IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
	)	No. 13 CH 23386
Plaintiff,	)	
	)	Judge Sophia H. Hall
vs.	)	Calendar 14
	)	
LYONS TOWNSHIP HIGH SCHOOL DISTRICT NO. 204	)	
	)	
Defendant.	)	

PLAINTIFF'S REVISED MOTION FOR SUMMARY JUDGMENT

Plaintiff, Township Trustees of Schools Township 38 North, Range 12 East ("TTO"), by its undersigned counsel, MILLER, CANFIELD, PADDOCK & STONE, PLC, for its Revised Motion for Summary Judgment (the "Motion") against the defendant, Lyons Township High School District No. 204 ("LT"), states as follows:

I. INTRODUCTION

The TTO is entitled, as a matter of law, to a declaratory judgment that: (a) LT failed to pay $511,068.60 for LT's annual audits during fiscal years 1994 through 2012; (b) LT failed to pay its proportionate share, totaling $2,628,807, of the Treasurer's compensation and expenses during fiscal years 2000 through 2013; and (c) LT was over allocated investment income of $1,386,267.03 during fiscal years 1995 through 2012. All of these claims arise as a result of unauthorized and unlawful conduct by the former Treasurer, Robert Healy, which resulted in LT receiving impermissible financial benefits, to the corresponding detriment of other school districts within the TTO's jurisdiction, and in violation of the Illinois School Code, Intergovernmental Cooperation Act, and other aspects of Illinois law. The TTO is also entitled to summary judgment on LT's nine (9) affirmative defenses.

This is a long Motion, in part because it has been broken into different sections, many of which start on new pages, to help the reader visually. There is a short section of general facts at the beginning of this Motion. Next, each of the TTO's three (3) claims is given its own section, each claim having its own set of facts and separate legal argument. The argument respecting the affirmative defenses comes last. In total, not counting the cover page, introduction and conclusion, or the statements of facts, there are twenty-eight (28) pages of argument: two (2) for the first claim, fourteen (14) for the second claim, three (3) for the third claim, and nine (9) for the affirmative defenses.

II. STATEMENT OF MATERIAL FACTS - GENERAL OVERVIEW

A. The TTO: Township Trustees and Treasurer.

1. The Township Trustees.

Plaintiff is a body politic comprised of three (3) Township Trustees who are elected by voters within Lyons Township ("Trustees"). (See Amend. Compl. and Answer, Exs. 1 and 2 at ¶¶1, 5; 105 ILCS 5/5-2.) The Illinois School Code provides that "the school business of all school townships having school trustees shall be transacted by three trustees...." 105 ILCS 5/5-2. In other words, the three Trustees comprise the board that governs the TTO. The Trustees also appoint the Lyons Township School Treasurer ("Treasurer"). (Exs. 1 and 2 at ¶¶1, 5; 105 ILCS 5/8-1.)

2. The Treasurer.

The Treasurer provides financial services for eleven (11) school districts, LT (*i.e.*, District 204) and also: Western Springs School District 101; LaGrange School District 102; Lyons School District 103; Cook County School District 104; LaGrange School District 105; Highlands School District 106; Pleasantdale School District 107; Willow Springs School District 108; Indian Springs School District 109; and Argo Community High School District 217. (See Exs. 1 and 2 at ¶6.) They consist of 38 schools educating about 20,000 students. (See *id.* at ¶7.) The Treasurer during the time period relevant to this lawsuit was Robert Healy. (Motion at 4.)

The Treasurer also provides financial services for two (2) other bodies: the LaGrange Area Department of Special Education ("LADSE"), which serves 15 school districts; and the West 40 Intermediate Service Center, which serves 40 school districts. (See Exs. 1 and 2 at ¶6.)

The Treasurer is statutorily obligated to, *inter alia*: (a) "[c]ollect from the township and county collectors the full amount of taxes levied by the school boards in his township;" (b) "[b]e

responsible for the receipts, disbursements and investments arising out of the operation of the school districts under his supervision; and (c) "[p]ay all lawful orders issued by the school board of any district in his township." 105 ILCS 5/8-17(a)(2); (a)(3); (a)(9). In other words, the Treasurer is required by statute to collect and manage the tax revenue of each school district, invest that revenue, and pay the bills of those districts as they direct. The Treasurer is the "only lawful custodian" of these funds of the school districts. 105 ILCS 5/8-7. The school districts are allocated, but do not have custody of, their own monies.

The Treasurer is **not** statutorily authorized to enter into contracts generally on behalf of the TTO; as noted above, the business of the TTO "shall be" transacted by the elected Trustees. Section 8-17 of the School Code sets forth the duties of the Treasurer, but none of them include the duty to contract generally. Section 8-7, on the other hand, authorizes the Treasurer to enter into only those contracts:

> [r]egarding the deposit, redeposit, investment, reinvestment or withdrawal of school funds, including, without limitation, agreements with other township and school treasurers, agreements with community college districts...and agreements with education service regions....

105 ILCS 5/8-7.

B. The Treasurer Is A Zero-Sum Office.

It necessarily costs money to run the Treasurer's office. The Treasurer is compensated, and the Treasurer has certain expenses of office, *e.g.*, leased offices, additional staff, office supplies. (Exs. 1 and 2 at ¶24; Affidavit of S. Birkenmaier, Ex. 3, at ¶7.) The **only** source of revenue to pay for these expenses is the member districts. (See 105 ILCS 5/8-4; Ex. 3 at ¶71.) The TTO does not have a tax base or any other source of revenue. (Ex. 3 at ¶71.)

The School Code requires that each district "shall pay a proportionate share" of the Treasurer's compensation and expenses. 105 ILCS 5/8-4. This share "shall be determined by

dividing the total amount of all school funds handled by the township treasurer by such amount of funds as belong to each such…district." *Id.* Each year, the Treasurer sends an invoice to each school district for its proportionate share of the prior year's costs. (Ex. 3 at ¶¶72-73.)[1]

LT acknowledges it has about 25% of the total funds the Treasurer manages. (Motion at 4.) This means LT is statutorily required to pay about 25% of the Treasurer's costs. It does not matter if LT thinks this a bad bargain; it is statutorily required. **If LT does not "pay" (in cash) the annual invoice setting forth LT's proportionate share, this necessarily creates a shortfall in funding, *i.e.*, a public deficit at the TTO**. The TTO has no other source of revenue to "make up" the shortfall. This means, absent relief from this Court, the other school districts have to pay more than their statutorily-prescribed to cover LT's shortfall.

As noted, one of the Treasurer's duties is investing the property taxes collected. (See 105 ILCS 5/8-17(a)(9).) The Treasurer is permitted to combine (*i.e.*, pool) for investment purposes the monies each district has. 105 ILCS 5/8-7. These monies must be "accounted for separately in all respects, and the earnings from such investment shall be separately and individually computed and recorded, and credited to the…school district…from which such investment was required." *Id.* At all times relevant, the Treasurer did, in fact, pool investments. (Ex. 3 at ¶6.) Each member district, thus, has a share of the pooled investments and its share of the investment income, and the Treasurer is obligated to properly credit these amounts to each district. If LT was over allocated investment income, this **necessarily** means that the remaining districts were under allocated investment income. (Dep. of M. Thiessen, Exhibit 4, at 114:20-115:11).

Understanding the zero-sum nature of the Treasurer's office is critical. The Treasurer is a custodian of funds that belong to others, and the only way the Treasurer pays its bills is by invoicing each district for its proportionate share of those bills. A good analogy is that the

[1] The Treasurer uses a fiscal year running from July 1 to June 30. (Ex. 3 at ¶4.)

Treasurer is the trustee of a trust with over a dozen different beneficiaries. The *corpus* of the trust is public tax dollars. If one beneficiary gets too much or pays too little, the other beneficiaries **necessarily** suffer the inverse of that, in violation of the School Code. There is no way around this logic, no matter how much LT wishes otherwise.

C. **LT.**

LT is one of the eleven (11) school districts that the Treasurer serves. LT is governed by a Board of Education consisting of 7 members elected by the public for a 2-year term. (Dep. of T. Kilrea, Exhibit 5, at 16:19-18:13.) LT's Board has various committees, including a Finance Committee. (*Id.* at 22:19-24) The most senior person charged with running the day-to-day operations of LT is the Superintendent, Timothy Kilrea. (*Id.* at 18:21-19:9) Underneath the Superintendent are various Directors; germane to this case is one such position, the Director of Business Services. (*Id.* at 19:10-21:11.)

III. STANDARD ON SUMMARY JUDGMENT

Summary judgment is appropriate where the pleadings, depositions, affidavits and admissions show there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005. Particularly appropriate to this case, the construction, interpretation and effect of written instruments, and of statutes, are questions of law properly decided on a motion for summary judgment. *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 164 (2d Dist. 2002); *Briarcliffe Lakeside Townhouse Owners Ass'n v. City of Wheaton*, 170 Ill. App. 3d 244, 249 (2d Dist. 1988); *Rice v. Bd. of Trustees of Adams County, Ill.*, 326 Ill. App. 3d 1120, 1122 (4th Dist. 2002).

IV. CLAIM 1 – LT's FAILURE TO PAY FOR ITS ANNUAL AUDITS

There is no genuine dispute that: (1) Healy paid $511,068.60 for LT's annual audits (and some other audit expenses) during the period in question and treated those payments as an expense of his office; (2) Healy *did not* pay for the annual audits of other school districts; and (3) regardless of what Healy told LT, the Trustees **never** voted to approve a contract whereby the TTO agreed to pay for LT's annual audits. For these reason, summary judgment on this claim is appropriate.

A. Material Facts: LT Did Not Pay For Its Own Annual Audits; But Other Districts Paid For *Their* Own Annual Audits *And* Their Share Of LT's.

Section 3-7 of the School Code provides that "[e]ach school district shall, as of June 30 of each year, cause an audit of its accounts to be made...." 105 ILCS 5/3-7. Each district, thereafter, "shall...submit an original and one copy of such audit to the regional superintendent of schools...." *Id.* If any district fails to do so, the regional superintendent "shall...cause such audit to be made by employing an accountant...to conduct such audit and shall bill the district for such services...." *Id.* The logical implication of this language is that the School Code requires each district to pay for its own audit, either because (a) it is the entity that "causes" the audit to be made, or (b) because it does not cause the audit to be made, and so the regional superintendent "causes" the audit to be made, and then bills the district for such audit.

During the period at issue (fiscal years 1994 through 2012), "[LT] engaged Baker Tilly and/or its predecessors-in-interest to provide these audits and other professional services, including, but not limited to, preparation of audited financial statements and independent auditor's reports." (Exs. 1 and 2 at ¶51.)[2] During this same time period, however, LT did not pay for its annual audits – rather, the Treasurer paid for those audits and treated them as an expense

[2] Baker Tilly is the name of the most recent auditing firm. It had two predecessors-in-interest. For convenience, the parties have referred to the relevant firm as "Baker Tilly" regardless of timeframe.

of the Treasurer's office. (Exs. 1 and 2 at ¶54; Ex. 3 at ¶¶20-53; see Ex. 3(A) at tabs 1994 – 2012 for TTO's analysis and backup.)

The result of treating the cost of LT's audit as an expense of the Treasurer's office is that the Treasurer thereby included the cost of LT's audit in his invoices to each member district. (*Id.*) This means that, on average, LT was invoiced only its proportionate share of its own audit (roughly 25% in any given year), and the other districts were invoiced for the balance. (*Id.*)

LT has defended this claim by arguing that the Treasurer *also* paid for the annual audit of the other districts during this same period. First, this would not have changed the fact that LT did not pay for its own audit, in violation of the School Code. Rather, it would just mean that the TTO would also have a claim it could assert against the other districts. Second, and more to the point, the TTO has undertaken a detailed analysis of the payment records and they establish beyond *genuine* dispute that LT's defense is not factually accurate. (Ex. 3 at ¶¶54-69; see Ex. 3(B) at tabs 101 – 2045 for TTO's analysis and backup.)

With three (3) isolated exceptions the Treasurer *only* paid the annual audits of LT, and not the other districts. These 3 exceptions are: (a) payment of $10,352 for the LADSE audit in fiscal year 2008; (b) payment of $7,000 for a benefit cooperative audit in fiscal year 2011; and (c) payment of $1,000 for a same benefit cooperative audit in fiscal year 2012. (Ex. 3 at ¶30.) The total amount of these payments is $18,352.

The total amount that the Treasurer paid for LT's audit, on the other hand, is $511,068.60. (Ex. 3 at ¶53.) After 2012, when Healy left office, LT resumed paying for its own annual audit. (Exs. 1 and 2 at ¶56; Ex. 3 at ¶52.) None of these facts are genuinely disputed.

B. Legal Argument: LT's Failure To Pay For Its Own Annual Audits Violates The School Code.

Fairly read, the School Code requires that each district pay for its own annual audit. The School Code must be construed as a single piece of legislation. *People ex rel. Bodecker v. Community Unit School Dist. No. 36*, 409 Ill. 2d 526, 532 (1951). This corresponds with the general rule that courts should evaluate statutory provisions as a whole and not focus on phrases in isolation. *People v. Glisson*, 202 Ill. 2d 499, 505 (2002). This Court may also assume that the legislature did not intend an absurd result. *Id.*

Section 3-7 of the School Code requires that each district "shall cause" an annual audit to be undertaken. While not expressly identifying who should pay, the fairest reading is that each district should pay for its own audit that it is "causing" to be undertaken. It is logical to assume the entity causing the audit to be undertaken is the entity that should pay for the audit.

Section 3-7 also provides that if a school district does *not* cause an audit to be undertaken, the regional superintendent "shall cause" the audit to be done, and "shall bill" the district for the cost. This reinforces the conclusion that school districts must pay for their own audit. Any other conclusion would create an absurd result, wherein the district is *not* responsible for the cost of its audit if the district causes it, but *is* responsible for the cost if the regional superintendent causes it. This logically makes no sense.

The extrinsic evidence suggests this conclusion, too. LT was the party who actually engaged Baker Tilly and it stands to reason that LT should therefore pay Baker Tilly. Further, the undisputed documentary evidence establishes, with three (3) isolated exceptions during the 18-year period at issue, all of the other school districts paid for *their* own annual audit. This additional evidence, however, should not be necessary for this Court to interpret Section 3-7.

LT argues that the TTO agreed to pay for LT's annual audits, and so this financial benefit was lawful. This argument fails for several reasons. First, such an agreement would violate the School Code's requirement that LT pay for its own annual audit, and a public body cannot lawfully enter into a contract that "is *ultra vires*, contrary to statutes, or contrary to public policy." *Matthews v. CTA*, 2016 IL 117638, ¶98.

Second, there is no evidence that that the Trustees ever voted to approve a purported contract whereby the TTO would pay for LT's annual audits. LT really is arguing that Healy told LT that the TTO would pay for LT's annual audit, but this does not help LT, either, because the conduct of Healy cannot bind the TTO, as the doctrine of apparent authority is not applicable against public officials. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶36. Only official conduct by the Trustees itself can bind the TTO, and LT cannot point to any official approval of a contract on this issue by the Trustees.[3] *See Matthews v. CTA*, 2016 IL 117638, ¶99 (holding the CTA may only be contractually bound by official action taken by its governing Board); *Schivarelli v. CTA*, 335 Ill. App. 3d 93, 102 (1st Dist. 2005) (holding that only the CTA Board may waive the rights of the CTA).

The Treasurer's impermissible payment of LT's annual audits during the period at issue resulted in the other districts each having unlawfully imposed upon them a share of LT's $511,068.60 audit expenses. The TTO is entitled to summary judgment on this claim and this Court should issue a declaratory judgment that the Treasurer may debit $511,068.60, representing LT's audit costs, from the monies being held by the Treasurer and allocable to LT.

[3] LT does not allege that it and the TTO entered into a contract providing for the Treasurer's payment of LT's annual audit, and none of the TTO's records reflect that the Trustees ever approved such a contract, in any event. (See Ex. 11.)

V. CLAIM 2 – LT'S FAILURE TO PAY ITS PROPORTIONATE SHARE OF THE TREASURER'S EXPENSES

There is no genuine dispute that LT did not pay its proportionate share of the Treasurer's expenses on an annual basis. There is also no genuine dispute that the TTO and LT never entered into a lawful contract excusing LT from paying its proportionated share of the Treasurer's expense for the years in question. LT's defense to non-payment is that it and the TTO entered into a contract that permitted LT to offset some of its own administrative costs against the amount that LT was invoiced by the Treasurer each year. Even assuming such a contract was formed; it would violate the School Code and/or the Intergovernmental Cooperation Act and, thus, be unenforceable. Even if such a contract was formed; it would have been, at best, effective for just one year, the 1999-2000 fiscal year. In any event, the TTO maintains that no such contract was formed because the Trustees themselves, and LT's Board of Education, never actually voted to enter into such a contract.

A. Material Facts: LT Did Not Pay Its Proportionate Share Of The Treasurer's Expenses.

As set forth in Part II(B) of this Motion, Section 8-4 of the School Code requires each district to pay its proportionate share of the Treasurer's compensation and expenses. 105 ILCS 5/8-4. At the close of each fiscal year, the Treasurer sends an invoice to the districts for their proportionate share. (Ex. 3 at ¶¶72-73; Ex. 3(C) at tabs 1994-2012.) There is no dispute that beginning with the invoice for the 1999-2000 fiscal year and continuing through the invoice for fiscal year 2013, LT did not pay its proportionate share.

For fiscal years 2000-2002 and 2013, LT paid a portion of its share; for the other fiscal years, 2003-2012, LT paid nothing. (Ex. 3 at ¶¶98.) The dispute is over *why* LT did not pay.

LT's theory is that in 2000, the parties entered into a contract whereby LT was permitted to offset against its proportionate share the salaries that LT was paying three (3) of its employees.

1. The Lisa Beckwith February 29, 2000 memorandum.

There is no dispute that Healy and the then-current LT Director of Business Services, Lisa Beckwith, discussed various ways of addressing LT's unhappiness that it believed it was paying too large a share of the Treasurer's expenses.[4] There is no dispute that the Trustees were aware of these discussions. The apparent end-result of these discussions was a February 29, 2000 memorandum prepared by Beckwith and sent to Healy. (A stand-alone copy of this memorandum is attached as Exhibit 6.)

In the Memorandum, Beckwith states the relevant "proposal:"

> Following is a list of responsibilities that District 204 proposes become the direct cost and responsibility of the Township Treasurer's office:
>
> - Payroll and accounts payable bank reconciliation.
> - Balance monthly totals between Treasurer and LTHS.
> - Provide printing costs for checks and envelopes for accounts payable, payroll, imprest and student activities.
> - Annual salary and benefit costs for 3 employees as listed below:

	Salary 99-00	OASDI Medicare	IMRF	Insurance Medical	Insurance Life	Total
Programmer Analyst	$41,205	$3,152	$3,045		$48	$47,450
Accounts Payable Bkkeeper	$23,192	$1.774	$1,714	$7,028	$48	$33,756
Payroll Bookkeeper	$21,861	$1,672	$1,616		$48	$25,197
Total	$86,258	$6,598	$6,375	$7,028	$144	$106,403

> An invoice will be sent to the Township Treasurer in May with receipt of funds expected prior to the close of the fiscal year.

(See Ex. 6.)

[4] LT was unhappy paying roughly 25% of the Treasurer's expenses because LT did not use many of the Treasurer's services. This is akin to parents who send their children to parochial school complaining about having to pay property taxes allocated to public school districts; they still must be paid.

The three (3) employment positions identified were already held by LT employees. LT was not hiring anyone new; rather these employees "were in place for years beforehand...." (Ex. 5 at 92:19-93:7.) LT believed the Treasurer should pay their salaries and other expenses of employment, totaling $106,403,[5] because LT was performing its own business services; overlooking that other districts also performed their own business services. (Dep. of E. Grimes, Exhibit 7, at 8:1-10; 28:20-29:3.)

2. The March 2000 Trustees' meeting.

On March 21, 2000, the Trustees had a regular board meeting. A copy of the Agenda, Minutes and relevant attachment are Exhibit 8. The Agenda reflects that at the meeting it was the Trustees intent to approve minutes, financial reports, office expenses, and a bond, in addition to discussing other business. (See Ex. 8, p. 1.) Item No. 8 on the Agenda was "**District 204 Business Office.**" (Ex. 8, p. 1) (emphasis in original).

The Minutes reflect that two (2) of the three (3) Trustees attended the meeting and that the two (2) Trustees voted "to approve" meeting minutes, monthly financial reports, the Treasurer's office quarterly expenses, and a working cash bond for another school district. (Ex. 8, p. 2-3.) The Minutes reflect that the Trustees discussed other items, including the following:

> Healy submitted to the Trustees the proposal from District 204 stating this office absorb certain payroll, accounts payable and computer processing expenditures by District 204. As these costs would be incurred by the Treasurer's office if Lyons Township High School were to totally utilize the facilities of the Treasurer's office. These costs would certainly be incurred. A point to be clarified is to make sure that workman's compensation is covered. A further recommendation by Trustee Hartigan is that the trustees be given an evaluation of the employee's performance for those aforementioned personnel employed at the high school.
>
> (Ex. 8, p. 2)

[5] Although LT's proposal, as stated in the memorandum, was that the Treasurer's office would pay the salaries and benefits for 3 positions totaling $106,403, this grew significantly. By 2012, LT had increased its "proposal" to include full or partial salaries for 5 positions totaling $297,991.10. (See June 13, 2012 memorandum, Exhibit 13; Dep. of D. Sellers, Exhibit 14, at 74:8-22.) But none of these subsequent "proposals" were ever shown to, or voted upon by, the Trustees. (See Ex. 11, p. 91-225.)

The Minutes then reflect the following action:

> A motion was made by Russell Hartigan seconded by Joseph Nekola to accept the proposal given to the Lyons Township Trustees of Schools by Cook County High School District #204.
> ROLL CALL: Ayes - Joseph Nekola, Russell Hartigan
> Nays - None (Ex. 8, p. 3)

Included with the Minutes were the documents reviewed, discussed and/or voted on in the meeting. The relevant document included was a copy of Beckwith's February 2000 memorandum. (See Ex. 8, p. 4)[6] LT argues that when the Trustees voted to "accept" Beckwith's memorandum, the Trustees agreed to enter into a contract with LT. (Ex. 5 at 68:13-69:20.) As argued later, this is inaccurate.

3. The June 2000 LT Board of Education meeting.

On June 19, 2000, LT's Board of Education held a regular meeting. A copy of the Agenda, Minutes and relevant attachment are Exhibit 9. The Agenda reflects that the meeting was divided into different sections including: New Business; Consent Agenda; and Open Session. (Ex. 9, p. 1-3.) The Consent Agenda included numerous items, including Item P, "**Township Treasurer's Invoice**." (See Ex. 9, p. 2) (emphasis in original).

The Minutes reflect that, in the New Business part of the meeting, LT's Board discussed and voted to approve a new contract – the "CIW Training Provider Agreement" – pending review by their attorney. (See Ex. 9, p. 7-8.) The Minutes also reflect that in the "Open Session" part of the meeting, LT's Board voted to approve an agreement with the Lyons Township High School Faculty Association for 2001-2005. (Ex. 9, p. 14.) In the "Consent Agenda" part of the meeting, the Minutes reflect that LT's Board voted to approve 62 items, *en masse*. (Ex. 9, p. 9-13.) One of these 62 items was the relevant item, the Treasurer's invoice, described as

[6] The other documents included with the Minutes are not relevant and are not part of Exhibit 8.

"**Township Treasurer's Invoice.**" (Ex. 9, p. 13.) The invoice was part of Exhibit T to the Consent Agenda.

Exhibit T was four (4) pages. The first page, a June 14, 2000 Memorandum from Beckwith to the Board, stated:

> Attached is a copy of the Lyons Township High School Treasurer's bill for the 1999-2000 school year. The District's share is $165,476, which is a 6% increase over the 1998-1999 school year. Also attached is a copy of the agreement that we made with the Treasurer, which pays the District $106,403 for comparable services provided to other township districts but not to Lyons Township High School. Board of Education action is to approve a payment in the net amount of $59,073. (Ex. 9, p. 17)

Despite Beckwith's statement that a copy of the "agreement" was attached, no "agreement" was attached. Rather, the next two pages were the Treasurer's invoice to LT for fiscal year 1999,[7] showing LT owed the Treasurer $165,476. (Ex. 9, pp. 18-19.) The final page of Exhibit T was the February 2000 memorandum from Beckwith to Healy. (Ex. 9, p. 20) LT's position is that "the [LT Board] vote approving payment of the [Treasurer's] invoice and the vote approving the contract are one, one [and] the same vote." (Ex. 5 at 61:5-23.)

[7] Although Beckwith referred to the Treasurer's invoice as being for the 1999-2000 fiscal year, the invoice that Beckwith attached was for July 1, 1998 to June 30, 1999, *i.e.*, the 1998-1999 fiscal year. Beckwith, thus, was seemingly proposing to offset the Treasurer's invoice for the period 1998-99 with expenses that LT would be incurring in 1999-2000.

B. Legal Argument: Neither Board Voted To Enter Into A Contract; If They Did, The Contract Violated The School Code And Intergovernmental Cooperation Act; And If It Violated Neither, It Was A One-Year Contract.

There are a myriad of reasons why LT's theory of this purported contract fail:

1. The alleged contract would violate Section 8-4 of the School Code and, thus, be unenforceable.

2. The alleged contract would not have complied with the Intergovernmental Cooperation Act and, thus, be unenforceable.

3. Such a contract, if formed and enforceable, would have been effective for only a single fiscal year.

4. In any event, the parties never agreed to a contract, as neither Beckwith nor Healy had authority to contract on behalf of LT and the TTO, respectively.

5. The Trustees never voted to enter into a contract with LT.

6. LT's Board never voted to enter into a contract with the TTO.

1. Such a contact would violate Section 8-4 of the School Code and, thus, be unenforceable.

A public body cannot enter into a contract that "is *ultra vires*, contrary to statutes, or contrary to public policy." *Matthews v. CTA*, 2016 IL 117638, ¶98. The purported contract would have functionally excused LT from paying its proportionate share of the Treasurer's expenses by modifying the allocation of expenses set forth in the School Code and, thus, be *ultra vires* and/or contrary to statutory obligations under the School Code, and unenforceable.

Section 8-4 of the School Code mandates each district "shall pay" its proportionate share of the Treasurer's expenses. 105 ILCS 5/8-4. This Section also sets forth the formula to be used when calculating each district's proportionate share. LT cannot reject this formula or pick-and-choose what services it is willing to pay for. Whether LT uses the services or not, and whether LT believes it is getting a good or a bad deal, LT must pay its proportionate share, just like parents who chose to send their children to parochial school must still pay property taxes.

It is undisputed that during the period encompassing fiscal years 2000 through 2013, LT did not pay its full proportionate share, resulting in a total shortfall in funding of $2,628,807. (Ex. 3 at ¶¶84-99.) LT's only argument is that it and the TTO entered into a contract whereby LT would get a credit for the salary of certain of its employees. The functional result of this, however, is that it excused LT from actually *paying* its share and thereby forced the other districts to may *more than* their proportionate share.

LT's argues it essentially engaged in barter. Let us imagine that in a given year, the total cost of the Treasurer's office was $1 million; LT's share would be about 25% of that. This would mean that LT "shall pay" $250,000. LT's theory is that, in essence, it instead provided services to the TTO valued at $250,000, and that this can be credited (or offset) against the amount invoiced to LT, resulting in LT not having to pay anything at all. But the math does not work.

If LT truly sold its services to the Treasurer, acting as a true vendor, then Healy should have included that cost when calculating the Treasurer's expenses of office, as he would do with any other vendor. Then he would need determine the proportionate share of each district and invoice them. Thus, if LT "sold" $250,000 in services to Healy, LT's proportionate share of that amount should have been invoiced back to LT. But then, regardless, LT still must pay the amount invoiced. One way or another, the Treasurer has must be repaid for its compensation and expenses of office. The Treasurer actually spends money during each fiscal for compensation and expenses – at the close of each fiscal year, if each district does not pay its proportionate share, then a public deficit exits, because the Treasurer did not receive enough cash to repay the Treasurer for the services for which it has already made payment.

Thus, LT's "barter" theory does not work. It altered the statutory formula for determining the proportionate share and functionally excused LT from actually paying its proportionate share,

which if left unresolved force the other districts to make up the shortfall, increasing *their* combined proportionate share, all in violation of Section 8-4 of the School Code.

2. The alleged contract would not have complied with the Intergovernmental Cooperation Act and, thus, be unenforceable.

Another problem exists with LT's "barter" theory – LT cannot be treated the same as any other vendor. If LT were truly a vendor, selling its services to the Treasurer's office, then because the TTO and LT are public bodies, the parties needed an intergovernmental agreement.

Historically in Illinois, local units of government were not permitted to contract with each other. Article VII, Section 10 of the Illinois Constitution of 1970, however, provided that local units of government may contract amongst themselves. *Connelly v. Clark County*, 16 Ill. App. 3d 947, 951 (4th Dist. 1973). In 1973, the Intergovernmental Cooperation Act was then enacted, 5 ILCS 220/1 *et seq.*

Section 3 of the Act provides that one public body may "exercise[], combine[], transfer[], and enjoy[]" its powers with another public body. 5 ILCS 220/3. Under LT's theory, this is what happened, *i.e.*, one public body (LT) performed work for another public body (the TTO). But Section 5 of the Act imposes certain requirements upon such contracts, and the purported contract at issue fails to comply with Section 5 of the Act in two (2) ways. These requirements are not merely technical. In particular, as neither the TTO nor LT are "home rule" units of government, the only have that power granted to them expressly by statute and such grants of power must be strictly construed. *Rajterowski v. City of Sycamore*, 405 Ill. App. 3d 1086, 1119 (2nd Dist. 2010).

First, Section 5 provides intergovernmental agreements may exist, "provided that such contract shall be approved by the governing bodies of each party to the contract...." 5 ILCS 220/5. The governing bodies of each party, however, did not approve the alleged contract, or any

form of contract. Moreover, because the purported contract actually resulted in the other districts paying more than their proportionate share, *those districts* would have had to have been a party to the contract. There is no evidence that LT's "proposal" was ever given to other districts.

Second, Section 5 provides that "[s]uch contract *shall set forth fully the purposes, powers, rights, objectives and responsibilities of the contracting parties.*" 5 ILCS 220/5 (emphasis added). LT's "proposal" does not contain this sort of detail. (See Ex. 6.) It does propose that certain tasks be performed by the Treasurer and that the Treasurer absorbs certain costs for the 1999-2000 fiscal year, but it does not state the purpose or objectives of the contract, nor the rights, powers, or any other responsibilities of the parties.

Indeed, it does not even provide for the offset that LT claims. Rather, *it states that LT will send an invoice to the Treasurer, and the Treasurer will pay LT's invoice.* (See Ex. 6.) There is no evidence that this ever happened. While the effect of the parties exchanging annual invoices and checks is to produce a net amount, this is not what the parties actually did. Rather, they deviated from the "proposal," and LT simply applied its own employees' salaries as an offset. The memorandum does not discuss this possibility.

There is no question that both parties understood how to effectuate a formal intergovernmental agreement. For example, on February 9, 2009, the Trustees voted to "approve" the "4th Amended Intergovernmental Cooperative Agreement of the Lyons Township Elementary School Districts' Employee Benefit Cooperate." (See Ex. 11, p. 165). Likewise, on June 16, 2008, for example, LT's Board voted "approve" the "Intergovernmental Agree to Join the Suburban Schools Consortium for Annuity Compliance." (See Ex. 12, p. 94.)

The existence of a proper intergovernmental agreement is not mere formality, even where home-rule units of government are involved. In *Village of Montgomery v. Aurora Township*, 387

Ill. App. 3d 353, 354 (2nd Dist. 2008), Montgomery brought suit seeking a declaratory judgment respecting which public body had the obligation to maintain a bridge. Aurora Township argued that either Montgomery or the City of Aurora had agreed to assume the obligation. The Appellate Court explained that:

> [a]lthough the record contains intergovernmental agreements reflecting that during certain years, [the City of] Aurora agreed to plow and salt the bridge on behalf of the Township, neither Aurora nor Montgomery ever executed a formal agreement to take over maintenance responsibility for the bridge.

Id. at 358. Accordingly, lacking a formal intergovernmental agreement to transfer maintenance, the Township retained the obligation for maintenance of the bridge. *Id.*

Similarly, in *Connelly v. Clark County*, 16 Ill. App. 3d 947 (4th Dist. 1973), decided before the Intergovernmental Cooperation Act became law, the Appellate Court addressed whether Clark County was permitted to operate a gravel pit and sell gravel to other public bodies. The court concluded that although Clark County *could* have entered into an agreement with other public bodies, no such intergovernmental agreement existed. *Id.* at 951. Accordingly, while Clark County could operate the gravel pit for its own needs, it *could not sell excess gravel to other public bodies*, absent a formal intergovernmental agreement. *Id.* at 952.

In short, if one body politic is going to contract to perform work for another body politic, an actual intergovernmental agreement is necessary, and such agreements must, since 1973, comply with the Intergovernmental Cooperation Act. When dealing with non-home rule units, this is even more important, and the fact that the TTO and LT did not enter into a formal intergovernmental agreement means the purported "contract" is unenforceable.

3. Such a contract, if formed and enforceable, would have been effective for only a single fiscal year.

Assuming the Trustees and LT's Board did vote to enter into a contract, and assuming it complied with the School Code and Intergovernmental Cooperation Act, the contract was at most effective just for a single year.

On its face, Beckwith's memorandum proposes that the Treasurer absorb the salaries of three (3) LT employees for "99-00." (See Ex. 6.) Nothing in the memorandum suggests it was to be applicable year-after-year on a going-forward basis. The face of the "contract" is not ambiguous and mandates the conclusion this was a one-year contract at best.

This conclusion is also supported, however, by the fact that a governing board of a public body is forbidden from making contracts for employment or other services lasting longer than the period for which the governing board making the decision has left to serve. *Cannizzo v. Berwyn Twp. 708 Cmty. Mental Health Bd.*, 318 Ill. App. 3d 478, 482-87 (1st Dist. 2000). Such contracts are "*ultra vires* and void *ab initio*." *Id.* at 487.

Here, the governing body of the TTO consists of 3 elected Trustees. 105 ILCS 5/5-2. One trustee is elected every 2 years to serve a 6-year term, with elections occurring in odd-numbered years. 105 ILCS 5/5-4; 5-13; 5-14. LT's theory is that the contract was agreed to by the TTO in March 2000 and by LT in June 2000. A new Board of Trustees would then be created in 2001, upon the next election. To the extent that LT argues the purported contract lasted longer than one (1) year, such longer contract would be *ultra vires* and void *ab initio*.

LT should not dispute this. When asked whether the purported contract was "something that had to be approved every year by both parties," LT's own Superintendent answered, "[a]s it involves expenditures, yes." (Ex. 5 at 55:2-4.) Despite this, there is no evidence the Trustees ever

again discussed or voted upon the February 2000 "proposal" or any other similar "proposal" in ensuing years. (See Ex. 11, p. 91-225.)

Reinforcing that this was a one-year contract at best, nothing in the TTO March 2000 Minutes or the LT June 2000 Minutes suggested an ongoing or reoccurring contract was being discussed by either party. The TTO Minutes (Ex. 11) reflect that the Trustees would vote on ongoing or reoccurring contracts on an annual or biennial basis, they did not leave contracts to renew automatically on their own accord. The contracts would typically state a length of time and the Trustees would revisit them in meetings for updates and renewals as needed. The Trustees custom was to review specific changes to the contracts from prior years, such as cost increases, and these actions would be recorded in the minutes. Examples of such ongoing contracts between 1993 and 2012 include the agreement with Puffer Hefty School District #69 (which the Treasurer provided services for on a contract basis) (see Ex. 11, p. 2, 20, 32, 40, 56, 67, 78, 79a-c, 97,114, 130); the TTO office lease agreement with District #102 (see Ex. 11, p. 35, 62, 106, 122-3, and 217 for examples); and the Treasurer's employment contract (see Ex. 11, p. 58-9, 84, 130, 159, and 188 for examples). Despite the fact that LT's single-year "proposal" grew rapidly from three (3) employees and $106,403, to five (5) employees and $297,991.10, there is no evidence the Trustees ever again voted on further "proposals" from LT.

LT may argue that Healy re-affirmed this proposal every year, but for the reasons discussed herein, this is insufficient. Healy did not have authority to enter into this type of contract on behalf of the TTO (as explained below); only the governing bodies of *each* party could make this sort of contract, if at all, under Illinois law, and there is **no** evidence the Trustees ever again were presented with another "proposal" from LT for other fiscal years. (See Ex. 11, p. 91-225.)

4. In any event, the parties never agreed to a contract, as neither Beckwith nor Healy had authority to contract on behalf of LT and the TTO, respectively.

The School Code mandates that all TTO business be conducted by the Trustees. 105 ILCS 5/5-2. The School Code enumerates certain duties of the Treasurer, but these duties do not include entering into contracts generally. 105 ILCS 5/8-17. Section 8-7 of the School Code, rather, authorizes the Treasurer to enter into only certain types of contracts. 105 ILCS 5/8-7. These contracts are limited to those "regarding the deposit, redeposit, investment, reinvestment or withdrawal of school funds . . . ." *Id.* The purported contract whereby LT was permitted to offset its proportionate share by the salary it was paying its own employees is not such a contract. Healy did not have actual authority to agree to the purported contract; rather, only the Trustees did. *See also Matthews v. CTA*, 2016 IL 117638, ¶99 (holding the CTA may only be contractually bound by official action taken by its governing Board).

To the extent LT argues that Healy had apparent authority, such argument would fail; the doctrine of apparent authority is not applicable against public officials. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶36. This is because: (a) it would leave a public body "helpless to correct errors" and "escape the financial effects of frauds and thefts by unscrupulous public servants;" and (b) persons acting with a public official are charged with knowing the bounds of his or her authority, even if the official is himself unsure. *Id.* Moreover, Beckwith acknowledged that she knew that Healy was not authorized to enter into the purported contract. (Dep. of L. Beckwith, Exhibit 10, at 96:3-23.)

Further, Beckwith herself did not have authority to enter into the purported contract. LT does not dispute that Beckwith did not have authority to contractually bind LT to this type of contract; rather, only LT's Board could do so. (Ex. 5 at 32:11-33:6; 38:8-39:21.)

5. The Trustees never voted to enter into a contract with LT.

The Minutes reflect that at the March 2000 meeting, the two (2) Trustees present discussed the February 2000 Beckwith memorandum, which proposed that the TTO pay for the salaries and benefits of three (3) existing LT employees. The Minutes also reflect, however, that the Trustees sought to clarify if worker's compensation insurance was covered, as it was not addressed in the memorandum. (See Ex. 8, p. 2.) The Minutes also reflect Trustee Hartigan recommended the Trustees be given evaluations for the LT employees at issue. (Ex. 8, p. 2.) These two points suggest the matter was not finalized and negotiation remained. The "proposal," however, was never again discussed by the Trustees at any point. (See Ex. 11, p. 91-225.)

The Trustees are required to keep written minutes of all their meetings. 5 ILCS 120/2.06(a). Pursuant to the School Code, the Treasurer also functions as a clerk and "shall attend all meetings and keep a record of the official proceedings of the trustees of schools." 105 ILCS 5/8-1(a). This "record of the official proceedings" (*i.e.*, the minutes and accompanying documentation) is the only lawful evidence of actions taken by the Trustees. *See Bellwood v. Galt*, 321 Ill. 504, 508 (1926) ("When a record of its proceedings is required to be kept the record is the only lawful evidence of its action."); *Otey v. Westerman*, 276 Ill. App. 395, 402 (4th Dist. 1934) ("The records of proceedings of the trustees of schools is the only manner in which their official actions can be proven.") Thus, absent official records showing that the Trustees had an official meeting and voted to approve a contract with LT, the TTO did not validly enter into a contract with LT.

The Minutes reflect that the Trustees voted "to accept" this single proposal given to them by LT. (Ex. 8, p. 3.) LT argues this means a contract was thereby formed and Hartigan's concerns, about insurance and performance evaluations, were moot. But in the context of a

deliberative body, such as the Trustees, that is not what it means to "accept" a document. Merriam-Webster defines "accept" both in regular usage and in legal usage as, *inter alia*, "*of a deliberative body*: **to receive** (a legislative report) officially (as from a committee)." (Bold added) (https:www.merriam-webster.com/dictionary/accept and https:merriam-webster.com/dictionary/accept#legalDictionary) (visited June 6, 2018).

That the Trustees were "receiving" a document when they voted "to accept" that document is illustrated by a review of the Trustees Minutes. Between 1993 and 2012, the Trustees took close to five hundred (500) actions in their regular and special board meetings. (See Ex. 11, p. 1-225.) Of those actions, 384 were recorded as votes "to approve" documents, resolutions, contracts, or similar items.[8] Included in this number was an action recorded in the Minutes as "*to accept and approve the legal bills*" and two (2) were "*to accept and approve the minutes*" -- thereby demonstrating that "accepting" and "approving" were not intended to be the same thing. (See Ex. 11, p. 100, 216, 222) Only seven (7) actions during this period were recorded as "to accept;" in addition to the LT proposal, the Trustees voted "*to accept the Canvass and Proclamation and file the Resolution and Abstract votes with the Cook County Central Office and State Board of Elections*" six (6) times. (Ex. 11, p. 17, 37, 65, 80, 99, 119) The Canvass and Proclamation are election results; the Trustees could only "receive" them and record them into the official record.

During this period, when the Trustees entered into contacts, such as leases, employment contracts, and agreements with other school districts, the Trustees would vote to approve the contracts in a regular meeting and make a record of such action in the Minutes. An example

[8] Counts are based on the TTO regular and special board meeting minutes that the TTO maintains and retains in the regular course of business. They are included in Exhibit 11. Minutes from four (4) meetings are missing from the TTO files for the years between 1993 and 2012 and are not included in the counts. They are July 18, 2005, April 20, 2009, May 18, 2009, and July 13, 2009. The agenda for those meeting has been included in Exhibit 11 instead.

similar to the contract alleged by LT is one the Trustees voted "to approve" ten (10) times during this period with another school district. For example, on February 2, 1999, the Trustees voted "*to approve the agreement between Puffer Hefty School District #69 and Lyons Township Trustees of School for the term of one year beginning May 1, 1999 and ending April 30, 2000, with a 3% increase from last year.*" (See Ex. 11, p. 78 and p. 79a-c for the contract; see also p. 2, 20, 32, 40, 56, 67, 97,114, 130.) Other examples of contracts the Trustees voted to approve include the lease for the office space the TTO rented from District 102 (see Ex. 11, p. 35, 62, 106, 122-3, and 217 for examples) and the Treasurer's employment contract (see Ex. 11, p. 58-9, 84, 130, 159, and 188 for examples).

LT's actions in their own Board of Education meetings reflect similar word usages. Between 2000 and 2012, in their June meetings, LT's Board of Education voted "to accept" a donation, a handbook, and the Title I funds for the 2009-2010 school year. (See Ex. 12, p. 4, 38, 106.) When entering into a contract, on the other hand, LT's Board consistently voted "to approve" the contracts. (See Ex. 12, p. 17, 34, 59, 72, 113 as examples.)

Although one might question why a public body might record in their official records an item as seemingly mundane as the receipt of a document, there is no question that *both* the Trustees and LT's Board did this as a matter of practice. As discussed above, the minutes are the official records. Public bodies speak through their records. Having voted only "to receive" LT's proposal, for it to become a binding contract, subsequent action by the Trustees would have to be taken and recorded in the Minutes, including authorizing a written contract, approving it, and executing it. The official action of the Trustees in the March 2000 meeting was to accept Beckwith's proposal, it was not to enter into a contract with LT, and at no point since have the Trustees ever voted to enter into the purported contract with LT.

6. LT's Board never voted to enter into a contract with the TTO.

Only LT's Board of Education was permitted to vote to enter into the purported contract; neither Beckwith nor the Finance Committee of the Board was authorized to do so. (Ex. 5 at 22:19-24; 24:5-25:6; 32:11-33:6; 38:8-39:21.) Illinois law regulates the contractual authority and procedures of a Board of Education; it is not treated the same as a private corporation. *Wesclin Educ. Ass'n v. Board of Educ.*, 30 Ill. App. 67, 75 (5th Dist. 1975). Statutes conferring powers on a Board of Education are strictly construed as a limitation on the powers of the Board. *See id.* (holding school board without authority to enter into subject contract). A Board may never contract away obligations imposed upon it by Illinois law. 105 ILCS 5/10-20.

LT's Board, like the Trustees, was also required to keep written minutes of all their meetings. 5 ILCS 120/2.06(a). Pursuant to the School Code, "[n]o official business shall be transacted by the directors except at a regular or a special meeting." 105 ILCS 5/10-6. Further, "[t]he secretary or clerk shall keep in a punctual, orderly and reliable manner a record of the official acts of the board." 105 ILCS 5/10-7.

The June 2000 Minutes reflect that LT's Board voted to authorize payment of a single invoice to the TTO in the amount of $59,073 for LT's proportionate share for fiscal year 1999. (See Ex. 9, pp. 9-13.) LT may argue that by approving payment of $59,073, which is the net amount of LT's proportionate share of $165,476 less the amount of $106,403 set forth in the LT proposal, LT was thereby agreeing to a contract. Indeed, that seems to be LT's position. (See Ex. 5 at 61:8-23.) There are several reasons why LT's position is at odds with the records and Illinois law.

First, the Agenda and Minutes do not reflect that LT's Board voted to enter into a contract with the TTO; they reflect that LT's Board approved payment of the TTO's invoice.

(See Ex. 9.) Second, in her cover memorandum to LT's Board, Beckwith did not recommend that the Board approve a contract; rather, she stated the "Board of Education action is to approve a payment...." (Ex. 9, p. 17.) Correspondingly, that is precisely what the Board did.

Third, in her cover memorandum, Beckwith stated that the "agreement that we made with the Treasurer" is attached. (Ex. 9, p. 17.) This indicates her belief that the parties had already entered into a contract, and all that needed to be done was to apply an offset and pay the net amount due. Yet no vote to enter into or approve any such contract can be found in any of the LT Board minutes,[9] despite it being required that such approval be recorded in the minutes. *See Decatur v. Board of Education of Decatur School Dist.*, 205 Ill. App. 57, 61 (3d Dist. 1917) (explaining a "fact can be shown only by the record, and the contract when made under such authority must be ratified by a majority vote of the members of the controlling board of such corporation, which vote can only be shown by the record of the corporation."

Fourth, the TTO invoice was included in the "Consent Agenda" portion of the meeting; it was not included in the "New Business" portion of the meeting, even though it would have been a new business item for discussion. In that same June 2000 meeting, in the "New Business" portion, the Board did in fact discuss and vote "to approve the CIW Training Provider Agreement" – pending review by their attorney. (Ex. 9, p. 7-8.) The Minutes also reflect that in the "Open Session" section of the meeting, LT's Board voted to approve an agreement with the Lyons Township High School Faculty Association for 2001-2005. (Ex. 9, p. 14.)

LT Board uses the "Consent Agenda" for "business items that are routine and come every month or every time during the year." (Dep. of T. Kilrea, Ex. 5 at 44:17-19) This is consistent with *Robert's Rules of Order*, which LT follows. (Ex. 5 at 21:24-22:2.) *Robert's* defines the

[9] If any such action is recorded in any of the Board's minutes, these minutes were not produced by LT in response to TTO's document requests.

Consent Agenda[10] as being for routine matters. (*Robert's Rules of Order* Newly Revised, 11th ed., p. 361:13-14). This would be appropriate for payment of the TTO's annual invoice; it would not be appropriate for entering into a new contract. A review of LT's regular June Minutes from 2000 through 2012 reflects the Board's pattern of voting to approve contracts in the New Business, Unfinished Business, or Open Session portions of their meetings. (See Ex. 12, p. 59, 94, and 113 for examples.) In contrast, the Consent Agenda was used to approve routine matters such as monthly bills, meeting minutes, and personnel resignations. (See Ex. 12.) The Consent Agenda was not an appropriate way for LT's Board to vote to enter into an intergovernmental contract that it had never before discussed publicly.

In the June 2000 Board of Education meeting, despite its attempt to rewrite history, LT's Board did not vote, or record a vote, to approve or enter into a contract with the TTO; rather, LT's Board only voted to pay one single invoice for fiscal year 1999. The TTO is entitled to summary judgment on this claim and this Court should issue a declaratory judgment that the Treasurer may debit the amount of $2,628,807, representing the amount of its proportionate share of the Treasurer's compensation and expenses that the defendant has failed to pay, from the monies being held by the Treasurer and allocable to LT. (Alternatively, if this Court finds that the parties entered into a one-year contract, then the Treasurer should be permitted to debit this amount less $106,403, or $2,522,404.)

[10] Robert's actually uses the term "Consent Calendar."

VI. CLAIM 3 – OVER-ALLOCATION OF INVESTMENT INCOME TO LT

As discussed above, one of the duties of the Treasurer is to pool the tax dollars it receives and invest those funds for the school districts. As these investments generate income, the Treasurer then allocates such income per the School Code. During Robert Healy's tenure, on a quarterly basis he would allocate distributions of this income to the school districts through a bookkeeping entry. There is no genuine dispute that when Healy did this, he (at times) allocated to LT more than its proportionate share of the investment income, and the experts agree that when Healy did this, it produced an over allocation to LT of at least $1.3 million during the years in question.

A. Material Facts: LT Was Allocated More Income From The Pooled Investments Than Its Proportionate Share Of Distributions Actually Made.

1. The School Code's Requirements.

Section 8-7 of the School Code: authorizes the Treasurer to pool the tax dollars it collects and invest them for the benefit of the school districts, and requires the Treasurer to allocate the investment income earned on the pooled funds among the district. This allocation is done by a bookkeeping entry reflecting the allocation to each district. (Exs. 1 and 2 at ¶¶39-40; Dep. of R. Healy, Exhibit 15, at 66:5-14.)

Each district can only spend the money it has been allocated. Thus, if one district receives an over allocation of, for example, investment income, then the other districts receive less money and have less money to spend on education. (Ex. 4 at 114:20-115:11.) There is no genuine dispute that, for unexplained reasons, Healy allocated to LT income generated by pooled investments that was more than LT should have been allocated per the School Code.

2. Healy's Allocation of Investment Income.

During fiscal years 1995 through 2012, Healy collected the property taxes and other revenue each district received and accumulated that revenue within a general fiduciary fund. (Ex. 15 at 51:11-52:5.) Healy also maintained a general ledger for each district, and each district had various "funds" (*e.g.,* for education or transportation). The monies collected from each district (as accumulated in the general fiduciary fund) were, for accounting proposes, "placed" in these separate funds for each district. (Affidavit of J. Martin, Exhibit 16, ¶4a-e.)

Healy invested the money in the general fiduciary fund in bonds, CDs and other investments. These investments earned investment income,[11] which was deposited back into the general fiduciary fund. Healy periodically allocated this investment income to the districts. (Ex. 15 at 51:11-53:23; Ex. 16 at ¶4a-e.)

When Healy allocated investment income to each district, he undertook the following steps. First, each month, Healy received a report, generated by the TTO's general ledger computer system, of the separate "fund" balances for each district, which he then added together. (Dep. of K. Bradshaw, Exhibit 17, at 92:24-93:8.) Healy added together each district's total fund balance to arrive at a "total fund balance" for all districts. He then calculated an average fund balance per quarter. The total fund balance for all districts became the denominator, and the total fund balance for each separate district became the numerator, in an equation to determine what percentage of the investment income earned would be allocated to the separate districts.[12] (Ex. 15 at 52:1-54:19; Ex. 16 at ¶4 a-e.)

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[11] The pooled investments generated interest, dividends and capitals gains; for convenience these are being referred to as "investment income"

[12] Thus, for example, if the total fund balances for all districts in a quarter was $100,000,000, and the total fund balance for LT for that same quarter was $25,000,000, Healy would determine that LT's share of the investment income for that quarter would be 25% ($25,000,000 divided by $100,000,000).

Healy then estimated how much investment income could be allocated to the districts each quarter. (Dep. of M. Terpstra, Exhibit 18, at 43:15-44:3.) He did not allocate all of the investment income that was earned each quarter; the amount of investment income to be distributed was generally a rounded number; *i.e.*, a reasonable, conservative estimate of the investment income available for distribution. Some investment income was, therefore, retained by the Treasurer and not allocated at that time.[13] (Ex. 15 at 52:7-59:22.)

After calculating the percentage of the total fund balance each district had, Healy then calculated, based upon that percentage, the amount of investment income that would be allocated to each district during that quarter.[14] (Ex. 15 at 52:16-59:15.) Healy prepared these calculations on handwritten ledger sheets each quarter during the relevant period, with all of the foregoing information set forth. (The investment income identified on the sheets is not the total amount earned each quarter, but rather is the amount Healy would actually distribute; recall that Healy allocated only a rounded, conservative amount of the actual, earned income.)

Healy's ledger sheets were accurate when prepared; were prepared and retained in the ordinary course of the TTO's business; and Healy had personal knowledge of the information and calculations in the handwritten sheets. (Ex. 15 at 94:5-96:12; Ex. 20 at 66:12-16.) (Copies of those handwritten sheets are contained in two (2) red welds marked as Bradshaw deposition

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[13] Martin Terpstra, LT's expert, testified that the TTO's audited financial statements for the years 1995 through 2007 revealed that not all of the investment income was distributed each year by the Healy. (Ex. 18 at 30:24-34:13). This confirms Healy's testimony. Terpstra and LT argue that if the undistributed investment income is distributed in the future, what LT owes would be reduced. (M. Terpstra Expert Report, Exhibit 19, at pp. 5-6.) That argument is without merit. As Terpstra testified, the undistributed investment income is available to be distributed, and LT would get its proportionate share when it is distributed. (Ex. 18 at 30:12-38:20.) Martin agreed. (Dep. of J. Martin, Exhibit 20, at 125:9-17.) LT is trying to create an offset from future distributions that have not yet occurred.

[14] For example, if Healy determined that $1,000,000 of investment income would be distributed during a particular quarter, and if LT's percentage of the total fund balance was 25% at that time, LT should receive an allocation of $250,000 of the investment income to be distributed in that quarter.

exhibits 5 and 6; due to their voluminous nature they are not being attached.) (See Ex. 17 at 115:2-117:6.)

When Healy made a distribution, the Treasurer's office merely made a bookkeeping entry in the general ledger for each district, showing the amount of investment income allocated from the TTO's general fiduciary fund. No investment income was actually "paid;" rather, the distribution was accomplished through bookkeeping entries. (Ex. 15 at 65:19-66:14.) The amount Healy calculated each quarter to be allocated to a given district **should** have been the amount actually allocated to that district.

Thus, for example, if one would add up the sums Healy calculated on his handwritten sheets to be allocated to LT each quarter, those sums **should** appear in TTO's general ledger for LT each quarter. At various times, however, the amounts set forth on Healy's notes that **should have been** allocated to LT were not the amounts **actually** allocated to LT on the general ledger. In some years, LT was over allocated investment income as calculated by Healy, and in other years, LT was under allocated investment income. (Ex. 16 at ¶4e; Ex. 17 at 90:19-92:18; 103:2-12 and 110:21-114:3; see also Exhibit 3 to Bradshaw deposition, attached as Exhibit 16(B) hereto.) The total amount of investment income that should have been allocated to LT (as reflected on Healy's notes), versus the amount actually allocated to LT (as reflected on the general ledger), reveals that LT was over allocated, in net, at least $1,386,267.03.[15]

[15] The TTO calculated the over-allocation as $1,574,636.77. The TTO then retained an expert, James Martin, who opined that the over-allocation was only $1,427,442.04. (Ex. 16 at ¶6.) LT then retained an expert, Martin Terpstra, who opined that Martin's calculation was still overstated and Martin's methodology should have produced a total over allocation of $1,386,267.03. (Ex. 19 at pp. 9-10.) The TTO will accept Terpstra's calculation of $1,386,267.03 for purposes of this Motion.

3. Reviewing the TTO's records after Healy's resignation.

After August 2012, Healy was no longer employed by the TTO. Kelly Bradshaw, an accountant within the Treasurer's office, reviewed Healy's handwritten ledger sheets calculating the investment income to be distributed to each district, and the general ledger for LT. The purpose of this review was to determine whether LT had been over allocated investment income. (Ex. 17 at 62:6-64:21; 85:14-95:7) Exhibit 16(B) is Bradshaw's work product; a report entitled "Interest Allocation 2.xls (produced 2/19/2016)." The first page is a summary, on a year-by-year basis for the relevant period, showing that in some years LT was under allocated investment income, and in other years LT was over-allocated investment income. According to Bradshaw, LT was over-allocated investment income in the net amount of $1,574,636.77. (Ex. 17 at 90:15-91:1; Ex. 16(B) hereto.)

Jim Martin, the TTO's expert, reviewed the same materials that Bradshaw reviewed and provided an opinion that during the relevant period, LT was over allocated just a little bit less: $1,427,442.04. (Ex. 20 at 63:5-13; Ex. 16 at ¶6.) This is because Martin found a few differences as compared to Bradshaw's initial work. (Ex. 20 at 101:6-103:10.) Martin determined that: (a) the entry on Bradshaw's report for 6-30-06 should be $569,952, (b) the entry for 1-31-05 should be $207,601, and (c) the entry for 6-30-04 should be $147,979. Because of the foregoing three changes, the summaries for FY 2005 and FY 2006 changed. As a result, the "difference" between Healy's calculations and the general ledger entries for LT's share of investment income reveal that LT was actually over-allocated $1,427,442.04. (See Exhibit 16 at ¶6; Exhibit 16(C); Ex. 20 at 63:5-65:17.) Martin's adjustments are reflected on the attached Exhibit 16(C), which is

Exhibit 7 to his deposition, entitled "District 204, Interest Allocation Analysis, Summary of Differences by Fiscal Year." (Ex. 16, ¶¶5-6.)[16]

Martin's opinion, that Healy over allocated $1,427,442.04 of investment income to LT, is based upon several assumptions respecting Healy's handwritten notes. First, that Healy's determination of the total fund balance for the general fiduciary fund and the total fund balance for each district on his handwritten pages was accurate. Second, that Healy's percentage of investment income to be allocated to each district was accurate, *i.e.*, Healy accurately determined the numerator and denominator of the equation. Third, that the amount of investment income identified to be distributed each quarter on the handwritten pages was available to be distributed.[17] (Ex. 20 at 30:11-33:20; 66:12-16, 69:14-24; Ex. 18 at 47:21-49:15.) Martin's opinion confirms that Healy's calculations on his handwritten sheets were accurate.

[16] Martin also examined allocations to the other districts and found that there were times that LT was receiving distributions of investment income that other districts were not receiving. (Ex. 20 at 72:12-76:5.) Martin determined that when LT was being misallocated investment income in a given quarter, the other districts were being given the proper percentages and amounts set forth on Healy's ledger sheets. (Ex. 20 at 154:4-155:7.)

[17] During the course of this litigation, LT has argued that the total amount of investment income earned for the years in question cannot be determined because of incomplete records. Both Martin and Terpstra agree with that statement. However, this argument is a red herring. It is undisputed that: (a) investment income was earned; (b) deposited into the general fiduciary fund; (c) distributed to all of the districts; and (d) all of the districts used that investment income. There was never a time where a district ran out of money because investment income was not available. Terpstra does not dispute that the investment income Healy determined was available for distribution was, in fact, available, and there is no contrary evidence on this issue. The point is that, **at the time of distribution**, Healy gave LT more than its share of the allocations actually being made. Either LT was over allocated income during the years in question, or LT got an interest-free advance on future allocations that have yet to happen.

B. Legal Argument: LT's Was Unlawfully Over Allocated Investment Income.

1. LT was over allocated investment income.

There is no genuine dispute that when Healy distributed income earned from pooled investments, he (at times) allocated to LT more income than he should have. This did not occur each and every time that Healy allocated investment income, but the net effect was to give LT at least $1,386,267.03 more than LT should have been given. LT's expert, Martin Terpstra, does not disagree with this basic fact.

Terpstra reviewed the documentation in this case, including Martin's determination as to the over allocation of investment income to LT. Several facts are important to note from Terpstra's opinions, which are set forth in both his Expert Report (Exhibit 19) and in his deposition. With respect to the methodology that Martin used to determine whether Healy over allocated investment income to LT, Terpstra: (a) ***does not*** disagree with the quarterly determinations by Healy of the total general fiduciary fund balance for all districts; (b) ***does not*** disagree with Healy's quarterly determination of the fund balances for each district; and (c) ***does not*** disagree that Healy accurately calculated the percentage of investment income that each district was to receive. (Terpstra's Expert Report and his deposition testimony do not dispute these statements.) Moreover, Terpstra testified that Martin relied on Healy's handwritten notes and calculations to determine the amount to be distributed to LT. (Ex. 18 at 47:14-49:15.)

Terpstra also does not dispute that almost all of Martin's analysis was accurate with respect to the amounts actually allocated to LT as set forth in the general ledger. The only minor disagreement is set forth on pages 9-10 of Terpstra's Expert Report. Terpstra believes that Martin should have made the following three adjustments: (1) the April 30, 1995 over allocation of $5,000.33 was cancelled out by another general ledger entry showing an interest transfer of

$5,000 on April 30, 1995 to LT; (2) the April 30, 1998 over allocation to LT in the amount of $4,674.68 was eliminated by the general ledger entry on March 31, 1998, for $4,675, described as "quarterly interest;" and (3) Martin included an additional $31,500 of investment income to LT from a June 20, 2006 general ledger entry, when the description for the entry was not consistent with the words "quarterly interest," which were used to describe all other investment income allocations to LT. (See Ex. 19 at pp. 9-10.) Terpstra opines that Martin should not have ignored these three entries. Ignoring these three entries produces the claim that the TTO will accept for purposes of this motion, *i.e.*, an over allocation of $1,386,267.03.[18]

2. Terpstra's other opinions do not defeat the TTO's position.

Terpstra also opines that certain of the entries on Healy's handwritten sheets are inaccurate. (Expert Report, Ex. 19 at pp. 8-9.) These inaccuracies are both red herrings and of no assistance to LT. On those entries where Healy's math was incorrect as to the amount of investment income to be allocated to a district, the general ledger for the district shows the correct amount.[19] Furthermore, almost all of the inaccuracies noted by Terpstra do not relate to LT (*i.e.*, District 204), and those that do relate to LT reflect an over allocation of investment

[18] In his Expert Report, Terpstra also states that there was an under allocation of $101,829.90 on December 31, 1997, but the TTO's auditor proposed an adjustment as to that exact sum, as reflected on Healy's handwritten sheet. Martin, however, ignored the auditor's adjustment. (Ex. 19 at p. 9.) If Terpstra is correct and the allocation to LT on December 31, 1997 was proper, and thus there was no under allocation of investment income to LT, this would ***increase*** LT's allocation by $101,829.90. Terpstra's theory actually would increase the TTO's claim. The TTO will, however, be guided by Marten's opinion and not increase its claim by this amount for purposes of this Motion.

[19] For example, in his fifth and seventh bullet-points on page 8 of Exhibit 19, Terpstra states: (a) "In his June 2006 calculation, Healy apparently over-allocated $128,819 to LT. While his math on the handwritten sheet does not appear to be accurate for several Districts, the amount written on the sheet for LT agrees to the amount recorded in the TTO's general ledger;" and (b) "In his April 2008 calculation, Healy apparently over-allocated $27,863 to LT; however, the amount on Healy's handwritten sheet ($292,000) for LT's quarterly distribution agrees to the amount recorded in the TTO's general ledger."

income – precisely as the TTO contends.[20] Thus, while there may have been a few instances over 18 years where Healy's handwritten sheets are not perfect, when Healy set forth a sum that was to be allocated to a district other than LT, that sum, as pointed out by Terpstra, was correctly recorded in the general ledger for that district. Thus, contrary to Terpstra's assertion, Healy's handwritten sheets are reliable.

As Martin and Healy agreed, those handwritten sheets are the business records of the TTO. (Ex. 15 at 94:5-96:11; Ex. 20 at 66:12-16.) Furthermore, while Terpstra opines that there are over allocations to other districts (see Ex. 19 at pp. 10-11), this merely means the TTO would be justified in pursuing claims against those districts, too; it does not excuse the over allocation to LT. Other than a difference of opinion between Terpstra and Martin as to the precise amount of over allocation, which is a difference of about 3% ($1,427,442.04 versus $1,386,267.03), both experts agree that using Healy's handwritten sheets as to the amount of investment income to be allocated to LT, and comparing the amount actually allocated to LT as reflected on its general ledger, there was an over allocation to LT of more than $1.3 million dollars. This is undisputed and, indeed, agreed upon by both experts.

Accordingly, the TTO is entitled to summary judgment on this claim, and this Court should enter a declaratory judgment that the Treasurer may debit the amount of $1,386,267.03, representing the over allocation of investment income to LT, from the monies being held by the Treasurer and allocable to LT.

[20] Terpstra's second, fifth, seventh, ninth and eleventh bullet-points on pages 8 and 9 of Ex. 19 refer to LT (District 204), and they all show that Healy benefitted, or seemingly tried to benefit, LT.

VII. THE TTO IS ALSO ENTITLED TO SUMMARY JUDGMENT ON LT'S AFFIRMATIVE DEFENSES

The TTO is also entitled to summary judgment on LT's nine (9) affirmative defenses. A copy of LT's Amended Affirmative Defenses is attached as Exhibit 21.

A. First Affirmative Defense: *Laches*.

"There is considerable reluctance to impose the doctrine of *laches* to actions of public entities unless unusual or extraordinary circumstances are shown." *Van Milligan v. Board of Fire & Police Comm'rs*, 158 Ill. 2d 85, 90 (1994). This is because "*laches* may impair the functioning of the [public body] in the discharge of its government functions, and valuable public interests may be jeopardized or lost by negligence, mistakes, or inattention of public officials. *Id.*; *accord Wabash County v. IMRF*, 408 Ill. App. 3d 924, 936 (2d Dist. 2011) ("the doctrine should not be imposed on a government entity absent extraordinary circumstances, because the public would be adversely affected.").

Further, although the decision to apply *laches* is discretionary, mere non-action of government officials is not sufficient to support a *laches* defense. *City of Chicago v. Alessia*, 348 Ill. App. 3d 218, 229 (1st Dist. 2004) Rather, an affirmative act is required, inducing the action of the defendant, under circumstances making it inequitable to permit the public body to retract what its officers had done. *Id.* The resultant delay must also cause particularized prejudice, "[a] defendant's suggestion that he might have asserted his rights differently or have entered into some kind of settlement had the plaintiff promptly asserted its rights is only speculative and does not support the validity of a *laches* defense. *Id.*

These factors establish that *laches* is not a viable defense of LT. Healy, either negligently or purposefully, gave impermissible financial benefits to LT. This caused corresponding harm to the other school districts and their interest in the public funds at issue would be barred were this

Court to apply *laches*. Moreover, LT has asserted only generalized prejudice, alleging that it relied on the purported contract in formulating its budget. (Ex. 21 at ¶55.) But even if the TTO had brought this lawsuit earlier, LT still would have passed its annual budgets and managed its funds on an annual basis. The "prejudice" of which LT complains is really little more than an argument that it wants to "keep" the financial benefits it wrongfully received.

B. Second Affirmative Defense: Statute of Limitations.

This Court denied LT's motion for summary judgment and rejected LT's argument that the TTO's claims were subject to a five-year statute of limitations. The TTO now asks this Court to take the next step and grant the TTO summary judgment on LT's Second Affirmative Defense, which asserts this same statute of limitations, thereby removing this issue from the future trial of this action.

The TTO's two primary arguments as to why its claims are exempt from the statute of limitations were that (1) it was enforcing a "public right," and (2) at all applicable times the Treasurer (who is appointed by the Trustees) was holding the public funds at issue in trust. With respect to the first issue, in *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 476 (1989), the Illinois Supreme Court set forth a three-factor test to help determine if a public entity was pursuing a "public right:" (i) the effect of the interest on the public; (ii) whether there is an obligation on the public body to act; and (iii) the extent to which public funds must be expended. *Id.* at 476 (citing *Shelbyville*, 96 Ill. 2d at 464-65).

With respect to this first argument, this Court concluded that:

> There is an obligation of the governmental unit to act on behalf of the public, it appears, and the extent to which the expenditure – my understanding of the language is how much money is involved here. And that extent of expenditure is there is a lot of money involved here. So I think that the Statute of Limitations does not prevent the trustees from pursuing this.

(Report of Proceedings, Exhibit 22, at 9:6-14.) The TTO respectfully submits that in addition to merely denying LT's motion on this issue, this Court should enter summary judgment that, as a matter of law, the TTO is pursuing a "public right" based on its prior analysis.

With respect to the second issue, the TTO argued that a second exemption from the statute of limitations applied, where the subject of the lawsuit was public funds being held in trust, relying upon the following language from *School Directors of District No. 5 v. School Directors of District No. 1*:

> [t]he trustee in this case was the township treasurer, and as long as he held the money it was a trust fund in his hands, but when he paid it out to appellee, or on its orders, it was not a trust fund in appellee's hands which would exclude the operation of the Statute of Limitations.

105 Ill. 653, 656 (1883).

The Court rejected the TTO's argument on this issue, explaining, "I don't see anything that indicates that the treasurer is holding any money in trust subject to the treasurer's discretion as to how they might spend things." (Ex. 22 at 6:13-17.) The TTO submits that *all* monies over which the Treasurer has custody are held in trust for the school districts the treasurer serves. The Trustees themselves, as their name suggests, are unquestionably trustees. They appoint the Treasurer, who performs the day-to-day duties of the Trustees, and the Treasurer's duties include collecting, managing and investing the funds of the school districts. All of these funds, so long as the Treasurer has custody of them, are held in trust, by the Treasurer, as explained in *School Directors* as quoted above. *See also Hackett v. Trustees of Schools*, 398 Ill. 27, 32 (1947) (explaining that "the trustees of schools...holds all of its property in trust for public use."). Because the funds at issue were never paid out upon LT's direction, they remained trust funds in the hands of the Treasurer. For this additional reason, this Court should enter summary judgment on LT's affirmative defense.

C. Third and Fourth Affirmative Defenses: Promissory Estoppel and Equitable Estoppel.

LT alleges promissory estoppel as its third affirmative defense and equitable estoppel as its fourth affirmative defense. LT does so only with respect to the first 2 claims; LT does not assert these doctrines as a defense to Healy's over allocation of interest to LT. "[S]imilar considerations apply when these doctrines are asserted against public bodies" and Illinois courts have consistently held that these doctrines "will not be applied to governmental entities absent extraordinary and compelling circumstances. *Matthews v. CTA*, 2016 IL 117638, ¶94.

1. Promissory Estoppel.

Promissory estoppel it is an offensive doctrine. It is intended to permit a claim to succeed, under certain circumstances, "where the other elements of a contract exist (offer, acceptance, and mutual assent), but consideration is lacking." *Id.* at ¶93. It is distinguished from equitable estoppel in that promissory estoppel "allows a party to pursue a claim for damages" whereas "the latter is used as a defense...." *Id.* at ¶94, n.11. For this reason alone the TTO is entitled to summary judgment on LT's affirmative defense of promissory estoppel.

Even if that this Court held otherwise, however, promissory estoppel creates a contract implied in fact. *Id.* at ¶93. A public body cannot be held liable under a contract implied in fact if such contract is *ultra vires*, or contrary to statute or public policy. *Id.* at ¶98. For example, in *Matthews*, CTA employees sought to hold the CTA liable for certain promises one of its agents made. The Supreme Court explained that the CTA "can only be contractually bound by official action taken by the Chicago Transit Board." *Id.* at ¶99. "Consequently, a CTA employee cannot act in such a manner as to form a contract without the approval of the Chicago Transit Board." *Id.* at ¶98. The Supreme Court, thus, rejected the application of promissory estoppel. Id. at ¶94.

For all of the reasons discussed in Part V of this Motion, the purported contract excusing LT from paying its proportionate share of the Treasurer's expenses is not enforceable. LT does not allege any such contract excused it from paying for its own audit expenses and LT certainly does not point to any action on the part of the Trustees to approve such a contract. This affirmative defense offers no actual defense to LT.

2. Equitable Estoppel.

Equitable estoppel may not be applied against a public body unless the body itself takes official action, or there is action by an official with express authority to bind the body. *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148 (2012), ¶39. A public body cannot be estopped "by an act of its agent beyond the authority expressly conferred upon that official." *Id.* at ¶39. Unauthorized acts by a public official do not bind a public body because otherwise the body "would remain helpless to correct errors." *Id.* at ¶36. To establish equitable estoppel LT must establish (i) an affirmative act by the TTO or by an agent within the scope of his express authority, and (ii) LT detrimentally changing its position in reasonable reliance upon such act. *Id.* at ¶40. Moreover, "when public revenues are at stake, estoppel is particularly disfavored." *Id.*

Here, beyond the single March 2000 Trustees board meeting, LT cannot point to conduct by the Trustees that might form the basis of an equitable estoppel claim. LT may argue that Healy told LT the Trustees had voted each year to confer wrongful benefits upon LT, but there is no evidence they actually so voted. Such misrepresentations cannot form the basis of an equitable estoppel claim against a public body.

Moreover, LT cannot point to a detrimental change it made in reasonable reliance upon such misrepresentations. With respect to the first claim, wherein the TTO purportedly agreed to pay the salaries of three (3) LT employees, those employee "were in place for many years"

before the purported contract was even discussed. (Ex. 5 at 93:3-7.) With respect to the TTO's payment of LT's annual audit, while LT may argue it would have engaged a different accountant had it been forced to pay for its own firm, this is just speculation. LT's Director of Business Services for the period 2003 through 2014 testified that Baker Tilly provided satisfactory services. (Ex. 14 at 32:8-13.)

Finally, the purpose of equitable estoppel is to "to prevent fraud or injustice." *Gorgees v. Daley*, 256 Ill. App. 3d 143, 146 (1st Dist. 1993). Requiring a party to comply with its obligations under the School Code cannot possibly be a fraud or injustice.

D. Fifth Affirmative Defense: Waiver.

LT alleges that the TTO waived its right to require LT to pay its proportionate share of the Treasurer's costs, because the TTO permitted LT to *not* pay its proportionate share. Waiver, however, "arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right." *People v. Houston*, 229 Ill. 2d 1, 10 n.3 (2008). The mere inaction and delay in asserting a claim cannot constitute a waiver. Further, as LT does not allege an express wavier, LT has the burden of proving an implied waiver through "a clear, unequivocal and decisive act of its opponent manifesting an intention to waive rights." *Ciers v. OL Schmidt Barge Lines, Inc.*, 285 Ill. App. 3d 1046, 1050 (1st Dist. 1996). All LT has alleged is that the TTO failed to force LT to pay its proportionate share of the Treasurer's expenses. This is not an affirmative act and is also not a "clear, unequivocal and decisive act" that establishes waiver.

Finally, the affirmative act must be the act of the Trustees themselves as the governing body of the TTO; Healy cannot waive the rights of the TTO. *See Schivarelli v. CTA*, 355 Ill. App. 3d 93, 102 (1st Dist. 2005) (holding that the failure of the CTA to seek payment of utility costs from its tenant, even though it accepted rent during the 14-year period at issue, did not

waive the CTA's rights to seek such payment, because there was no evidence the CTA Board itself waived the right). LT has not alleged that the Trustees themselves undertook such a clear, unequivocal, decisive and affirmative action that would support the defense of implied waiver.

E. Sixth Affirmative Defense: Unclean Hands.

Unclean hands is "not favored by the courts...." *Carlyle v. Jaskiewicz*, 124 Ill. App. 3d 487, 498 (1st Dist. 1984). Its purpose "is to protect courts of equity in keeping with the policy that equity should not aid a wrongdoer; [its purpose] is not to protect the party asserting it as a defense." *Id.*; *see also Cole v. Guy*, 183 Ill. App. 3d 768, 776 (1st Dist. 1989) ("purpose of the 'unclean hands' doctrine is to protect courts of equity from assisting litigants in accomplishing their fraudulent or unlawful purposes, and not to protect the party raising the doctrine as a defense." Its application lies within this Court's sound discretion. *Id.*

LT alleges the "bad conduct" of the TTO began in 2013, when it (a) denied the existence of the purported contract excusing LT from paying its proportionate share of the Treasurer's expenses, (b) argued that any such contract would have required an intergovernmental agreement, (c) asserted its claim that LT was over-allocated of investment income despite the "absence of sufficient records," and (d) sought to recoup the audit payments. (Ex. 21 at ¶92.) The TTO's assertion of its present claims in 2013, *i.e.*, this lawsuit, cannot be fairly characterized as either "fraudulent or unlawful" in purpose. Even if LT disagrees with the validity of these claims, the TTO is not acting with unclean hands by attempting to reverse financial improprieties that disadvantaged other school districts.

F. Seventh and Eighth Affirmative Defenses: Unjust Enrichment and *Quantum Meruit*.

LT alleges unjust enrichment for its seventh affirmative defense and *quantum meruit* for its eighth affirmative defense. Through each, LT alleges that the parties agreed that LT could

offset the salaries of its own personnel against LT's proportionate share of the Treasurer's expenses of office. These are not affirmative defenses; they are affirmative claims. *Partipilo v. Hoffman*, 156 Ill. App. 3d 806, 809-10 (1st Dist. 1987); *Storino, Ramello & Durkin v. Rackow*, 2015 IL App (1st) 142961, ¶36.

G. Ninth Affirmative Defense: Voluntary Payment Doctrine.

The voluntary payment doctrine provides that, absent fraud, duress or mistake of fact, money paid on a claim of right to the payment cannot be recovered on the ground that the claim was illegal. *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 801 (3rd Dist. 2007). No Illinois court has ever applied this doctrine against a public body. Other jurisdictions, however, have held that the doctrine does not apply where the recovery of public funds are at issue. *See, e.g., Kansas City v. Halvorson*, 177 S.W.2d 495, 498 (Mo. 1943); *Township of Normania v. Yellow Medicine County*, 286 N.W. 881, 883 (Minn. 1939); *State ex rel. Hunt v. Fronizer*, 1906 WL 1164 (Ohio C.C. May 19, 1906); *Wiles v. McIntosh County*, 88 N.W. 710, 712-13 (N.D. 1901); *Village of Ft. Edwards v. Fish*, 50 N.E. 973 (N.Y. 1898).

This is logical because, as discussed throughout this Motion special rules govern lawsuits involving public entities and public funds. The voluntary payment doctrine is little more than another form of estoppel and the Illinois Supreme Court has explained that estoppel "will not be applied to governmental entities absent extraordinary and compelling circumstances." *Matthews*, 2016 IL 117638 at ¶94. Further, estoppel may not be applied against a public body through the unauthorized acts of a public official. *Patrick Eng'g*, 2012 IL 113148 at ¶39. There is no reason for this doctrine to apply to this lawsuit.

Even if his Court were to apply the doctrine, however, such application would fail under the facts presented. When Healy allocated investment income to LT, he did not actually make

any payment, but just made a bookkeeping entry. Moreover, such bookkeeping entries were entered under LT's "claim of right" to the particular payments at issue. When Healy paid for LT's annual audit, he made a cash payment – but not to LT. He had the payment to Baker Tilly, and Baker Tilly is not the party asserting this doctrine. Finally, although Beckwith's February 2000 memorandum proposed that the TTO would "pay" to LT the sums set forth therein, such payment was never actually made. The TTO has not "paid" any sums to LT.

VIII. CONCLUSION

WHEREFORE, for the reasons stated herein, the plaintiff, Township Trustees of Schools Township 38 North, Range 12 East, respectfully requests that this Court grant this Motion for Summary Judgment and:

a. enter a declaratory judgment that the Treasurer may debit $511,068.60, representing the defendant's audit costs, from the monies being held by the Treasurer and allocable to the defendant;

b. enter a declaratory judgment that the Treasurer may debit the amount of $2,628,807, representing the amount of its proportionate share of the Treasurer's compensation and expenses that the defendant has failed to pay, from the monies being held by the Treasurer and allocable to the defendant;

c. enter a declaratory judgment that the Treasurer may debit the amount of $1,386,267.03, representing the over-allocation of investment income to the defendant, from the monies being held by the Treasurer and allocable to the defendant;

d. enter summary judgment in favor of the TTO and against LT on LT's Affirmative Defenses; and

d. providing such further relief as may be equitable.

The Plaintiff will provide a form declaratory judgment for entry upon this Court's ruling on this Motion for Summary Judgment.

Respectfully submitted,

TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

By: /s/ Barry P. Kaltenbach .
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PROOF OF SERVICE

The undersigned, a non-attorney, certifies that a copy of the following document, **Plaintiff's Revised Motion For Summary Judgment** , has been served upon:

Jay R. Hoffman
Hoffman Legal
20 N. Clark Street, Suite 2500
Chicago, IL 60602

as follows:

X	by messenger delivery service on June 12, 2018 before 4:00 p.m.
	by U.S. mail, by placing the same in an envelope addressed to them at the above address with proper postage prepaid and depositing the same in the U.S. Postal Service collection box at 225 W. Washington Street, Chicago, Illinois, on June 12, 2018 before 4:00 p.m.
	by facsimile transmission from 225 W. Washington Street, Suite 2600, Chicago, Illinois to the [above stated fax number/their respective fax numbers] from my facsimile number (312) 460-4201, consisting of ____ pages on June 12, 2018 before 4:00 p.m., the served [party/parties] having consented to such service.
	by Federal Express or other similar commercial carrier by depositing the same in the carrier's pick-up box or drop off with the carrier's designated contractor on June 12, 2018 before the pickup/drop-off deadline for next-day delivery, enclosed in a package, plainly addressed to the above identified individual[s] at [his/her/their] above-stated address[es], with the delivery charge fully prepaid.
	by electronic mail, on June 12, 2018 before 5:00 p.m., the served [party/parties] having consented to such service.

[X] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct

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