IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

I.B.I.D. ASSOCIATES LIMITED PARTNERSHIP d/b/a I.B.I.D ASSOCIATES, L.P., Plaintiff,	:	
v.	:	2:22-cv-00954
COUNCILMEMBER JAMIE GAUTHIER and THE CITY OF PHILADELPHIA, Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

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I. INTRODUCTION

This case challenges the constitutionality of the Philadelphia City Council's legislative efforts to address the lack of affordable housing through zoning and land-use regulations. Upset with the potential impact of these efforts on its efforts to sell the property, Plaintiff seeks to restrain the City from enforcing a bill that impacts a corridor that includes its property. But local governments regularly address affordable housing through zoning and Plaintiff's attempt to argue that the City's actions here are an unconstitutional taking rests on a broad—and unsupported—extension of takings law that would ultimately eviscerate all zoning regulation. As explained below, the law does not support Plaintiff's argument on takings or any of its other constitutional theories. And, of equal import for the purposes of this motion, to the extent Plaintiff can allege harm here (though it has provided no evidence of actual buyers or the value of its property), that harm would be economic and therefore does not warrant injunctive relief.

Of course, Plaintiff does not just name the City. It also seeks an order restraining Councilmember Jamie Gauthier, an independently elected public official, in her official capacity and, shockingly, in her personal capacity as well. While we understand that Plaintiff may not be pleased by City Council's enactment of a bill addressing affordable housing and potentially impacting development efforts, the inclusion of the Councilmember is both inappropriate and unnecessary, particularly insofar as Plaintiff seeks punitive damages against the Councilmember. Legislators are afforded broad immunities to serve the public. Plaintiff portrays itself as a victim of one Councilmember's actions, but that is not how the legislative process works. The legislation Plaintiff challenges has been passed by City Council, and this Court, in reviewing the actions of City Council, has no basis to restrain an individual councilmember. Plaintiff's inclusion of the Councilmember is contrary to law and appears to be nothing more than an intimidation tactic.

When the focus is on the legal issues, and Plaintiff's bluster is set aside, it is clear that Plaintiff has neither immediate nor irreparable harm and that it is not likely to succeed on the merits of its claims, so this Court should deny the motion.

II. FACTUAL BACKGROUND

Plaintiff IBID owns property at 3900 Market Street (the "Property") in the University City area of West Philadelphia that includes 70 townhomes. (ECF No. 1 ¶ 33). The townhomes have been rented as Section 8 affordable housing pursuant to a contract with the Department of Housing and Urban Development (HUD) (the "HUD Contract") for about 40 years. (*Id.*) Many of the townhomes include multi-generational families and individuals who have lived there since the townhome's inception.[1] (ECF. No. 1-1 (Ex. 6) at 134). On March 10, 2022, the Philadelphia City Council passed Bill No. 210778, as amended (the "Bill"), which changes the zoning in part of University City including IBID's property. (ECF No. 1 ¶ 14). In addition to addressing the Bill, whose enforcement Plaintiff seeks to enjoin, we provide factual background for the Bill's passage.

A. Philadelphia's Lack of Affordable Housing

City Council's recent legislative efforts reflect a growing focus on the lack of affordable housing in Philadelphia, the impact of market forces on neighborhood development, and the ability of Philadelphia's residents to preserve their homes and their communities.[2] The Bill,

[1] Ryan Briggs and Aaron Moselle, *1,700 units of housing are set to vanish in the next 5 years. There's little Philly officials can do,* Phila. Trib. (Nov. 11, 2021), https://www.phillytrib.com/news/local_news/1-700-units-of-housing-are-set-to-vanish-in-the-next-5-years-there/article_7d62197d-f3e7-502a-9154-a4d9abdbf244.html, attached hereto as Exhibit A.

[2] *See, e.g.*, Bill No. 210681 (Approved 10/20/2021) (Sponsored by Councilmember Council President Clarke) (approving expenditure of $100 million by various agencies in the first year of the Neighborhood Preservation Initiative Program to be spent on housing preservation, production of affordable housing, and other related programs and activities); Bill No. 210203 (Sponsored by Councilmember Parker for Council President Clarke) (Approved 5/27/2021)

which focused originally on the immediate corridor where the townhomes are located, provides a template for maintaining and incentivizing the creation of affordable housing throughout the City.

Data shows that Philadelphia, and University City in particular, lacks sufficient affordable housing. The Census tract that contains the townhomes (and the initial geography captured within The Bill) saw the median gross rent double between 2000 and 2018.[3] Further, in that same time period, the Black population east of 52nd Street has been cut in half. (ECF No. 1-1 (Ex. 6) at 131). Those who need access to affordable housing most are finding it less and less in this section of the City.

A recent study warns that over 9,000 Philadelphia families are at risk of losing their affordable housing as landlords "opt out" of Section 8 project-based housing, as IBID has, and that opt-outs disproportionately affects Philadelphians who are low-income and African

(authorizing service agreements related to the Neighborhood Preservation initiative, including the issuance of indebtedness of up to $400 million related to the program); Bill No. 210507 (Approved 8/26/2021) and Resolution 210524 (Approved 6/17/2021) (Sponsored by Councilmembers Green, Squilla, Parker, Gym, Gauthier, Gilmore Richardson, Brooks, Domb, Thomas and Johnson) (proposing to amend the Home Rule Charter to require an amount equal to at least 0.5% of the City's total General Fund appropriation for expenditure out of the City's Housing Trust Fund); Bill No. 190869-A (Sponsored by Councilmember Green) (Approved 12/30/2019) (requiring owners of certain affordable housing developments to provide notice to the City prior to the owner ending certain subsidies or selling certain affordable housing properties); Resolution No. 211029 (Sponsored by Councilmembers Gauthier, Johnson, Parker, Bass and Henon) (Adopted 12/16/2021; Hearing Held 12/15/2022) (authorizing public hearings to explore the crisis of expiring affordable housing subsidies and the impact of those expirations on the availability of affordable housing in Philadelphia).

[3] Phila. City Council, *A Changing City: Tracking changes in select Census data 2000-2018*, at Rent: Census Tract 88.02 (last accessed Mar. 23, 2022), https://philacitycouncil.maps.arcgis.com/apps/MapSeries/index.html?appid=cdaf75b91bdc4b2a9514989f48fa47b1, attached hereto as Exhibit B.

American.[4] Many opt-outs are in gentrifying census tracts with rapidly escalating property values. *Id.* The study concludes that if project-based housing is lost, the populations that already face the highest housing burdens would further disproportionately face increased burdens within the private market. *Id.* at 5-6. While Section 8 residents living where owners "opt out" are provided federal housing vouchers to relocate, given the high rate of voucher discrimination in Philadelphia and the unavailability of affordable housing in amenity rich areas, it is highly unlikely that such residents will be able to relocate to an area with similar access to transit, healthcare, quality schools, parks and jobs unless meaningful action is taken to ensure more dedicated affordable housing is developed in such areas. *See id.* at 15; (ECF No. 1 ¶ 10; ECF No. 1-3 (Ex. 9) at 275-78). Instead, voucher holders are forced to move to less desirable neighborhoods with less amenities, more crime, and lower quality housing stock in order to use their vouchers. *See* Burns, supra note 4, at 15. In fact, studies show that less than half of households forced to relocate are unable to make use of their voucher.[5]

Maintaining affordable housing in the University City area is a priority for the City, given its proximity to public transportation, world-class medical facilities, sought after schools, and a thriving commercial area, as well as the fact that affordable housing in this area of West Philadelphia has become scarce.[6] (*See* ECF No. 1-3 (Ex. 9) at 275-78). In late 2021, City Council passed the Mixed-Income Neighborhoods Overlay (the "MIN Overlay"). The MIN

[4] Rita Burns et al., *Danger of the Opt-Out: Strategies for Preserving Section 8 Project-Based Housing in Philadelphia* 5, 7 (2017), *available at* https://law.temple.edu/csj/wp-content/uploads/sites/3/2017/01/Danger-of-the-Opt-Out.pdf, attached hereto as Exhibit C.

[5] Vincent J Renia & Ben Winter, *Safety net? The use of vouchers when a place-based rental subsidy exists*, 56 Urb. Stud. 2092, 2097 (2009), attached hereto as Exhibit D.

[6] Office of Councilmember Jamie Gauthier et al., *The Geography of Affordable Housing in Philadelphia's 3rd District* (Nov. 2020), https://urbanspatial.github.io/3rdDistrictPlanning/#housing-market-report, attached hereto as Exhibit E.

Overlay is a zoning overlay that applies in certain areas of West and North Philadelphia and requires any newly constructed "Residential Housing Project"[7] within its boundaries to maintain 20% of all dwelling units and 20% of all sleeping units as affordable[8] on the same site as all other dwelling and sleeping units, with certain very limited exceptions. *See* Phila. Code § 14-533(1), (3). Residential Housing Projects in the MIN Overlay are permitted to be built at significantly higher density than would otherwise be permitted in a property's base zoning district. *Compare* Phila. Code § 14-533(4) at Table 14-533-4: Maximum Floor Area Ratios in MIN Overlay District; *with* § 14-701(3) at Table 14-701-3: Dimensional Standards for Commercial Districts. The Property is located within the MIN Overlay.

IBID notified tenants in July 2021 that it would end its HUD Contract, evict the current tenants in July 2022, and sell the Property for redevelopment. (ECF No.1 ¶¶ 11, 50-53.)

B. Current Legislation Related to Affordable Housing in West Philadelphia

Bill No. 210778 was introduced by Councilmember Gauthier on September 30, 2021.[9] The Bill then went through stages of City and legislative processes appropriate for zoning related bills, including consideration by the Philadelphia Planning Commission on October 21, 2021, and by the Council Committee on Rules on October 26, 2021. *See* Legislative History Website; (ECF No. 1 ¶ 14). The Bill, with amendments that had been made during these consideration

[7] The term Residential Housing Project is defined in Section 14-533(2) of the Code, as "any development which itself, or in combination with any closely related development, involves the construction of ten or more dwelling units, twenty or more sleeping units, or both, and that is located in whole or in part within the Mixed Income Neighborhoods Overlay District," with certain limited exceptions.

[8] The affordability requirements are set forth in Section 14-533(6) of the Code.

[9] *See* City of Phila. City Council Leg. Info. Ctr., *Legislation File #: 210778-AA*, https://phila.legistar.com/LegislationDetail.aspx?ID=5153261&GUID=7B6244F2-3DDD-4660-AB62-37FC51EA4E7B&Options=ID|Text|&Search=210778 [hereinafter "Legislative History Website"] (last accessed 3/23/2022), attached hereto as Exhibit F.

processes, was voted out of the Council Committee on the Rules and became effective on that date. *See* (*id.* ¶ 14); Phila. Code § 14-304(3)(g). On March 10, 2022, City Council considered the Bill in its amended form and voted 15-1 in favor of the bill. *See* Legislative History Website. The Bill is now under consideration by the Mayor who must decide whether to sign, veto, or abstain from taking action on the Bill on or before Thursday, March 24, 2022. Phila. Home Rule Charter § 2-202. In addition to the Bill, City Council has several other pieces of legislation seeking to address issues of affordable housing currently pending or recently passed. *See supra* note 2.

The Bill in its enacted form (as amended January 20, 2022) creates an "Affordable Housing Preservation Overlay District" (the AHP Overlay) that applies to the area between 39th Street to the east, 40th Street to the west, Filbert Street to the north, and Ludlow Street to the south, which includes IBID's property. (ECF No. 1-3 at 272,[10] Ex. 9 (Bill at Proposed Code § 14-534(2))). In relevant part, the AHP Overlay provides that all non-residential uses must be located on the ground floor of a building and imposes a twelve-month moratorium on demolition to IBID's Property. (*Id.* at 278-79 (Bill at Section 2 (Proposed Code § 14-534(2)), Section 3)).

Many possible property uses are available under this structure. After the demolition moratorium ends, the Bill allows IBID to build, by right, a high-rise-residential structure comparable to the high-rise residential towers found throughout Philadelphia's Center City business district and University City, with commercial use on the first floor. If the property includes a significant amount of residential housing that triggers the affordability requirements under the MIN Overlay, IBID would be able to build at 50% greater density under the MIN Overlay development standards applicable than the previous zoning. Alternatively, IBID can also rent out the current homes to tenants—whether or not it chooses to continue its HUD Contract—

[10] Pinpoint citations to ECF documents are to the ECF system pagination.

or sell them as townhomes, neither of which would require demolition of the current properties. IBID can also sell the property as a whole, as is. Nothing in the Bill in any way impacts IBID's right to sell the Property.

III. LEGAL STANDARD

The standard for obtaining a temporary restraining order is the same standard for obtaining a preliminary injunction. *Corporate Synergies Grp., LLC v. Andrews*, 775 F. App'x 54, 58 n.5 (3d Cir. 2019) (citing *PennMont Sec. v. Frucher*, 586 F.3d 242, 245 (3d Cir. 2009)). To obtain preliminary injunctive relief,

> the moving party must generally show as a prerequisite[:] "(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted . . . . [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest."

Reilly v. City of Harrisburg, 858 F.3d 173, 179 (3d. Cir. 2017) (citation omitted). "[A] movant for preliminary equitable relief must meet the threshold for the first two 'most critical' factors," and if those are met "a court then considers the remaining two factors." *Id.* at 179.

IV. ARGUMENT

IBID's motion fails every part of the test for injunctive relief. IBID cannot show irreparable harm from a potentially lower sales price or from the constitutional nature of its deficient claims. It has not shown even a probability of success on the claims because each suffers from fatal legal flaws. No part of the Bill effects a taking, because it does not require physical access to the Property and because the Property retains significant value as a result of the Bill. IBID's equal protection and substantive due process claims fail because IBID cannot show it was similarly situated to any other property owner in relevant respects, and the Bill is rationally related to the preservation of affordable housing in the affected areas. For the same

reasons, and because the Bill has no effect on the termination of IBID's HUD Contract, IBID's Contract Clause argument has no merit. Finally, the balance of the equities and public interest weigh against injunctive relief where IBID has not shown nonmonetary harm and its demolition of affordable housing would be irreversible and devastating to the community.

A. IBID Faces No Irreparable Harm

As an initial matter, IBID has not shown—and indeed cannot show—irreparable harm and their motion fails on that basis alone. IBID makes two arguments: First, IBID claims that the deprivations of real property interests always constitute irreparable harm. This is wrong as a matter of law. And second, IBID asserts that any violation of constitutional rights automatically constitutes irreparable harm *per se*. This is contrary to controlling precedent in this Circuit. And even if IBID's theories supported irreparable harm in some context (they don't), IBID does not provide facts to support such a finding here. IBID does not allege any "unique" property interest or explain why its bare assertion of lost sale profits is not a quintessential example of harm that is compensable by money damages. And IBID provides no real argument as to why this Court should extend *per se* irreparable harm to the constitutional provisions on which IBID bases its claims. IBID has not made—and cannot make—a factual showing of irreparable harm. IBID's motion must be denied on that basis alone.

1. IBID's Claimed Damages Are Both Monetary and Speculative

IBID's claimed irreparable harm is that the Bill is "restricting IBID's ability to sell the Property for its highest and best use," (ECF No. 2 at 47), but a lower sales price is not irreparable harm. It is axiomatic that economic losses do not satisfy the irreparable harm requirement for injunctive relief. *Acierno v. New Castle Cty.*, 40 F.3d 645, 653 (3d Cir. 1994) (explaining that economic losses, "'however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough'" (quoting *Sampson v. Murray*, 415 U.S. 61,

90 (1974))). A plaintiff asserting irreparable harm must be able to demonstrate "potential harm which cannot be redressed by a legal or an equitable remedy following a trial.'" *Id.* (citation omitted). This requires a harm that is of such a peculiar nature that "'compensation in money cannot atone for it.'" *Id.* (citation omitted). And even where such harm is present, in must be real and imminent. An injunction "may not be used simply to eliminate a possibility of a remote future injury" or "merely to allay the fears and apprehensions" of a party. *Cont'l. Grp., Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 359 (3d Cir. 1980) (citations omitted).

Perhaps aware that the alleged loss of value in the Property does not constitute irreparable harm, IBID glosses over this entirely and directs the Court to a seemingly broad proposition that is actually much narrower than IBID suggests and does not support IBID's claims here. (ECF No. 2 at 48 (citing *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011)). When the Court in *Minard Run* made the broad statement that "preliminary injunctive relief '*can* be particularly appropriate'" where real property is involved, it was discussing a situation in which a property owner's natural resource interests could be taken by *neighbors* without any right of recompense and opining that the loss is by definition not compensable. *Minard Run*, 670 F.3d at 256 (emphasis added) ("The adjoining owner's only remedy against such [oil and gas] drainage is to 'go and do likewise.'" (citing *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801 (Pa. 1907))). Again, IBID's alleged loss here is monetary and is compensable. Further distinguishing this matter from *Minard Run*, the governmental taking of a property interest never constitutes the sort of irreparable harm that is appropriate for injunctive relief. *See Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2179 (2019) (noting "injunctive relief [is] foreclosed" for takings claims).

IBID provides nothing to suggest it has the type of interest that could warrant an injunction in a real property case and does not explain how such an injunction could issue in a matter involving an alleged governmental taking. Indeed, IBID's only factual claim of irreparable harm is that the Bill restricts "IBID's ability to sell the Property *for commercial development for its highest and best use*," (ECF No. 2 at 49 (emphasis added)). This is plainly insufficient. As an initial matter, IBID provides absolutely no evidence to support this bald assertion. Neither the Complaint nor IBID's motion attach, describe, or cite a single offer from a prospective buyer, let alone a lost sale or even a study of the market showing the alleged difference in values.[11] And even if IBID had evidence, the harm IBID allegedly would experience through a lower sale price, not even restrictions on IBID's own use, is quintessential money damages. *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988) (finding even "substantial lost profits . . . is compensable by money damages"). Because IBID has not articulated, let alone shown, an injury of such "'a peculiar nature[] so that compensation in money cannot atone for it,'" *Acierno*, 40 F.3d at 653, IBID cannot satisfy the irreparable harm requirement necessary to justify an injunction.

2. IBID's Claimed Constitutional Violations Do Not Constitute *Per Se* Irreparable Harm

Faced with money damages, IBID argues that its constitutional claims alone satisfy the harm requirement even though there is binding precedent to the contrary. Specifically, while certain constitutional violations can constitute irreparable harm *per se*, the Third Circuit has

[11] Instead, IBID refers to comments about a previous iteration of the Bill that included a higher minimum of affordable housing, (*id.* at 49), but regardless of whether the comments were accurate or not, they do not apply to the version of the Bill at issue here.

found the types of violations alleged by IBID do not. As a result, the nature of IBID's claims do not entitle it to a finding of irreparable harm.

Courts have held certain First Amendment harms, loss of fundamental rights, and invidious discrimination can constitute irreparable harm *per se*. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Victory v. Berks County*, No. 18-5170, 2020 WL 236911, at *26 (E.D. Pa. Jan. 15, 2020) (gender discrimination); *NAACP State Conference of Pa. v. Cortes*, 591 F. Supp. 2d 757, 767 (E.D. Pa. 2008) ("If relief is refused, there is a real danger that many voters in the Commonwealth will have their constitutional right to vote unduly burdened."); *Maldonado v. Houstoun*, 177 F.R.D. 311, 333 (E.D. Pa. 1997) (right to travel). The reason invidious discrimination causes irreparable harm is not simply because it violates the Constitution, but because "by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, [it] can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Matthews*, 465 U.S. 728, 739–40 (1984) (citation omitted).

These are not the type of harms allegedly present here. IBID has not brought a First Amendment, a fundamental right,[12] or an invidious discrimination claim and courts have not

[12] Although IBID analyzes its claims under rational basis, in a footnote it incorrectly attempts to suggest heightened scrutiny should apply. (ECF No. 2 at 37 n.4). IBID correctly notes that equal protection claims involving "fundamental rights" and suspect classes are reviewed under heightened scrutiny. (*Id.*) But IBID goes on to suggest that "ownership in a property interest" is also a fundamental right because it receives substantive due process protection. (*Id.* (quoting *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 600 (3d Cir. 1995)). But not only does IBID improperly mix equal protection and substantive due process claims, IBID also conflates analysis of "fundamental *personal rights*," *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (emphasis added), with *DeBlasio*'s actual test and terminology that confers substantive due

extended the notion of *per se* harm in a manner that would support IBID's argument. Instead, IBID's claims are predicated on alleged violations of the Takings Clause, Equal Protection Clause, Contracts Clause, and IBID's substantive due process rights. None of these qualify as irreparable harm *per se*.

First, as discussed above, it is black letter law that "injunctive relief [is] foreclosed" for takings claims. *Knick*, 139 S. Ct. at 2179; *see also Troy Ltd. v. Renna*, 727 F.2d 287, 300 (3d Cir. 1984). Second, for Substantive Due Process and Equal Protection claims not alleging invidious discrimination, the Third Circuit has required plaintiffs such as IBID to make a factual showing of irreparable harm and held that such a showing is not satisfied when the harm can be remedied by an award of money damages. *See Acierno*, 40 F.3d at 654 (reversing the grant of a preliminary injunction involving alleged violations of developer's substantive due process and equal protection rights because "any actionable harm [plaintiff] may suffer, if it is ultimately determined that the County violated his constitutional rights, can be remedied by an award of money damages").[13] The same is also true for Contracts Clause violations. *See N.J. Retail*

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process protection on "fundamental *property interests*," as opposed to lower "quality" property interests, 53 F.3d at 600. As IBID implicitly concedes in only pursuing a rational basis argument, "fundamental rights" and "fundamental property interests" are not equivalent and IBID's claims are subject only to rational basis review.

[13] *See also Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 484–85 (1st Cir. 2009) ("[I]t cannot be said that violations of plaintiffs' rights to due process and equal protection *automatically* result in irreparable harm."); *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990) ("No authority from the Supreme Court or the Eleventh Circuit has been cited to us for the proposition that the irreparable injury needed for a preliminary injunction can properly be presumed from a substantially likely equal protection violation."); *United States v. N.Y.C. Bd. of Educ.*, No. 02–CV–256, 2002 WL 31663069, at *3 (E.D.N.Y. 2002) (noting lack of cases supporting claim that "an alleged equal protection violation in the employment context constitutes irreparable harm"); *Johnson v. City of San Francisco*, 2010 WL 3078635, at *3 (N.D. Cal. 2010) ("[T]o the extent Plaintiff makes out a plausible claim for denial of his rights to the equal protection of the laws under the Fourteenth Amendment, the harm he alleges to have suffered is economic harm which

Merchants Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 388 (3d Cir. 2012) (holding that while the plaintiffs had shown a likelihood of success on the merits for their Contracts Clause claim, irreparable harm was only satisfied because monetary relief would not be available due to state sovereign immunity).

Because IBID does not allege a violation of a fundamental right or discrimination because of its membership in a disfavored group, IBID cannot claim irreparable harm by virtue of its constitutional claims alone. Having failed to show irreparable harm as a factual matter, IBID cannot satisfy the test for injunctive relief.

B. IBID Cannot Show a Likelihood of Success on the Merits

1. The Councilmember Has Immunity for Her Actions

IBID seeks injunctive relief against Councilmember Gauthier even though she is both an improper defendant and immune from these claims. Absolute legislative immunity shields members of "local legislative bodies for actions taken in a purely legislative capacity." *Acierno v. Cloutier*, 40 F.3d 597, 610 (3d Cir. 1994). "[D]rafting, introducing, debating, passing, or rejecting legislation" are all activities protected by legislative immunity. *Baraka v. McGreevey*, 481 F.3d 187, 196 (3d Cir. 2007); *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998). A court cannot inquire into an official's motive or intent when determining whether an act is legislative in nature. *Bogan*, 523 U.S. at 54. Here, the actions complained of are legislative, and so the

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is not irreparable as a matter of law."); *cf. Warren v. City of Athens, Ohio*, 411 F.3d 697, 711 (6th Cir. 2005) (engaging in factual irreparable harm analysis despite finding of constitutional violation); *cf. M. Rae, Inc. v. Wolf*, 509 F. Supp. 3d 235, 250 (M.D. Pa. 2020) ("Given plaintiffs' weak showing on the merits of their [class-of-one] equal protection claim, a particularly compelling showing of irreparable harm is needed to obtain emergency injunctive relief. Plaintiffs have not sustained that burden.").

Councilmember is immune from claims against her.[14] And ultimately, since the Councilmember has no role in the enforcement of the Bill—which is the relief IBID currently seeks—IBID lacks standing to pursue claims for injunctive claims against her on redressability grounds. *See, e.g.*, *Free Speech Coal., Inc. v. Att'y Gen. of the U. S.*, 825 F.3d 149, 165 (3d Cir. 2016).

2. The Bill Is Neither a *Per Se* nor a Regulatory Taking

IBID argues that the Bill—which requires development above the first floor to be residential and, if sufficiently dense, for a further percentage of that housing to be set aside as affordable housing—effects a taking, both *per se* under *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021) and *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992), as well as under the *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) balancing test. The Bill is categorically not a *per se* taking and IBID's reliance on *Cedar Point* is misplaced. Contrary to IBID's argument, the Bill does not involve physical access to property (as articulated in *Cedar Point*) or the deprivation of all economic value (as in *Lucas*) but instead is a wholly supportable, non-compensable restriction on the use of property under *Penn Central*.

In *Cedar Point*, the Supreme Court held that a regulation that required a property owner to provide individuals with physical access to its property constituted a *per se* taking. 141 S.Ct. at 2074. IBID tries to make the same argument here but cannot point to any way in which the Bill requires IBID to provide physical access. While the Bill certainly incentivizes affordable housing by limiting the uses IBID may make of the Property, ultimately the Bill leaves the decision of who to admit up to IBID; the Bill does not require IBID to actually rent out such units or allow people access to the Property. As a result, and as the *Cedar Point* decision made

[14] Even if they somehow were not legislative, she would be entitled to qualified immunity since IBID does not explain how any of the violations it alleges were clearly established. *See, e.g.*, *Bag of Holdings, LLC v. City of Phila.*, 682 Fed. App'x 94, 98 (3d Cir. 2017).

clear, "[w]hen the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his property, a different standard applies." *Id.* at 2071. There is simply no *per se* physical taking here. And given that, at a minimum, IBID can continue to use the Property for affordable housing as it currently does, IBID's claim that it has been deprived of "all economically beneficial use of the land" is nonsensical. (ECF No. 2 at 30 (quoting *Lucas*, 505 U.S. at 1020, 1029)); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 341 (2002) (thirty-two-month development moratorium did not constitute a *per se* taking).

Instead, the Bill's restrictions on the use of the Property are properly analyzed under the *Penn Central* factors for regulatory takings. *See Cedar Point*, 141 S.Ct. at 2071-72 ("To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central* . . . ."). These include "'[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations[,]" and "the 'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005) (quoting *Penn Central*, 438 U.S. at 124). This requires examination of "the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981). Importantly, with respect to the economic impact, the Court has been clear that a government regulation need not permit the highest potential return, it need only allow a "reasonable return." *Penn Cent.*, 438 U.S. at 136 (finding prohibition on further development over Grand Central Terminal that allowed continued existing

use was not a taking); *accord Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (use restriction permitting only residential development to avoid progression of industrial or businesses uses upheld despite resulting in 75% reduction in property value).

Under this framework the Supreme Court has expressly held that property regulations are valid in circumstances similar to those imposed by the Bill. In *Yee v. City of Escondido, Cal.*, the Court found that rent control and limitations on the right to evict or *select tenants* do not constitute *per se* takings, and *Cedar Point* has not overruled this precedent. 503 U.S. 519, 529 (1992) ("When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge or require the landowner to accept tenants he does not like without automatically having to pay compensation." (citations omitted)); *see also Cedar Point*, 141 S. Ct. at 2072 (citing but not overruling *Yee*); *Block v. Hirsh*, 256 U.S. 135 (1921) (government regulation allowing tenants to remain after expiration of lease term and prohibiting landlords from evicting tenants unwilling to pay higher rent did not constitute a taking).

Applying the *Penn Central* standard here, there is no taking. The Bill regulates IBID's ability to change the future use of the Property, but so far there is no evidence it will affect IBID's rate of return on their investment. IBID suggests it "possessed investment-backed expectations in the Property's future sale," yet provides no evidence. (ECF No. 2 at 31). IBID also argues that the exclusion of exclusively commercial uses "has drastically destroyed the Property's value," but IBID supplies no support for this assertion. (*Id.*) There is no support for the proposition that residential uses will completely, or even partially destroy the value of the Property. And even if it could, it would not qualify as a regulatory taking. *See Penn Cent.*, 438 U.S. at 130 (rejecting the idea that a taking can be established by showing the denial of "the ability to exploit a property interest that [the plaintiffs] heretofore had believed was available");

cf. Appeal of Key Realty Co., 182 A.2d 187, 188 (Pa. 1962) (Appellant acquired no vested right in continuation of zoning classification which permitted erection of an apartment building).

Importantly, IBID has been maintaining the Property as affordable housing for almost 40 years now and does not assert that doing so was a valueless proposition. Only in the most extreme cases does a regulation create a taking. *See Pa. Coal Co. v. Mahon*, 260 U.S 393 (1922) (finding that a regulation that made every use of a property commercially impractical constituted a taking). That is simply not the case here. *See Lucas*, 505 U.S. at 1015. Indeed, as in *Penn Central*, the challenged Bill

> not only permits but contemplates that [IBID] may continue to use the property precisely as it has been used for the past [40] year[s] . . . . So the law does not interfere with what must be regarded as [IBID's] primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the . . . law as permitting [IBID] not only to profit from the [Property] but also to obtain a "reasonable return" on its investment.

Penn Cent., 438 U.S. at 136.

Thus, under the proper takings analysis, there is no taking.

3. There Is No Equal Protection Violation

IBID is not likely to succeed on the merits of its equal protection claim. To assert its equal protection claim, IBID alleges it is a "class of one". A "class of one" claim requires a plaintiff to demonstrate that it has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *PG Pub. Co. v. Aichele*, 705 F.3d 91, 114 (3d Cir. 2013); *see also Engquist v. Or. Dep't of Agr.*, 553 U.S. 591, 564 (2008). IBID fails to satisfy both of these requirements. Plaintiff's equal protection claim fails at every step. First, Plaintiff fails to show how the properties it identifies are comparable in all relevant respects, instead leaving Defendants and this Court to guess if the properties it names are in fact similarly situated. Second, the Bill's specific provisions are rationally related to the

important goal of preserving existing and incentivizing further affordable housing in amenity rich neighborhoods, such as the one in which the Property is located.

a. IBID Fails to Show Its Proposed Comparators Are Similarly Situated

To prove its claim, IBID must identify similarly situated properties and provide *evidence* to show that they were similar "in all relevant aspects." *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3d Cir. 2008) (emphasis added); *see also Cordi-Allen v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2007) (to carry burden, plaintiffs "must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves"). Further, the "similarly situated" requirement must be enforced with particular rigor in the land-use context because such decisions "will often, perhaps almost always, treat one landowner differently from another." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (Breyer, J., concurring).

Here IBID argues that "each and every adjoining lot to the property" is similarly situated, (ECF No. 2 at 35), and that "a nearby lot at 55 North 40th Street that includes 82 subsidized units" is also an appropriate comparator, (*id.* at 36). These bare assertions do not satisfy the similarly situated requirement. Without more, this Court cannot determine if the properties proposed and IBID's property are alike in all relevant aspects. *See Giuliana v. Springfield Twp.*, 238 F. Supp. 3d 670, 702 (E.D. Pa. 2017) ("[T]he burden of production and persuasion must be shouldered by the party asserting the equal protection violation." (quoting *Cordi-Allen*, 494 F.3d at 250-51 ("It is inadequate to merely point to nearby parcels in a vacuum and leave it to the municipality to disprove conclusory allegations that the owners of those parcels are similarly situated.")).

IBID fails to articulate how these other properties are similarly situated in all relevant aspects. They do not explain if any of the comparable properties are also susceptible to expiring HUD contracts or threats of demolition of existing housing. Without knowing how these

properties compare to the Property there can be no ability to appropriately compare and determine if they are in fact similarly situated.

Because IBID has so far not identified and shown that other properties are similarly situated, IBID's equal protection claim will likely fail on the merits and this Court should not grant it a temporary restraining order.

b. The Bill's Provisions Are Rationally Related to Preserving Affordable Housing in the AHP Overlay

Under the rational basis standard, any rational ground for the conduct in question will suffice to defeat the class-of-one claim. *See Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 824 (5th Cir. 2007); *Srail v. Village of Lisle*, 588 F.3d 940, 946 (7th Cir. 2009) (plaintiff must "eliminate any reasonably conceivable state of facts that could provide a rational basis" for the government's actions). *Aulisio v. Chiampi*, 765 F. App'x 760, 765 (3d Cir. 2019). "Rational basis review requires that legislative action, at a minimum, . . . be rationally related to a legitimate governmental purpose. There is a strong presumption of validity when examining a statute under rational basis review, and the burden is on the party challenging the validity of the legislative action to establish that the statute is unconstitutional." *Adhi Parasakthi Charitable, Med., Educ., & Cultural Soc'y of N. Am. v. Twp. of W. Pikeland*, 721 F. Supp. 2d 361, 381 (E.D. Pa. 2010) (citations omitted).

The purpose of the Bill is to preserve affordable housing. This is a legitimate government purpose. *See, e.g.*, *440 Co. v. Borough of Ft. Lee*, 950 F. Supp. 105, 110 (D.N.J. 1996), *aff'd*, 129 F.3d 1254 (3d Cir. 1997). As the Bill explains, it was

> inspired by the potential loss of the rich community and needed housing provided by the University City Townhomes, the significant prior history of the displacement of lower income communities in this area, and the explosion of commercial development in University City over the past ten years, the Affordable Housing Preservation Overlay District creates a framework for zoning mixed use properties

> in high density, amenity rich areas, to encourage sustainable residential development for the areas identified below, and other areas throughout the City.

(ECF No. 1-3 at 275 (Ex. 9 (Bill, Whereas Clauses))). The Bill's pause on demolition and requirements—that on the Property and others nearby substantial future construction be primarily residential and include affordable housing—is rationally related to the legitimate government interest in preserving affordable housing in one form or another in University City and West Philadelphia. As the statement in the Bill articulates, the area where IBID's property sits is amenity rich and supports the City's goal of encouraging affordable housing developments in areas such as this.

The fact that the Bill only encompasses a small but vital area of West Philadelphia does not defeat this legitimate purpose. *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 136 (3d Cir. 2002) ("Indeed, because the purpose of zoning ordinances is to distinguish among uses in order to draft comprehensive municipal plans, a degree of arbitrariness is inevitable. The question presented in these cases is when does a distinction cross the constitutional line. As long as a municipality has a rational basis for distinguishing between uses, and that distinction is related to the municipality's legitimate goals, then federal courts will be reluctant to conclude that the ordinance is improper."). Moreover, the fact that IBID asserts, without support, that it plans to build affordable housing in the "surrounding community" does not change the analysis. (ECF No. 2 at 38). "As long as [the government] rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of alternative methods of furthering the objective 'that we, as individuals, perhaps would have preferred.'" *Heller v. Doe by Doe*, 509 U.S. 312, 330 (1993) (citation omitted). IBID's belief that the affordable housing

goals of the City will be furthered by *their* plan does not change that the Bill is rationally related to a legitimate government interest.[15]

Preserving affordable housing is an important goal and the Bill helps the City reach it. The fact that IBID's property falls into the Overlay area that is the subject of the Bill does not defeat that. The limitation on commercial development is likewise tied to a legitimate government interest of preserving affordable housing on the Property as is the demolition moratorium. Both will ensure that in the short- and long-term, affordable housing will be available on the Property.

4. The Bill Has a Rational Basis and Does Not Shock the Conscience Under Substantive Due Process

Because the Bill satisfies rational basis review, IBID's substantive due process claim also fails. Perhaps foreseeing this, IBID instead attempts to have the Court apply the "shocks the conscience" standard for executive actions that are alleged to violate substantive due process rather than the rational basis standard applicable to legislative action such as the Bill. Ultimately, it makes no difference, because the Bills survive either standard.

[15] Plaintiff's reliance on *Haskin Family Partnership v. Upper Merion Twp.* No. 01–1622, 2012 WL 43610 (E.D. Pa. Jan 6, 2012), to support its equal protection claim is misplaced. First, the Court in *Haskin* did not issue a dispositive finding on the equal protection claim, but instead said there were triable issues of fact that defeated summary judgment. Second, *Haskin* was based on a factual background that evidenced government officials' desire to require *only* one property keep its current use. This assertion was supported by specific statements of officials indicating their desires to keep a golf course at the *Haskin* site, and statements that evidenced animus towards the owners of the *Haskin* site. These facts are not analogous to those before this Court. There is nothing in the record to indicate Defendants sought to require the current use, townhomes, to permanently continue at the Property. Instead, the Bill simply requires that any future development be primarily residential and include affordable housing on the site. Moreover, the restrictions apply to a wider area than just the Property. The record here is devoid of evidence of animus towards Plaintiff that could show irrational and arbitrary action against it rather than the laudable goal of keeping affordable housing in West Philadelphia.

"Substantive due process contains two lines of inquiry: one that applies when a party challenges the validity of a legislative act, and one that applies to the challenge of a non-legislative action. In a case challenging a legislative act, as here, the act must withstand rational basis review." *Am. Express*, 669 F.3d at 366 (citing *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000) (Alito, J.)). When a plaintiff challenges a non-legislative state action (such as an adverse employment decision), the question is whether the government's conduct is "so egregious that it 'shocks the conscience.'" *Nicholas*, 227 F.3d at 139 (citation omitted). "[A] legislative body, passing a de jure law affecting only a single person," still acts legislatively. *Gallas v. Supreme Court of Pa.*, 211 F.3d 760, 774 n.14 (3d Cir. 2000).

Here, almost by definition and as IBID implicitly concedes, the Bill is legislative action. (*See* ECF No. 2 at 33 (alleging the Bill is a "conscience-shocking use of legislative authority")). In suggesting the shocks-the-conscience standard applies, IBID cites *Eichenlaub v. Township of Indiana*, which noted that "a zoning official's actions or inactions violate due process is determined by utilizing a 'shocks the conscience' test." 385 F.3d 274, 285 (3d Cir. 2004) (addressing action by Indiana Township Board of Supervisors) (citing *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 399 (3d Cir. 2003) (addressing action by "Warrington Township and its Board of Supervisors")). But crucially, neither *Eichenlaub* nor *United Artists* control here because each involved a township's board of supervisors, which have executive powers, whereas the Philadelphia City Council does not. *Compare* 53 P.S. § 65607 ("The board of supervisors shall: (1) Be charged with the general governance of the township and the execution of legislative, executive and administrative powers in order to ensure sound fiscal management and to secure the health, safety and welfare of the citizens of the township."); *with* Phila. Home Rule Charter §§ 1-101, 1-102(1) ("The legislative power of the City . . . shall

be exclusively vested in and exercised by a Council, subject only to the provisions of this charter. . . . The executive and administrative power of the City, as it now exists, shall be exclusively vested in and exercised by a Mayor and such other officers, departments, boards and commissions as are designated and authorized in this charter.).[16] Further, "[a]ny procedural deficiencies identified by Plaintiff [a]re 'mere technical violation[s]' that do not convert an otherwise legislative act into an administrative one." Order, *Feibush v. Johnson*, No. 14-cv-03947, at 2 n.1 (E.D. Pa. Mar. 9, 2016) (quoting *Acierno*, 40 F.3d at 614).

Because the Bill is legislative action, the rational basis test applies. "It is enough that the State offers a conceivable rational basis for its action, and '[t]he court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack.'" *Am. Express*, 669 F.3d at 367 (citation omitted). "It is 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . . .'" *Id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). Given that, it is unsurprising IBID entirely omits this test, because as discussed above, *see supra* Part IV.B.3.b, the Bill easily satisfies it. As IBID concedes, the preservation of affordable housing is a "legitimate state interest," and it not only could, but is, "rationally furthered by the statute." *Am. Express*, 669 F.3d at 366; (ECF No. 2 at 32 (agreeing that "public policy in fostering affordable housing is" "worthy"); ECF No. 1 ¶ 47 ("IBID and its affiliates are proud of the four decades during which they have worked with HUD

[16] *See also Stockham Interests, LLC v. Borough of Morrisville*, No. 08–3431, 2008 WL 4889023, at *7-*8 (E.D. Pa. 2008) (applying shocks-the-conscience test to denial of variance and rational basis to zoning ordinance); *Pompey Coal Co. v. Borough of Jessup*, No. 20-cv-00358, 2021 WL 1212586, at *5 (M.D. Pa. 2021) (differentiating between "legislative action—the consideration and adoption of a local land use ordinance and zoning map—and executive action—the planning commission's enforcement of the ordinance"); *Frompovicz v. Twp. of S. Manheim*, No. 06cv2120, 2007 WL 2908292, at *12 (M.D. Pa. 2007) ("Since the actions about which plaintiff complains here are individual decisions in zoning cases, not zoning ordinances themselves, we will apply the 'shocks the conscience' standard to our evaluation.").

and the City to provide safe and decent affordable housing . . . , especially in diverse communities like West Philadelphia.")).

But even if the "shocks the conscience" test proffered by IBID did apply, IBID still has not shown a likelihood of success. "Federal courts do not sit as super zoning tribunals, passing on local land-use decisions" that are properly litigated in state courts. *Vorum v. Canton Tp.*, 308 Fed. App'x. 651, 653 (3d Cir. 2009) (citing *United Artists*, 316 F.3d at 402). "Land-use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper" motives.'" *United Artists*, 316 F.3d at 402.

"Only 'the most egregious official conduct' can be said to 'shock[] the conscience.'" *Feibush v. Johnson*, No. 14-3947, 2015 WL 13655175, at *2 (E.D. Pa. Mar. 20, 2015) (quoting *Eichenlaub*, 385 F.3d at 285) (rejecting substantive due process claim relating to alleged use of councilmanic prerogative to impede development). In the zoning context, conscience-shocking actions are those "involving corruption or self-dealing, hampering development to interfere with otherwise constitutionally protected activity, bias against an ethnic group, or a 'virtual taking.'" *Blain v. Twp. of Radnor*, 167 Fed. App'x 330, 333 (3d Cir. 2006) (quoting *Eichenlaub*, 385 F.3d at 285); *see also DB Enter. Devs. & Builders, Inc. v. Micozzie*, 394 Fed. App'x 916, 917-19 (3d Cir. 2010) (finding allegations official "forc[ed] [contractor] to choose between performing $180,000 in sewer construction or having its development at Springfield Knoll disrupted" did not state a claim under the shocks-the-conscience test). Put another way, "a state actor's decision is not conscience-shocking if it is related to a legitimate governmental objective." *Vorum*, 308 Fed. App'x at 653 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)); *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001)).

As the basis for its substantive due process claim, IBID suggests that the Bill's new zoning restrictions on commercial uses show animus because they were enacted "surreptitious[ly]" and allegedly with knowledge they would "usurp" IBID's rights to sell the property. (ECF No. 2 at 42). In support, IBID cites *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 170 (3d Cir. 2006), where the court found the plaintiff stated a claim against a town that changed the zoning of the plaintiff's property such that its current business was no longer allowed, allegedly with knowledge that it violated the plaintiff's rights. The court found these facts could support the claim that the decision was motivated by "irrationality and arbitrariness" and made "'for reasons unrelated to land use planning.'" *Id.* (citation omitted). But here IBID remains free to continue using its property as it has or to sell its property. Nor has IBID alleged a single fact that could suggest that the Bill's passage has anything do with the fact that IBID in particular owns the property. Rather than showing "animus," the Bill's *preservation* of the property's current use for affordable housing evidences precisely the kind of rational "land use planning" blessed by *Concrete Corp*. and that courts should not second guess or constitutionalize. And while IBID claims, without citation, that it has offered an alternate way to preserve affordable housing, (ECF No. 2 at 42), it describes no such plan here.

IBID's other allegations are similarly flawed. IBID references statements about whether a former version of the Bill "could" constitute a taking. (ECF No. 2 at 20, 42). But not only are these merely concerns and cautionary statements, passage of the Bill despite them, particularly after revision, is also not equivalent to taking action "knowing that it violated plaintiff['s] legal and contractual rights." *County Concrete*, 442 F.3d at 170. As to IBID's characterization of the Bill's legislative history as "surreptitious" and its complaints about transparency, allegations of state administrative law violations are irrelevant to the substantive due process analysis. *See*

United Artists, 316 F.3d at 402 ("A bad-faith violation of state law remains only a violation of state law." (quoting *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104–05 (8th Cir. 1992)).

At bottom, IBID's claim here fails for the same reason as the Eichenlaubs'. Like them, IBID complains that the Bill applies zoning requirements "to [its] property that were not applied to other parcels." *Eichenlaub*, 385 F.3d at 286. But as *Eichenlaub* explained, this kind of complaint is an "example[] of the kind of disagreement that is frequent in planning disputes. . . . [T]here is no allegation of corruption or self-dealing here. The local officials are not accused of seeking to hamper development in order to interfere with otherwise constitutionally protected activity at the project site, or because of some bias against an ethnic group." *Id.* As a result, "the misconduct alleged here does not rise sufficiently above that at issue in a normal zoning dispute to pass the 'shocks the conscience test.'" *Id.*

5. The Bill Does Not Impair Any Contract

IBID's Contract Clause argument suffers from two fatal flaws. First, it fails to identify any impairment, let alone a substantial one. Second, the Bill is reasonable and necessary to the important public purpose of preserving affordable housing. Either reason would be sufficient to defeat IBID's claim, and both apply here.

A law only violates the Contract Clause if it fails a three-part test. First, the clause only applies where a law "operate[s] as a substantial impairment of a contractual relationship." *ACRA Turf Club, LLC v. Zanzuccki (ACRA II)*, 724 F. App'x 102, 108 (3d Cir. 2018) (quoting *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Virgin Islands*, 842 F.3d 201, 210 (3d Cir. 2016)) (alteration in original). If it is a substantial impairment, the law still survives if "the government entity, in justification, had a significant and

legitimate public purpose behind the regulation" and "the impairment is reasonable and necessary to serve this important public purpose." *United Steel Paper*, 842 F.3d at 210.

a. There Is No Impairment

Under the first prong, the Court must determine "(1) whether there is a contractual relationship; (2) whether a change in a law has impaired that contractual relationship; and (3) whether the impairment is substantial." *Transp. Workers Union of Am., Local 290 v. SEPTA*, 145 F.3d 619, 621 (3d Cir. 1998). Courts "determine whether there has been a substantial impairment of a contractual relationship by inquiring whether legitimate expectations of the plaintiffs have been substantially thwarted." *Id.* at 622. In determining what expectations were legitimate and whether any impairment is substantial, prior regulation of the subject matter makes related contracts "subject to further legislation in the area, and changes in the regulation that may affect its contractual relationships are foreseeable." *Am. Express*, 669 F.3d at 369. If the law does not operate as a "substantial impairment," the Contracts Clause is not implicated. *Troy Ltd.*, 727 F.2d at 297.

While IBID has identified a contractual relationship, it does not identify any impairment. IBID claims that the Bill "eliminat[es] IBID's right to opt-out of the affordable housing program, as expressly permitted in the 2021 HUD." (ECF No. 2 at 45). This is pure ipse dixit. Nothing in the Bill prevents IBID from opting-out, and IBID does not identify any part of the Bill that does so. (*See id.* at 43-46). Instead, IBID's complaint seems to be that some of the benefit it had hoped to reap as a result of opting out may allegedly be reduced. Whether or not these were IBID's expectations or realistic, they were certainly not part of its HUD contract. As a result, there is no impairment, and no Contracts Clause violation.

b. The Bill is Reasonable and Necessary to Preserve Affordable Housing

Even if there could be some impairment deemed substantial, the City is acting reasonably in furtherance of a legitimate public purpose to preserve affordable housing. IBID does not contest that the City passed the Bill for the legitimate public purpose of preserving affordable housing, but disputes whether it was a reasonable means of doing so. (*See* ECF No. 2 at 45-46; *see also id.* at 32, 38, 42 (agreeing that "public policy in fostering affordable housing is" "worthy," that "Defendants' proffered goal [is] preserving affordable housing," and that "the Overlay Bill serves the ostensible purpose of preserving affordable housing")). When, as here, the government is not a contracting party, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure" "[a]s is customary in reviewing economic and social regulation." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977). IBID tries to transpose its equal protection argument into this context by arguing that the alleged differential treatment shows the Bill is not reasonable, but just as the Bill satisfied rational basis before, *see supra* Part IV.B.3.b, so too does it here.

C. The Public Interest and the Balance of the Equities Do Not Support Injunctive Relief.

Because IBID cannot show irreparable harm or a likelihood of success on the merits, the Court need not reach the balance-of-the-equities or the public-interest factors. But given the lack of demonstrated injury and the permanence of demolition, those factors also favor the City.

"'Balancing the equities' is jurisprudential 'jargon for choosing between conflicting public interests.'" *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 584 (E.D. Pa. 2017) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring)). "'[C]ourts must *balance* the competing claims of injury and must consider the

effect on each party of the granting or withholding of the requested relief." *Reilly*, 858 F.3d at 177–78 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008)).

Here, IBID has not alleged any substantive irreparable harm and only alludes to generalized financial harm in the form of a potentially lower sales price. Compare this to the irreversibility of demolition, which could make future affordable housing at the site far more difficult. As a result, the balance of equities and public interest favor the City, and IBID cannot satisfy the requirements for injunctive relief.

V. CONCLUSION

For all the reasons set forth above, Defendants respectfully request that this Court deny the Plaintiff's Motion for a Temporary Restraining Order.

Respectfully submitted,

CITY OF PHILADELPHIA LAW DEPARTMENT
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Date: March 23, 2022

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