairman acceded to LeCompte's request that the consideration "not get bogged down like happened the last time." The ZBA voted on the first text amendment two nights after concluding the hearings. Stieper confirmed that the ZBA as part of its regular practice was in possession of transcripts before its deliberations and vote. He confirmed that with respect to the two votes on September 11 and December 3, 2014 the vote was taken without the benefit of

[12] LeCompte's fervent denials that $20,000.00 in total as campaign contributions and the method and timing of same were not related to his objective of raising a defense to the Drury lawsuit filed 3 weeks earlier rings hollow. Just as the hearing examiner in the Board of Elections observed in connection with the misreporting of the campaign contributions (**Pls Ex 21**), it is not a coincidence that LeCompte was soliciting these individuals' support so close in time to the campaign contributions. David Stieper called it like it is, "Pay for Play".

[13] This email to the Chairman is one of several extremely prejudicial emails LeCompte failed to produce.

transcripts. (R 854, L10-15; R 861, L15-19; R 867, L6-13) The ZBA refused to grant Drury and others a continuance to present their own witnesses, evidence and testimony. The hearings and vote on the second text amendment went even faster as demonstrated by the timeline (**Pls. Ex.152**) included at Tab 7 in the Appendix. All of these facts are identified in this Court's opinion ¶¶ 21-40.[14]

The startling change in position on retroactivity by Kurt Anderson ("Anderson") is another relevant fact in examining the sequence of events demonstrating that the Ordinance was adopted for LeComptes' benefit. The Anderson I and LeCompte's petition (**Pls. Exs. 33, 34** and **36**) were nearly identical but for retroactivity. That new insertion of the retroactivity provision was despite Anderson stating on the record that retroactivity was designed to benefit LeCompte. The majority of the ZBA voted for an amendment without retroactivity. In a span of six weeks, Anderson inserted retroactivity into his amendment. Anderson could not offer any credible explanation as to what caused him to change his position that retroactivity would only benefit one individual to the position that retroactivity would benefit the community as a whole.

The answer to this irreconcilable inconsistency is apparent. Anderson was being brutally honest in September and his opinion was spot-on -- retroactivity was inserted to benefit LeCompte. Yet, in the next 45 days, he cast his concern aside and advanced and then voted for a text amendment with retroactivity that he had previously acknowledged was for the benefit of one individual. Anderson also failed to credibly explain why he

[14] All of the allegations that this Court found persuasive if proven as the basis for sustaining the complaint were proven at trial.

initiated a new text amendment when the Village Board had tabled Anderson I and sought additional information. (R 2722-24)

Not only the sequence of events but the uncontradicted testimony of Gourguechon a land use expert with more than 45 years of experience, demonstrates that that the Ordinance was such a deviation from the history of the Village's Zoning Ordinance, that its passage was inconsistent with the established purposes found in the Village's zoning pattern.

Based on the uncontested facts it is evident that like the Schuman Letter four years earlier the retroactivity clause in the Ordinance was a "Get out of Jail" card played by LeCompte made possible by his allies on the Village Board. The sequence of events leading up to the passage of the Ordinance along with the very significant departures from the normal procedural sequence and the significant substantive departures identified below demonstrate that the Ordinance is constitutionally invalid on its face and is *void ab initio*.

C. Departures From the "Normal Procedural Sequence" in Passing the Ordinance.

The testimony and exhibits when considered in light of the departures from the normal procedural sequence in adopting the Ordinance, demonstrates abnormality, haste, and numerous significant departures from established procedure. There was a clear push to pass the Ordinance before the next election in the Spring of 2015 and the result was contrary to the interest of the general public welfare. Appellants have demonstrated through their proofs serious departures from the "normal procedural sequence" which demonstrates that the Ordinance is *void ab initio*. It is undisputed that:

1. The Meeting Schedule to Hear Public Testimony; the Vote on the Recommendations; the Denial of the Requests for a Continuance Departed From the Normal Procedural Sequence.

The Chrono of 2014 Events (**Pls. Ex. 152**) is attached at Tab 7 in the Appendix. That Chrono establishes the following departures from the normal procedural sequence:

i) there were two special meetings in September and four special meetings in November and December;

ii) the voting meeting in September was held two days after the public hearing;

iii) the voting meeting on December 3 (**Pls. Ex. 45**) was held on the very night that public comment concluded;

iv) three of the meetings to consider the second text amendment were special meetings;

v) the public hearings scheduled on the petition submitted by Anderson in October 2014 were even more accelerated than the meetings on the text amendments considered in September, 2014;

vi) special public hearings were initially scheduled for November 10 and November 12, 2014, but had to be cancelled due to the ZBA's haste and its failure to provide the minimum 15 days' notice mandated under the applicable state statute;

vii) special public hearings were then scheduled for two consecutive days on December 2 and 3, 2014;

viii) the transcript on December 2 reveals that the Chairman limited each presenter's time to three (3) minutes. (**Pls. Ex. 44,** p. 3);

ix) Ms. Freeman acknowledged that during her tenure as ZBA Chairman, it was unusual to have special meetings. (Judith Freeman Stipulation, ¶ 45;

x) Anderson introduced substantial last minute amendments at the voting meeting in December that the ZBA voted to recommend after the public hearing had been closed;

xi) certain ZBA members and the public were denied sufficient opportunity to consider the last minute amendments introduced by Anderson at the December 3, 2014 hearing because the ZBA voted that same night refusing to continue the matter when there were several requests to do so from members of the ZBA and the public who pleaded that there was a need to do so;

xii) the second Anderson amendment was described at trial by LeCompte as "brilliant" and a new approach to the issue. Yet this new approach was recommended for approval in less than 60 days after it was initially introduced by Anderson; and

xiii) the explanation for the swift passage of the Ordinance was acknowledged by LeCompte and the Chairman as a response to a change in the political environment. LeCompte admitted that both he and the Chairman were concerned about the results of the upcoming election in 2015. (See: LeCompte letter to Karen Rosene (**Vil. Ex. 6**) on March 17, 2011) and LeCompte's acknowledgment of the same concerns by the Chairman's about the 2015 election under cross examination. (Trscpt of 12-28-2022, p. 98, L6-100, L14)

The only credible explanation for adopting the Ordinance in less than two months and with only two public hearings and a voting meeting on the same night is that LeCompte and his allies in the Village feared an electoral defeat in the March 2015 election and sought to pass the Ordinance before the election. That is not a legitimate basis grounded in the public welfare for adopting an ordinance.

David Stieper testified to his opinion on what drove the pace for the adoption of the Ordinance. The expedited pace of the meetings was clearly for the benefit of one—

LeCompte. It was to get retroactivity in because of the Appellate Court decision that came down. There was a heated election. McLaughlin was installed as president, and then the remaining three were up for election, so there was a threat that the Save 5 Acre Crowd[15] would lose their majority. He explained that because the Village has little commercial development, he believed that zoning proposals concerning entitling commercial development should be subject to a greater amount of deliberation and scientific exactness. He did not believe that was the case in connection with the adoption of the Ordinance. (R 1134, L10 – R 1135, L6) Stieper's testimony demonstrated that as a result of these departures from the normal procedures followed by the Village, he and other members of the ZBA were not given enough time to be able to study it and provide one's opinions and analysis and to be deliberative. He expressed grave concerns about treating a use like commercial boarding which should have been treated as a special use and converting it into a permitted use, putting it *in pari passu* with, with R-1 zoning.

He confirmed several other procedural departures including: i) transcripts not made available in advance of either of the voting meetings in September and December; ii) the pace and the speed with which this matter was proceeding to a vote on the recommendation in the ZBA record; iii) the Chair's refusal to table/continue the matter on the motion. (**Pls. Exs. 44** and **45,** pp. 87-92); and iv) the absence of a packet with any proposed text amendment in advance of meetings.

ZBA Member Wolfgram reminded his fellow members of the Rules of Participation which state: "Because the Village of Barrington Hills is a public agency subject to many laws and has extensive liability, it must act in a careful, deliberate manner. The Village has

[15] The Five Acre Crowd's candidates were Messer, Meroni and Selman.

learned that in most cases, it is better to take matters under advisement before taking action. Hasty actions in many cases lead to future problems for the Village." (**Pls Ex, 45**, p. 101.)

The rush to judgment is apparent from a review of the transcript from the close of the public hearing (**Pls. Ex. 45**, pp. 82-83) to the adjournment of the meeting at (**Pls. Ex. 45,** p.139) That review discloses a majority single mindedly bent on taking a vote no matter how many well-reasoned arguments were raised for continuing the vote to a later date.

2. The Introduction of Substantial Amendments to the Text Amendment on the Evenings of the Vote on September 11 and December 3 Were Not Preceded By Adequate Notice.

On December 3, 2014, after the public hearing had been closed and after the Zoning Board had voted to approve the findings that the text amendment promoted public welfare, Anderson introduced several substantive amendments to the text amendment. (**Pls. Ex. 45**, pp.106-111.) These amendments eliminated the requirements for permits and eliminated setback requirements.

There is no evidence that Anderson's last-minute amendments were distributed to the members of the ZBA in advance of the meeting. (**Pls. Ex. 45**, p. 107.) No evidence was submitted at trial to support Anderson's claim (**Pls. Ex. 45**, p. 107) that his amendments were based on discussions and/or testimony of Schuman and something that Schuman had "sent out". None of the several witnesses called by the Intervenors including Anderson, Freeman, Messer and Meroni identified any such correspondence. It is evident from a review of the transcript of December 3 that no one on the ZBA but for Anderson and perhaps Freeman had any idea in advance what changes Anderson was proposing that night. (R 877, L14 – R 878, L2)

A copy of **Pls. Ex. 177**, included in the Appendix at Tab 8 shows a side by side of Exhibit 43 (Anderson II excerpt before the last-minute changes made by Anderson on

December 3) and the version submitted to and voted on by the Village Board (the Ordinance) does not show by strikeout the language Anderson eliminated on December 3 with his last-minute amendments from the original draft of Anderson II. The language has simply been dropped in the amendment without clear indication to the public, or the Village Board for that matter, that this occurred.

Even after the text amendment was recommended for approval by the ZBA on December 3, because of this failure to accurately identify the changes, there was utterly no notice of the changes to the public before the Village Board voted on it. In contradistinction to the original Anderson II text amendment (**Pls. Ex. 43**) which contained strikeouts and highlights formatted in a manner that permitted the members of the ZBA and the public to readily identify and ascertain the extent and import of the proposed amendments, Anderson's last-minute amendments lacked such clarity and accuracy.

These amendments suffered from many procedural infirmities: i) the original text amendment introduced in October, 2014 (**Pls. Ex. 43),** was the subject of public comment during public hearings at the December 2 and 3 hearings; ii) these additional amendments were not subjected to meaningful public comment; time permitted only one member of the public to speak before the meeting adjourned; iii) the amendments were introduced after the public hearing was closed; these amendments on December 3 were never circulated to members of the ZBA and the public in advance of their introduction; iv) the amendments considered on December 3 were never posted on the Village's website; and v) All the public had was Anderson's description of the same. (**Pls. Ex. 45**, p. 107.)

Mrs. Maddrell, the only member of the public, afforded the opportunity to provide public comment (after the Zoning Board had recommended the adoption of the text

amendment with the December 3 amendments) strenuously objected to what was going on indicating that what Anderson proposed was very hard to follow and insisted there needs to be more discussion. She testified,

> "…I do not understand. All of a sudden we now have an amendment again that you allowed to go through. I had, as I said, his text amendment. I could not even follow it. I'm a resident of this village, and you're letting this group change our zoning code without another public hearing. We changed it. Why is this different than what we had before?... You all should be ashamed of yourselves." (**Pls. Ex. 45, 137-138.**)

Stieper characterized the process that was followed here as egregious deviations and aberrant departure from the norms of Village process. He described the typical procedure followed by the Village as: "It is typical that you would share an amendment to legislation, to a special use, to a map amendment, with your fellow Board Members well in advance of the meeting, certainly not the night of the meeting." Unlike what occurred here-- being handed an amendment to Anderson II on the night it was to be voted upon. He compared the process here to the one followed in connection with the light ordinance and the sign ordinance. (R 815, L5-15)

3. The Village Board Expedited the Adoption of the Ordinance and Did Not Insist on the ZBA Responding to the Several Issues It Requested the ZBA to Gather Evidence.

The Village Board's decision evidences the same hasty-making decision-making in evidence at the ZBA. For no apparent reason except the known absence of the Village President, a special meeting was called less than two weeks after the ZBA's recommendation. See the Chrono of 2014 Events included at Tab 7**.**

The Village President's stern objection to the process employed is set forth in his message to the Village Board on December 15, 2014 (**Pls. Ex. 47**) In that message he expressed his sadness at the process that was employed by the majority to save a single

property owner at the expense of the entire Village. He noted that the adoption of an ordinance favoring LeCompte was contrary to the legal advice offered by not only the current Village Attorney but against the advice offered by James Kelly, the attorney for LeCompte in this proceeding. He condemned the retroactivity provision found in the Ordinance "attempting to change a law favoring one neighbor over another is bad enough. Attempting to do so retroactively, to cover up for those responsible for years of this debacle is reprehensible." during my administration if this hastily assembled board acts tonight." He accurately predicted that the action of the Village Board will now involve the Village in the Drury/LeCompte lawsuit.

The President vetoed the Ordinance. (**Pls. Ex. 48)** In his veto message he accurately explained that the Ordinance was adopted for the benefit of LeCompte and not adopted for the public's benefit.

The Village Board acted on the evening of December 15, 2014 without the benefit of transcripts from the proceedings before the ZBA on December 2 and 3. It acted without a highlighted version of the last-minute amendments introduced by Anderson on the evening of December 3.

It acted without insisting on the evidence the Village Board had requested from the ZBA to gather (**Pls. Ex. 40)** ("Kosin Memo"). On September 22, 2014, the Village Board considered the first Anderson text amendment and tabled it. On October 17, 2014, the Village Board directed the ZBA to gather information on several issues of importance that were necessary to understand in order to make a reasoned decision. The planning questions posed to the ZBA in the Kosin Memo were:

> "[3.1] If horse boarding is an allowed commercial activity, does this create the potential for additional commercial activities [***14] in the Village?

[3.2] What is the effect of a permitted use of this type versus making it a special use?

Comment. Both questions go to the basic elements of planning meaning the identification of the trend of development and techniques of zoning regulations. The land use consultant who assisted the Village in the uses and revision of the Comprehensive Plan may be consulted for an opinion."

This Court remarked with respect to the questions contained in the Kosin Memo, "These appear to be reasonable and important issues that a responsible municipality would want to consider before making a significant change to its zoning laws" (**Pls. Ex. 40)** *Drury* ¶ 103. As this Court observed that the Village Board called for a special meeting to vote on the Anderson text amendment on December 15, 2014, although a month still remained on the Board's request for the ZBA to answer its series of questions. *Drury*, ¶108.[16]

The Village Board overrode the President's veto in February 2015.

4. LeCompte's *Ex Parte* Communications with Members of the Zoning Board Violate the Zoning Board's Rules.

The record is replete with evidence of LeCompte's repeated pattern of communicating with members of the Zoning Board on their personal email rather than through their official Village email. LeCompte's and certain individual ZBA members' repeated derogation of the Zoning Board policy as set forth in the Overview (Tab 9) is evidence of substantive departure from normal procedure in connection with the adoption of the Ordinance. See Tab 11 (C 10165-88).

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[16] Intervenors reference the Harrington comments in the minutes and the Chairman's response in the minutes as a basis for the claim that the ZBA did not ignore the Village Board. The Intervenors are mistaken. As to Harrington's statement in the minutes, it was one trustee's viewpoint which was superseded by the Kosin Memo. The Kosin Memo was very clear on the time the ZBA was given—90 days.

Intervenors also rely upon Judy Chairman's comments in the minutes, but the Intervenors ignore the questions that were disregarded. Intervenors fail to address the utter failure of the ZBA to address the planning questions. Further, she made no written response to the Village Board on why ZBA did not consider many of the issues.

That Overview provides in relevant part, "The ZBA does not enjoy the luxury of advocacy. Decisions are not based on a popular vote or by private lobbying of Board Members. Board Members by statute must be open and unbiased in their consideration of petitions before them. All information that any member of the public wishes to transmit to Zoning Board Members must be submitted through the Village Clerk."

5. **Conclusion.**

The record is replete with numerous serious substantive departures from the normal procedural sequence. The only explanation for these flagrant departures is that LeCompte was desperate in the face of the consequences of his illegal activities. He was out of legal recourse. LeCompte and his allies in the Village feared an electoral defeat in the March 2015 election. In their haste they discarded the procedural norms that had been followed in the Village.

It is abundantly clear that the Ordinance was adopted for the benefit of LeCompte. All of the above demonstrates that the Village and its Zoning Board over and over again departed from the procedural criteria and normal sequence before and during the adoption of the Ordinance. As a result, the Ordinance is constitutionally invalid on its face and is *void ab initio*.

D. Substantive Departures From the Normally Accepted Decisional Criteria in Passing the Ordinance.

The testimony adduced at trial and the exhibits admitted into evidence demonstrate that there were many substantive departures from the decisional criteria in connection with the adoption of the Ordinance. These instances include:

The Ordinance with the Retroactivity Provision abridges the Village Code;

The absence of meaningful restrictions on this commercial use;

Ignoring the directive of the Village Board to gather more information;

Ignoring the opinions of the witnesses;

Inadequate Findings;

1. The Ordinance with the Retroactivity Provision abridges the Village Ordinance.

The Ordinance is directly proscribed by the Village Ordinance. Section 1-2-3 (**Pls. Ex. 153**) pertaining to court proceedings expressly prohibits the adoption of ordinances that repeal a former ordinance where an offense has been found to have been committed

> No new ordinance shall be construed or held to repeal a former ordinance, whether such former ordinance is expressly repealed or not, as to any offense committed against such former ordinance...

A copy of Section 1-2-3 of the Village Code is included at Tab 10 of the Appendix.

LeCompte was found to have violated the HOO, the subject of the cease-and-desist order. All of his appeals were denied. LeCompte's desperate attempt to undo that violation through the Ordinance's retroactivity provision is for naught inasmuch as it is specifically prohibited by the Village Code.

The practical effect that the retroactivity provision in the Ordinance had was to allow LeCompte to claim in the adjacent landowner (*Drury*) case that his operation is a legal non-conforming use which vested at the passage of the Ordinance.

The passage of the retroactivity provision contained in the Ordinance was a substantive departure from the normally accepted decisional criteria, as it directly violated Section 1-2-3 of the Village Code. The Village has a duty to consistently apply the ordinances across the entirety of the Village which promotes public health, safety and welfare. Passing a retroactivity provision in an attempt to erase a validly issued cease and desist order to an individual property owner was a blatant violation of Section 1-2-3. For a

village to enact for the first time a retroactivity provision, which is clearly in derogation of its own Village code is a material substantive departure.

2. The Absence of Meaningful Restrictions on a Very Large Imposing Commercial Operation in a Community Almost Entirely Devoted to Residential Development Evidences the Unconstitutionality of the Ordinance.

This Court has remarked on more than one occasion that commercial horse boarding does not comport with the Village's Zoning Code overall (*See LeCompte I*, ¶ 33, *LeCompte II*, ¶38-39). Ms. Freeman years earlier when deliberating on LeCompte's argument in his administrative appeal identified the "illogic" of treating large scale commercial horse boarding as agriculture. She found LeCompte's claim that his operations were agriculture illogical. (**Ints. Ex. 82**, pp. 68-69) She stated,

> "…anyone in the village could build a barn that has larger square footage than their home, call it agricultural and bring in 500 horses. And that to me could never have been intended by the way that the code is written…"

Ms. Freeman correctly analyzed that LeCompte's approach would lead to abuse allowing a property owner to declare their property agriculture and establish a large-scale commercial horse boarding operation to the detriment of one's neighbors. That is exactly what the Ordinance allows LeCompte to do to the detriment of Drury. Ms. Freeman's observations equally apply to the Ordinance. Anyone with 10 acres or more can unilaterally declare their property qualifies under Section 5-3-4(A)(2) and avail themselves of nearly unlimited floor area, height and elimination of the other bulk requirements. The Ordinance contains no meaningful restrictions on a large commercial enterprise in a Village devoted almost exclusively to residential development.

Under the Ordinance LeCompte's property comprised of 120 acres, can board 240 horses with all of the traffic and commercial activity attendant to such a use. As indicated

in the testimony of Schuman at the December 2, 2014 hearing there is no longer any requirement that the accessory buildings be smaller than the residence. On LeCompte's property (assuming it is 120 acres) he can construct in excess of 250,000 sq. ft. of accessory buildings. There is no limit on the height of these structures. (**Pls. Ex. 44,** pp 89-96)

It is uncertain whether building permits are required. Schuman acknowledged enforcement issues in the proposed ordinance. He recognized the uncertainty and lack of clarity concerning whether the Building Code applies inasmuch as the Ordinance categorizes the use as agriculture.

Anderson's last-minute amendment on December 3 did not clear up the confusion. Schuman had requested in his remarks on December 2nd that it be clear that the intent is that permits would be required. (**Pls Ex 44**, p. 89) Instead, the Ordinance reads:

> **5-3-4 : REGULATIONS FOR SPECIFIC USES:**
>
> A. Agriculture
>
> (1) Other than those regulations specifically provided for in section 5-3-4(A)2(a) below, the provisions of this title shall not impose regulations or require permits with respect to land used or to be used for agricultural purposes.

This formulation is hardly an exercise in clarity. Instead of a clear-cut statement that building permits will be required, the Ordinance is open to the construction that no permits are required. There is no superseding permit requirement in Section 5-3-4(A)2(a) that is referenced in the "Other than" clause contained in Section 5-3-4(A)(1).

If the Zoning Board had not been in such a rush to recommend approval, this issue could have been addressed in a deliberative manner. Instead, the Ordinance is open to a claim by LeCompte that the Village cannot impose a permit requirement.

Similarly, the Ordinance is subject to a claim by LeCompte[17] that setbacks cannot be required in connection with large scale commercial horse boarding. Section 5-2-1 of the Zoning Ordinance expressly provides that the boarding of horses is included in the use of land for agricultural purposes. (**Pls Ex. 2**.) The Village's Zoning Ordinance for permitted agricultural uses provide for "no requirements" concerning minimum front yard and side yard for agricultural uses. See **Ints. Ex. 173.** The significance of eliminating setback requirements is that LeCompte can construct boarding structures right up to the property line to the detriment of the homeowners like Drury whose homes lie immediately adjacent to the private road easement.

Anderson's testimony on the genesis of the last minute amendment to the setback requirement attributed to Don Schuman is littered with inconsistencies. Initially he testified that Schuman conveyed it to him before the December 2 hearing (R 2737, L19-24; R 2738, L14) and then changed his testimony that Schuman stated the amendments he wanted at the December 2 hearing. (R 2738, L15-14; R 2739, L1-10) The record of Don Schuman's statement on December 2, 2014 (**Pls. Ex 44**) does not support Anderson's testimony that it was Schuman who requested the changes on setbacks that Anderson secured approval for at the last minute.

Nor is Anderson's testimony that no one complained about the lastminute amendments accurate. During cross examination Anderson was confronted with the testimony of Mrs. Mandrell which impeached this claim. (R2758, L4-24; R2759, L1-15)

[17] Only LeCompte can raise these claims because he is the only commercial horse boarding operation that is claiming legal nonconforming status and a vested right in the Ordinance.

Plonczynski, one of the Intervenors' planning witnesses, confirmed the unlawfulness of the process that was pursued her. He confirmed that Illinois law requires significant changes like those effected by Anderson in his last-minute amendments pertaining to permits and setbacks should have been part of the public record, the Zoning Board should have been made aware of it and amending the ordinance after the public hearing had been closed should have resulted in a new public hearing. (R 4139, L19 to R 4141, L1-7)

The absence of straightforward concise clear requirements in this regard is but yet another reason why the Ordinance is a substantive departure from the decisional criteria and is thus facially invalid and *void ab initio*.

The testimony of Appellants' expert land planner, Gourguechon, identified the significant changes worked by the Ordinance pertaining to the regulation of commercial horse boarding in the Village. In his opinion, the text amendment changed the regulation and treatment of commercial horse boarding in the Village in many significant ways, including the negative impact of the owners of estate lot residential homes in the Village and the resulting loss in value of their property.

3. The ZBA Ignored the Directive of the Village Board to Gather Significant Information and Properly Review the Amendment Before Approving It.

The Appellate Court found this fact relevant. With respect to the Kosin Memo (**Pls. Ex. 40** at trial), the Court stated:

> **"These appear to be reasonable and important issues that a responsible municipality would want to consider before making a significant change to its zoning laws.** Yet only three days later, on October 20, 2014, ZBA member Kurt Anderson introduced his own text amendment that was all but identical to the LeCompte text amendment—the same village-wide permit for commercial boarding, the same 8½ -year retroactivity provision." *Drury*, ¶103. (emphasis added).

David Stieper confirmed in his testimony that doing studies is the traditional method in the Village prior to formulating legislation like the Ordinance. (R 866, L24-869, L10; R 882, L21 – R 883, L11)

4. The Zoning Board Ignored the Opinions of its Own Witnesses.

It is undisputed that no witness testified before the ZBA that the amendment promoted the public welfare (**Pls. Ex. 44**), another fact this Court found relevant. *Drury*, ¶*104*. To the contrary, the professional land planning witness, who the Intervenors vouched for in this matter, stated unequivocally that he was NOT prepared to conclude that the Ordinance promoted the public welfare. He stated that to reach such an opinion would require many more studies and analyses. (**Pls. Ex. 44,** pp. 75-78)

No witness provided any support for the singularly unprecedented 8-year retroactivity clause. Both at the Zoning Board and again at the trial not one witness testified that in their lengthy career had ever encountered such a retroactivity clause in connection with a zoning ordinance.

No witness provided any support at the trial for the permitted as a matter of right approach incorporated into the Ordinance. Each of the three planning witnesses (Gourguechon for the Appellants and Savoy and Plonczynski for the Intervenors) testified that in their lengthy career had never encountered a permitted use as a matter of right approach to large scale commercial horse boarding. Instead, these witnesses identified the special use approach as the typical method for a community to regulate these large commercial operations. (C 1593, L16-1595, L20; C 1818, L18 – C 1819, L16; C 2664, L13 – C 2662, L10)

All of the above demonstrates that the Ordinance was untethered from sound planning and zoning principles and thus was contrary to the Village's substantive decisional criteria.

5. The Professional Planning Witnesses Supported the Special Use Approach.

The record conclusively demonstrates that a special use is consistent with the Village's substantive decisional criteria. Gourguechon testified that zoning ordinances almost always have provisions for variations and special uses which also provide flexibility to what otherwise would be overly rigid land use controls. However, these provisions are much more closely contained and limited so as not to disrupt neighbor's enjoyment of their property.

Ms. Freeman's Letter to the Village Board (**Pls. Ex. 26**), on behalf of the Zoning Board (issued shortly after the Schuman Letter), laid out the case for special use regulation of large-scale commercial horse boarding. She explained the benefit of the special use approach, "The special use permit requirement would allow the community to have some involvement in whether such operations are appropriate at that particular location and, if so, under what conditions they should operate. As a result, we are suggesting that those facilities that board ten (10) horses or more be regulated as Special Uses." She concluded, "We feel that the attached proposal represents a good balance between preserving and protecting the equestrian nature of the Village while taking into account the concerns of residents who might be impacted by larger boarding facilities."

6. The Recommendation and Approval of the Ordinance Did Not Comport with the Statutory Requirements and Fundamental Zoning Principles.

This Court had occasion to address the Findings of Fact ("Findings") and after examining them found:

> "The 'findings of fact' issued by the ZBA in regard to the Anderson text amendment are, to say the least, quite short on the required 'facts.' " (*Drury*, ¶ 107.)

At trial, the Intervenors offered nothing in the way of defense to these inadequate Findings but to blame the Village Attorney. However, an examination of the deliberations at the voting meeting on December 3 (**Pls. Ex. 45,** pp. 84-103) discloses little, if anything, that resembles facts to support the recommendation of the majority that would inform the Village Attorney of the factual basis for their recommendation. Once again, the Zoning Board did not do its job in its haste to make a recommendation and forward it onto the Village Board to pass before the next election.

7. Conclusion.

All of the above demonstrates that the Village and its Zoning Board over and over again substantially departed from normally accepted substantive decisional criteria before and during the adoption of the Ordinance. As a result, the Ordinance is constitutionally invalid on its face and must be declared *void ab initio*.

E. Application of the "Drury Factors" Supports Reversal of the Trial Court's Final Order and Judgment in Favor of Appellants.

The "subjects of proper inquiry" in determining "whether a legislative body acts for a certain (impermissible) reason" set forth in *Drury*, ¶ 111 n.2 *citing Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-268 (1977), warrant reversal of the final judgment order and judgment in favor of the Appellants. The evidence was sufficient to establish that: the historical background of the decision reveals a series of official actions taken for the invidious purpose of adopting an ordinance not in the public interest but for the benefit of one individual; the specific sequence of events leading up the challenged decision reveals a change to a longstanding zoning policy immediately

after Drury availed himself of the existing policy; there existed several significant departures from the normal procedural sequence; and there existed several significant substantive departures from the normally accepted decisional criteria. ("Drury Factors")

In *Chicago Nat. League Ball Club, Inc. v. Thompson*, 108 Ill.2d 357, 367-68 (1985), the Supreme Court drew the parallels between the prohibition against special legislation and invidious discrimination under the equal protection clause. Both result from government withholding from a person or class of persons a right, benefit or privilege without a reasonable basis for the governmental action. [citation omitted] Legislation which confers a benefit on one class and denies the same to another may be attacked both as special legislation and as a denial of equal protection. A claim that the special-legislation provision has been violated is generally judged by the same standard that is used in considering a claim that equal protection has been denied. [citation omitted]

The record establishes that Drury has been the victim of disparate treatment as a result of government action. The Village has put its finger on the scale (in the words of the former Village President) (C 110, L 9-21) to pass special legislation that served as a defense to LeCompte in the Drury lawsuit. The Village did it in a manner unparalleled in the annals of the Village with respect to the speed, manner and departure from established norms with which it was recommended and adopted and with the inclusion of a never before adopted retroactivity clause.

The result was withholding from Drury the protections he enjoyed under the former ordinance regulating commercial horse boarding operations, the protections afforded under two decisions of this Court and the protections afforded him under the adjacent property owners act. Section 11–13–15 of the Illinois Municipal Code (65 ILCS 5/11–13–15 (West

2023)). This is the second time the Village acted in this manner—a continuation of a pattern and practice that began with the Schuman letter to aid LeCompte in defeating the *Drury* lawsuit.

IV. THE EVIDENT MISUDERSTANDING OF CERTAIN FACTS AND THE FAILURE TO GIVE PROPER WEIGHT TO CERTAIN FACTS SUPPORT THE REVERSAL OF THE FINAL JUDGMENT ORDER

The Final Judgment Order evidences a serious misunderstanding of the Schuman Letter; fails to give proper weight to the Village's legislative decision that the Ordinance is unconstitutional (a determination that the Village has consistently held for more than seven years); and fails to factor into the decision Intervenors' failure to disclose several prejudicial emails all of which were within the purview of the document production request propounded by the Appellants. All of these are significant issues central to the resolution of this case and warrant reversal of the Final Judgment Order.

On the question of Appellants' burden, the case, *Forestview Homeowners v. County of Cook.*18 Ill. App. 3d 230 (1974), is instructive. *Forestview* is a seminal zoning case. Like here, it addressed zoning issues with little precedent and with exceptional facts. There the trial court ruled for the County. Significantly, in *Forestview,* there is not one reference to the appellant's burden in the course of the court's lengthy thorough review of the facts in which it reversed the trial court. Here, too, this Court is requested to examine the facts *de novo* and not subject to the manifest weight standard.

A. The Statements by the Trial Court with Respect to the Schuman Letter Manifest a Serious Misapprehension of the Facts.

The trial court in its Final Judgment Order states, "However, there is no apparent impropriety surrounding that letter, nor does it even have any apparent legal effect." (Final Judgment Order at p. 5) (Appendix at Tab 3.)

This statement is mistaken for several reasons:

i. the letter was central to the analysis of this Court's opinion in *Drury*. This Court concluded that it was nothing more than "a fait accompli-shield to justify their noncompliance with the zoning code or to deprive plaintiffs of relief." *LeCompte II*, ¶54;

ii. the evidence adduced here further establishes its impropriety:

   a. the letter was the product of *ex parte* solicitations to Village officials who had been handed sizable campaign contributions shortly before the solicitation; b. the letter was the product of a solicitation made in derogation of the Village Overview **(Tab 9)**; c. that solicitation was not disclosed in discovery by LeCompte; d. the Schuman Letter was the product of a process designed to mask it from public view.

iii. Contrary to the trial court's statement, the letter had significant legal effect:

   a. the Schuman Letter was the basis for Judge Valderrama dismissing the Drury lawsuit; b. this Court observed LeCompte had continued to operate a large-scale commercial horse boarding operation relying on the authority of the "Schuman Letter" and the Village took no action to enforce the cease and desist order or the judgment it had secured in *LeCompte I*. (Village's Answer to Complaint filed 9/22/16, ¶ 47); *LeCompte II,* 2014 IL App (1st) 121894-U, ¶ 24.

This statement by the trial court with respect to the Schuman Letter manifests a serious misapprehension of the facts and constitutes a consequential error.

B. The Trial Court Failed to Address the Subsequent Village Board's Repeal of the Challenged Ordinance and Refused to Give Weight to the Village Board's Position That the Ordinance Does Not Promote the Public Welfare.

The trial court completely failed to address the subsequent Village Board repeal of the Ordinance, a fact identified and found significant by this Court and established at trial. There is no mention whatsoever of this fact in the entire Final Judgment Order.

That the Ordinance was subsequently repealed is relevant and persuasive evidence consistent with the Appellate Court's finding. It would make no sense, in determining whether the Ordinance was adopted for the public welfare, to completely ignore the fact that the Board, just less than a year after its adoption, determined that it was in the public interest to repeal that legislative act and restore the *status quo ante*. *Drury*, ¶ 111. A copy of the Ordinance (**Pls. Ex. 3**) is included in the Appendix at Tab 14.

Moreover, it is not apparent from the Final Judgment Order why the trial court accorded the actions of the Village Board which adopted the Ordinance significant weight and gave no weight whatsoever to the actions of the subsequent Village Board. The trial court judge on more than one occasion stated "the court is not persuaded the Village's current opinion has any bearing on whether it in fact had a rational basis in 2014 to enact the Ordinance provision under Illinois law." See footnote 2 in the Final Judgment Order (Tab 3) and footnote 1 in the 12.16.21 order on the Joint Motions for Summary Judgment. (Tab 2) The trial court repeated its error in blessing the Ordinance as a "legislative pardon" in his original Order dismissing the complaint. *Drury* ¶¶ 4, 95.

The subsequent Village Board repealed the Ordinance, attempted to settle this lawsuit, in its Answer admitted the Ordinance was adopted for the benefit of one individual and appeared and represented that position before the trial court. Yet the trial court, without

any credible explanation, fails to give these legislative determinations any weight whatsoever.

The record supports the conclusion that the actions of the former Village Board are not entitled to any weight and that its adoption of the challenged ordinance is not entitled to the presumption of validity. See arguments *infra* at Section III C and D above concerning the several serious repeated procedural and substantive departures from the Village's normally accepted practice and procedure- by the Village Board and its ZBA.

The testimony at trial by the Village President and the messages he delivered to the former Village Board support the conclusion that the presumption of validity should not be accorded to the actions of the former Village Board and its ZBA. See **Pls. Ex 45** and **48**. He testified to the "fast and furious" pace of the meetings which indicated to him an intent to change the law quickly. He referenced the recommendation of the attorneys who represented LeCompte in this matter to not amend the ordinance while the Drury lawsuit was on-going. **(Pls. Ex 48)** He concluded that the Ordinance was not adopted to protect the public welfare but to benefit a single individual (R 113, L2-10).

The Village President's testimony as to what occurred and the reasons for his objections were cogent and well-reasoned. He memorialized those objections in two messages to the Village Board which identified the substantial bases for his opinion grounded in the public welfare. Those messages form the basis for finding that the former Village Board's actions should not be accorded a presumption of validity.

The trial court judge erred in according the former Village Board's actions here the presumption of validity and wholly disregarding the actions of the subsequent Village Board.

C. The Testimony of the Intervenors' Principal Witnesses is not Credible.

Repeatedly, LeCompte and the main Village actors in this case, Knoop, Messer and Anderson, failed to produce documents involving communications extremely relevant to the issues in this case although production requests were propounded on all of them. Four separate incriminating communications authored by LeCompte were not produced. Those communications include his solicitation of the Schuman Letter, (**Pls. Exs. 13** and **14**); his solicitation of support from Karen Rosene, a member of the Zoning Board in 2011 for a text amendment to legalize his use, (**Vil. Ex. 6**); his 2014 solicitation of support from the then Chairman for his text amendment and to not let the process get bogged down, (**Pls. Ex. 180**); and the June 2015 email to the Yeterian responding to the Riding Club's refusal to intervene in the instant lawsuit. **(Pls. Ex. 175**)

LeCompte's responses on cross examination to questions concerning his solicitations to Knoop and Stieper in 2011 (Trscpt of 12-28-2022, p. 70, L24 - 82, L16, p. 43, L19 – p. 46, L3) and to Judy Freeman in 2014 (Trscpt of 12-28-2022, p. 70, L24 – p. 82, L16) remove any doubt as to LeCompte's credibility. He simply cannot be believed.

The message to the Riding Club, (**Pls. Ex. 175**) peels the onion back as to the financial control LeCompte wielded over the equestrians. That correspondence contains his acid comments,

> Apparently, the majority of the board, from what I have been told, think that the only mission of the riding club is to keep up the trails and flip eggs on Sunday morning… Obviously, I must have been incorrect in assuming that the trails would be of little value if the assault upon the equestrian community resulted in an insidious withering of the equestrian activities within the village. Having said this, if the riding club's true mission is only keeping up the trails and hosting occasional breakfasts, then certainly participating in and handsomely benefiting financially from the Kaloway Cup, as they have for the past 10 years, is far beyond their mission. To this extent the club has the right to do as they wish but must be willing to accept the consequences of their decision.

If the Riding Club would not do his bidding he was threatening to pull out his financial support including refusing the use by the Riding Club of his polo field and other "favors" he bestowed upon the equestrians. The record is replete with the success of these threats as the equestrian members of the ZBA and the Village Board did his bidding between 2011 until 2015 until they were removed from office.

Again, these exhibits were not produced in response to Appellants' Supreme Court Rule 237 document requests. Clearly, they should have been produced. The majority of the incriminating document that Appellants secured were provided by others (Stieper, Freeman, Rosene).

The evasiveness was not limited to LeCompte. Knoop, Messer, and Anderson all claimed they did not produce any emails because they had changed computers and the emails were lost. (Knoop, R1252, L4 – R1253, L15); (Messer, R1395-1408); (Anderson, R2766, L20-24; R2762, L15-24; R2763, L5-21) Both Messer and Anderson are attorneys and officers of the Court and thus owe a higher duty to comply with lawful discovery.

Trial by concealment is the unseemly consequence of discovery abuse and Illinois courts are not powerless when confronted with such. "Our discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the violation." *Buehler v. Whalen*, 70 Il1. 2d 51, 67 (1970).

The discounting of these witnesses' credibility is a proportionate consequence of this type of discovery abuse. "Discovery is not a tactical game". *Williams v. A.E. Stanley Mfg.* 83 Ill. 2d 559, 566 (1981); *Ostendorf v. Int. Harvester Co.*, 89 Ill. 2d 277, 282 (1982), nor a "poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room for a rule designed to enhance the search for truth."

Williams v. Florida, 399 U.S. 78, 82 (1970). It is the concealment factor which serves to turn a truth-seeking process into an exercise of gamesmanship. Here finding the testimony of LeCompte, Knoop, Messer and Anderson's testimony not credible forecloses that corrupting possibility.

The lack of credibility of the parade of witnesses that LeCompte presented is set forth in Attachment B to the Appellants' Findings of Fact. (10165-88) which is included in the Appendix at Tab 11.

V. APPELLANTS WERE ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE UNCONSTITUTIONALITY OF THE RETROACTIVITY CLAUSE

The Joint Motion for Summary Judgment motion presented a legal issue rather than a factual one and thus *de novo* review of the denial of summary judgment is appropriate. *Battles v. La Salle National Bank*, 240 Ill.App.3d 550, 558, 181 Ill.Dec. 365, 608 N.E.2d 438, 444 (1992). The trial proceeded as if the Retroactivity provision was lawful. Thus, there was no other occasion to address that ruling until the instant appeal.

For the reasons set forth below Plaintiffs respectfully submit that the trial court erred in its construction of *Commonwealth Edison Co. v. Will County Collector*, 511 U.S. 244 (1994) and *Landgraf v. USI Film Product*, 196 Ill. 2d 27 (2001), to the facts in this case and that its decision should be reversed.

The Ordinance (Tab 1) contains the constitutionally offensive retroactivity clause. The Ordinance is deemed retroactive effective to June 26, 2006, a date 8 ½ years prior to its passage. The Ordinance replaced the HOO in effect since 2006.

A copy of the trial court's order on the joint summary motions is included in the Appendix at Tab 2. The trial court correctly recognized that there is "a default presumption against applying statutes retroactively" but the court erred in effectively ending his analysis

because the challenged ordinance contained an intent to relate the Ordinance back to 2006. Simply adding a specific temporal reach is insufficient to render it constitutional and the undisputed facts demonstrate that the retroactivity here impaired rights possessed by Appellants dating back to when it acted to enforce the Village's Zoning Ordinance prohibition on commercial horse boarding at LeCompte.

The trial court compounded his error by mistakenly concluding that the retroactivity clause would not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." The court myopically focused on LeCompte (for whose benefit the retroactivity clause was adopted), and completely overlooked the rights of Drury who lived immediately next door to the commercial operation, had initiated the adjacent property owner's lawsuit, prevailed on appeal when his complaint was reinstated and then faced the impairment of his rights by the retroactivity clause which LeCompte has asserted either legalized his use or granted him vested rights. The trial court opinion utterly fails to address the impairment of Drurys' rights that he has availed himself under the adjacent property owner's act. See Section 11–13–15 of the Illinois Municipal Code (65 ILCS 5/11–13–15 (West 2023)). Drury lost the protections ingrained in the HOO dating back to 2006 including the rights reaffirmed by this Court that such home occupation uses must be incidental and secondary to residential occupancy, and their commercial horse boarding operation could not be done in a manner that maintained the peace, quiet and domestic tranquility within their R-1 zoned residential district. *LeCompte*, 2011 IL App (1st) 100423, ¶¶ 34-39.

The trial court further compounded his error by failing to address the Commonwealth Edison factors. The inescapable conclusion is that the retroactivity

provision was adopted for the benefit of LeCompte. Here again the facts are stubborn: **i.** LeCompte initiated a text amendment with retroactivity included in it; **ii**. retroactivity was designed as a shield against Drury's lawsuit in *LeCompte II* by giving LeCompte the dual defenses that his operation are and have been legal back to 2006; or in the alternative he had a vested right by virtue of operating during the time period the retroactivity was in effect; **iii**. the Appellate Court in this matter recognized LeCompte has pursued that defense in the *LeCompte II* lawsuit, "That distinction matters to Drury…" *Drury,* at ¶58; **iv**. the proposed text amendment followed shortly after LeCompte had lost the appeal in *LeCompte II*, which dismissed his Schuman Letter defense; **v**. it is entirely too coincidental that shortly after LeCompte lost the appeal in *LeCompte II* resulting in his operations once again facing serious legal peril that the retroactivity clause was adopted by the Village Board; **vi.** the Appellate Court found to be relevant well plead facts found in the complaint. See *Drury* at ¶95-112; **vii**. the 8½ year retroactivity provision itself establishes the Ordinance's facial invalidity; **viii.** the determination of whether a statute is retroactive is not formulaic. Simply because the legislative body expresses an intent to apply the new law retroactively does not end the inquiry as constitutional protections like those raised in the Complaint must be examined and considered. See *Commonwealth Edison v. Will County Collector*, 196 Ill. 2d 27,33 (2001); **ix**. the Illinois Supreme Court in *Commonwealth Edison* factors to be considered in a constitutional challenge to a retroactive statute are identified and discussed below. **x**. an examination of the Ordinance and its retroactivity provision in connection with these factors was particularly appropriate in this case and the trial court erred in not undertaking such an analysis. Such an analysis demonstrates that the retroactivity clause is unconstitutional.

A. Commonwealth Edison Factors Relevant to the Ordinance.

1. **Timing of Adoption.** The timing of the adoption of retroactivity provision following the decision adverse to LeCompte is well known and followed a similar pattern followed with the Schuman Letter after Drury initiated his lawsuit in 2011. It is apparent that the Ordinance was adopted to benefit LeCompte. The record is replete with evidence that the Village Board saw no problem with the HOO until LeCompte was in legal peril. (**Pls. Exs. 28** and **132** and **Ints. Ex. 147**)

2. **No Legislative Purpose but to Benefit LeCompte.**

a. Savoy, one of LeCompte's disclosed expert planning witnesses, acknowledged that he was not familiar with an ordinance that had a similar retroactivity provision. This sworn testimony was consistent with his testimony six years earlier at the ZBA on December 2, 2014**. (Pls Ex 44)** Eight years later Savoy had still not found either a zoning ordinance or a text amendment with a retroactivity provision! (R 1831 L2-9).

b. Plonczynski confirmed the same facts. He agreed that "It is not something that is typically done." He testified that such a provision was "unusual". (R 2645, L12-17).

c. Gourguechon, Appellants' professional expert witness with 45 years of unimpeachable credentials, clearly articulated why such a provision offends the public health safety and welfare. He concluded that, "Retroactive application of zoning amendments makes a mockery of zoning is unheard-of and was adopted to benefit one individual in an attempt to legalize a use that was unlawfully established." (R1597, L23 - R1598, L1-13) He supported that conclusion with solid facts and land use planning principles guiding the

exercise of the police power. The fundamental flaw in retroactivity was that property owners would not have a basis to make investment decisions that a proper zoning ordinance provides. To make substantial investments property owners need to rely and have confidence in official and permanent land use patterns over the long term.

d. Legislative Determination that the Ordinance is invalid. On three separate occasions (in the settlement agreement; in the verified answer; and for a third time when it nullified the Ordinance and restored the HOO) acting in its legislative capacity acknowledged that the Ordinance and the retroactivity provision was for the benefit of LeCompte and that it did not advance any public interest.

e. Anderson's Admission. So too, the author of the text amendment, Anderson, then a member of the ZBA, acknowledged at trial his statement that the retroactivity benefitted one person, LeCompte. He acknowledged that this statement on September 11, 2014 **(Pls. Ex. 38)** represented his "honest belief" at the time it was made. (R2766, L3-13) Yet on cross examination he dubbed it "speculation" and incredibly claimed he did not know whether the retroactivity benefitted LeCompte. (R 2764, L8-23)

It is evident that retroactivity was for LeCompte's benefit by virtue of his claim at trial that he is both legal by virtue the retroactivity and grandfathered under the 2014 Ordinance with respect to the 2016 Ordinance.(Trscpt of 12-28-2022, p. 164, L17-22) As the Appellate Court observed in *Drury* this cause of action would be moot but for

LeCompte's insistence that he has acquired vested rights under the Ordinance's retroactivity provision and that the 2016 Ordinance does not apply to him. *Drury*, ¶58.

3. Length of the Retroactivity.

a. 8 1/2 year Retroactivity. The length of the retroactivity in the Ordinance is sufficient in and of itself to raise a red flag on its constitutionality. The 8½ years of retroactivity reaches back in time to before LeCompte was cited for violating the HOO. His drafts of the text amendment **(Pls. Exs. 33** and **34)** both expressly provided for retroactivity back to June 26, 2006. That is the retroactivity date included in the Ordinance.

b. Testimony of Real Estate Professionals. Amongst the five real estate experts with collectively nearly 150 years of experience, not one of them could identify a single retroactivity provision adopted in any municipality in the State of Illinois! Such an undisputable fact rings out like a "fire bell in the night" to the patent illegality of the retroactivity.

4. Detrimental Reliance. The record establishes Drury's reliance on the HOO and the Village's success in the Appellate Court in *LeCompte I*. In reliance on this Court's determination that commercial horse boarding did not comport with the Village Zoning Ordinance, he filed the adjoining property owner's complaint to enforce the HOO and prevailed on appeal in reversing the dismissal of his lawsuit which had been dismissed on account of the Schuman Letter.

5. Conclusion. The trial court should have examined these other factors and if he had the evidence conclusively establishes that the retroactivity clause is unconstitutional l on its face. The retroactivity clause is not reasonably related to public welfare, it constitutes an invalid exercise of the police power in violation of the Illinois Constitution and the Federal Constitution and is *void ab initio*.

VI. THE ORDINANCE DOES NOT PROMOTE THE PUBLIC WELFARE

For all of the reasons set forth above which are adopted and incorporated as if fully set forth herein, Appellants have established that the Ordinance does not promote the public welfare and is *void ab initio*.

VII. CONCLUSION

WHEREFORE, the Plaintiffs-Appellants, JAMES J. DRURY, AS AGENT OF THE PEGGY D. DRURY DECLARATION OF TRUST U/A/D 02/04/00, JACK E. REICH, and JAMES T. O'DONNELL, pray this Honorable Court:

A. Reverse the trial court's Order entered on April 24, 2023 entering a final judgment in favor of the Intervenors;

B. In the alternative, reverse the trial court's orders entered on December 16, 2021, denying Plaintiffs-Appellants' partial summary judgment on the unconstitutionality of the retroactivity provision.

C. Consistent with either paragraphs A or B declare the Ordinance facially invalid and *void ab initio*; and

D. For such other and further relief as this Court deems just and proper pursuant to Supreme Court Rule 366.

Plaintiffs-Appellants,
JAMES J. DRURY III, as agent of the Peggy D. Drury Declaration of Trust U/A/D 02/04/00, Jack E. Reich and James T. O'Donnell

/s/ Thomas R. Burney

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 50 pages.

/s/ Thomas R. Burney

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the foregoing was filed with the Clerk of the Appellate Court for the First District through the electronic system, which will automatically send electronic mail notification of such filing to registered participants, and that I emailed copies to the persons as set forth below on September 18, 2023:

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