

**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.	:	CIVIL ACTION NO. _____
	:	
COUNCILMEMBER JAMIE GAUTHIER and	:	
THE CITY OF PHILADELPHIA,	:	
	:	
Defendants.	:	
	:	
	:	

VERIFIED COMPLAINT

I.B.I.D. Associates Limited Partnership d/b/a I.B.I.D. Associates, L.P. (“IBID”), by and through its attorneys, hereby asserts the following claims against the City of Philadelphia and Councilmember Jamie Gauthier (collectively “Defendants”) and alleges as follows:

INTRODUCTION

1. This Complaint arises out of the dictatorial conduct of an individual City Councilmember Jamie Gauthier who has abused her position and power to coerce a private entity to forego its constitutional property rights while footing the bill for her unreasonable demands. She is abetted by a notorious official custom known as the councilmanic prerogative. Pursuant to the councilmanic prerogative, any district councilmember can seek to require any developer to comply with his or her demands and, if the developer refuses to capitulate, the councilmember can write a zoning bill to enact his or her demand and all of the other councilmembers will defer to and vote for the councilmember’s zoning bill. Everything else is a charade. Committee and Council public hearings are not hearings at all, but, instead, mere window dressing for the ultimate passage of the councilmember’s bill.

2. What makes the councilmanic prerogative so effective in the passage of a district councilmember's bill is its malignant reciprocity. Any councilmember opposing or voting against the bill runs the manifest risk of having his or her bill voted down. No one councilmember will oppose or vote against a bill knowing his or her bill will never be enacted.

3. Nowhere in the Philadelphia Home Rule Charter is there any authority for the exercise of the councilmanic prerogative. On the contrary, the Home Rule Charter spells out the procedure for consideration and enactment of legislation. That procedure entails and requires an unbiased and impartial consideration of any and all proposed bills at the Committee and Council public hearings, meetings, and votes. The councilmanic prerogative is the very antithesis of the process envisioned and required by the Home Rule Charter because deference to the wishes and will of an individual councilmember inescapably precludes and corrupts the requisite unbiased and impartial consideration of a bill.

4. Here, Councilmember Gauthier, abetted by the councilmanic prerogative, used the power of her office to force IBID to accept conditions repugnant to IBID's undisputed real property and contractual rights which would have undeniably prevented IBID from selling its Property for its highest and best use as allowed under its CMX-4 zoning. When IBID refused to bend to the Councilmember's will, she, abetted by the councilmanic prerogative, had the Rules Committee of the Philadelphia City Council vote unanimously to recommend passage of her legislation, which at that point became a "pending ordinance" with the full effect and force of law. On March 10, 2022, the Philadelphia City Council passed the legislation.

5. Gauthier's legislation targets IBID with precision and runs roughshod over IBID's real property and contractual rights in three respects: (i) it requires IBID to permanently provide affordable housing on its Property, despite the fact that by contract IBID has the right to

discontinue doing so effective July 9, 2022; (ii) it restricts all non-residential, *i.e.*, commercial, use to the ground floor of the Property; and (iii) it imposes a demolition moratorium on the Property. The intended purpose of Gauthier's legislation is to bar IBID from selling its Property for its highest and best use as a research and development, life sciences, or luxury housing center consistent with its CMX-4 zoning.

6. The provisions of the Overlay Bill, and the process by which it was passed, are unconstitutional. As a result of Gauthier's conduct, which has been abetted by the councilmanic prerogative, her Overlay Bill has resulted in the following constitutional violations, has caused enormous and irreparable harm to IBID, and violates IBID's rights in at least the following ways:

- a. The legislative mandate that IBID use its Property for subsidized housing violates the Fifth Amendment's Takings Clause;
- b. Gauthier's obvious and discriminatory targeting of IBID violates the Fourteenth Amendment's Equal Protection Clause;
- c. The Council's mechanistic acquiescence to Gauthier's will to pass legislation that targets IBID violates the Fourteenth Amendment's Due Process Clause;
- d. The Overlay Bill's undoing of IBID's prior contractual right to opt out of providing subsidized housing violates the Constitution's Contracts Clause; and
- e. The Overlay Bill imposes a punishment on IBID for not accepting Gauthier's demands in violation of the Constitution's prohibition on Bills of Attainder.

NATURE OF THE CASE

7. IBID is a single purpose entity that owns the University City Townhomes ("UC Townhomes"). Altman Management Company, Inc. ("AMC") is a successor to companies owned and operated by Altman Brothers. AMC operates in excess of 10,000 affordable housing units. This group of business entities ("Altman") has grown into a recognized industry leader in

responsible, ethical, and high-quality development. Altman firmly believes in the value of affordable housing and the need to preserve affordable housing in Philadelphia.

8. For four decades, IBID has owned and operated the UC Townhomes, a residential development consisting of 70 subsidized units available to individuals eligible for affordable housing (“Statutorily-Defined Group of Individuals”) supported by project-based rental assistance as part of the Section 8 Program of the United States Department of Housing and Urban Development (“HUD”). IBID is proud of its success in providing safe, quality, and affordable housing to families and households in the rapidly-growing University City neighborhood of Philadelphia.

9. The UC Townhomes are located at 3900 Market Street, an approximately 2.67 acre parcel (the “Property”) that is zoned CMX-4, a designation reserved for parcels the City believes should support high density commercial and mixed-used developments. The Property encompasses an entire city block, a rarity for commercially-zoned areas in the City, and much of the surrounding area—including all immediately adjacent properties—similarly is zoned CMX-4.

10. The Property is situated at the center of booming institutional, commercial, luxury housing, research and development and life sciences facilities in University City, an area fast becoming a national hub for industries like gene and cell therapy research and vaccine development. Indeed, in its 2013 University Southwest District Plan, the Philadelphia City Planning Commission envisioned significantly increased density on the Property and the properties adjacent to it to take advantage of the abundant amenities and economic activity of the surrounding area. The zoning and potential use of the site have long been acknowledged and never debated by City officials, until now by Councilmember Gauthier.

11. In line with this vision, late in 2019, IBID principal Brett Altman met with then-

Councilmember-elect Gauthier and other City of Philadelphia officials to discuss plans to exercise IBID's contractual right to opt-out of the HUD Section 8 Program at the UC Townhomes. IBID is contractually and legally entitled to decline further participation in HUD's Section 8 Program at the UC Townhomes, so long as it provides the proper notice to HUD and to the UC Townhomes residents. It provided this notice on July 8, 2021.

12. IBID, however, has gone well beyond its legal obligations. In the two years since their initial meeting, IBID has communicated extensively with Councilmember Gauthier and her staff in order to keep them apprised of IBID's plans and to incorporate their priorities in the Property's development. For example, although not required to do so, IBID agreed to strongly encourage the Property buyer to enter into a Community Benefits Agreement ("CBA")¹ and to include input from the Councilmember in the solicitation that went out to potential buyers.

13. More importantly, although not required to do so, IBID has worked diligently to make the transition for the UC Townhomes residents as undisruptive as possible. IBID is providing residents with comprehensive relocation assistance, committing to pay for costs like packing, moving, security deposits for new rentals, and assisting with securing vouchers to maintain their affordable housing benefits at new locations. IBID has also committed to transfer the Property's project-based rental subsidies to other non-profit entities in West Philadelphia that will be able to use subsidies to support up to **108 additional** affordable housing units in the surrounding neighborhood. Finally, the offering memorandum for the Property itself expressly states that a buyer who proposes incorporating affordable housing **at the site** will have an advantage in the bidding process. In short, a central component of IBID's plans for selling the Property is taking

¹ A Community Benefits Agreement is an agreement with area community-based organizations to deliver certain economic or social benefits to the local community.

care of the families in the UC Townhomes and expanding access to affordable housing for others in the West Philadelphia community.

14. Unwilling to continue any engagement on the project—despite IBID’s repeated entreaties to do so—Councilmember Gauthier decided to employ the subversive councilmanic custom known as “councilmanic prerogative” to prohibit IBID’s undisputed right to sell the Property. Thus, on September 30, 2021, Councilmember Gauthier introduced Philadelphia City Council Bill 210778 (as amended, the “Overlay Bill”), which was recommended out of the Council’s Rules Committee on October 26, 2021 and ultimately passed by Council on March 10, 2022. At this point, the legislation has the force of law with respect to zoning and land use and IBID must conform to it.

15. This is no ordinary zoning regulation. Instead of principled consideration of land-use policy and the City Planning Commission’s District Plan for University City, the Overlay Bill was introduced for the sole and obvious purpose of torpedoing IBID’s commercial sale of the Property as allowed under its CMX-4 zoning. It amends the Zoning Code to create an “overlay district” that, as introduced, would apply to only a single property, *expressly named in the text of the law*: 3900 Market Street. The overlay district—through provisions like unprecedented affordable-housing requirements, a first story only restriction on commercial and life-sciences uses, and an illegal demolition moratorium—effectively destroys the commercial value of the Property and any prospect IBID may have had for selling it. It does this for the purported reason of securing affordable housing in University City and West Philadelphia, even though it applies, as amended, only to lots located in the area bounded by Filbert Street, 39th Street, Ludlow Street, and 40th Street. In doing so, it undermines IBID’s efforts to secure an affordable housing commitment from a potential buyer, extend rental assistance benefits for residents, and even

expand access to affordable housing for others in the neighboring communities.

16. Therefore, rather than reasonably advance a rational policy purpose, the clear reason for Councilmember Gauthier's legislation is to target IBID—and only IBID—with laser-precision and punish it for deciding to legally opt out of owning and managing an affordable housing property after 40 years and for declining to capitulate to Councilmember Gauthier's dictatorial demands.

17. Even worse, the Overlay Bill was introduced and recommended out of the Rules Committee without adhering to City Council's public notice and other rules, and its ultimate passage was virtually guaranteed because of Councilmember Gauthier's use of the councilmanic prerogative.

18. The Home Rule Charter prescribes a procedure for legislation to be considered and acted upon by the Council. That procedure entails a proposed bill being presented at a public hearing before a Committee of the Council and then reported for a public hearing at the Council at large. *See* Home Rule Charter Section 2-201. By permitting a district councilmember to pressure a developer, who knows that the remaining councilmembers will approve whatever the district councilmember wants regardless of the legality of any such measure, the entire process as set forth in the City Charter is corrupted. Everything becomes a foreordained conclusion; the public hearing becomes meaningless and there is no meaningful interaction among the Committee members because of the inevitability of the councilmanic prerogative governing the proceedings. This practice, among other issues, subverts the legislative process and results in "legislation" that violates targeted individuals' rights to due process of law. IBID has suffered from such a violation here.

19. Recognizing the potential for misuse and abuse of the state's power, the

Constitution protects against this type of egregious and intentional overreach in several ways. The government cannot arbitrarily or invidiously treat a single person different from others like him or her, or deprive the person of his or her protected property rights without due process of law. Moreover, the state cannot use legislation to target and punish an individual, impair an already-existing contract, or compel a property owner to give up his or her property without paying for it. The Overlay Bill, however, brazenly accomplishes all this.

20. Urgent judicial intervention is required to secure several of IBID's constitutional rights from infringement by Defendants' toxic Overlay Bill, remedy the harm that the Overlay Bill already has caused, and prevent the future harm that invariably will result if the Overlay Bill is not vitiated.

PARTIES

21. Plaintiff IBID is an owner of real property and a Pennsylvania limited partnership with its principal place of business at 240 New York Drive, Ste. 1, Fort Washington, Pennsylvania, 19034.

22. IBID is the owner of the Property located at 3900 Market Street, Philadelphia, Pennsylvania, 19104.

23. Defendant City of Philadelphia (the "City") is a political subdivision of the Commonwealth of Pennsylvania.

24. Defendant Jamie Gauthier is a Member of the Philadelphia City Council residing in this judicial district with a place of business at City Hall, 1400 John F. Kennedy Boulevard, Room 586, Philadelphia, PA 19107. In November 2019, Defendant Gauthier was elected to represent the City's Third Councilmanic District, in which the Property is situated. She is sued in her official and individual capacity.

JURISDICTION AND VENUE

25. This is an action under 42 U.S.C. § 1983 for monetary, injunctive, and declaratory relief for violations of the Fifth and Fourteenth Amendments to the United States Constitution and the Constitution's Contracts and Takings Clauses and the prohibition against Bills of Attainder.

26. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this case arises under the laws and Constitution of the United States.

27. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because all of the claims asserted by Plaintiff arose in the Eastern District of Pennsylvania.

FACTUAL ALLEGATIONS

A. Property and Contract Background

28. In 1982, IBID acquired the Property from the Redevelopment Authority of the City of Philadelphia after being chosen by the City through a bid solicitation process.

29. The Property consists of a square-block parcel, with an area of approximately 2.67 acres, bounded by Market Street on the north, 39th Street on the east, Ludlow Street on the south, and 40th Street on the west. As configured, it is one of the largest parcels along a major commercial corridor within a central business district in Philadelphia.

30. The Property is, and at all relevant times was, zoned CMX-4 (Core Commercial Mixed-Use) under Title 14 of the Philadelphia Code (the "Zoning Code"). *See Zoning Map, attached as Exhibit 1 to the Appendix to the Complaint.* The purpose of the CMX-4 base zoning district is to allow for high-density commercial office, research and development, and residential uses. At the Property, it allows for buildings with a floor area of 580,000 square feet to 1.39 million square feet, depending on compliance with the Zoning Code's various floor area "bonuses." In other words, as zoned, the Property can be developed as-of-right with a high-rise structure comparable to the high-rise commercial and residential towers found throughout Philadelphia's

Center City business district.

31. Significantly, all of the properties adjacent to the Property are also zoned CMX-4.

See Appendix, Ex. 1.

32. Soon after purchasing the Property, on or about June 28, 1982, IBID entered into a Housing Assistance Payments Contract with HUD, pursuant to which HUD agreed to make housing assistance payments to IBID in exchange for IBID's development and leasing of dwelling units on the Property at subsidized rents (the "1982 Contract"). *See* the 1982 Contract, attached as Exhibit 2 to the Appendix.

33. Under and in furtherance of the 1982 Contract, IBID constructed the UC Townhomes on the Property. The UC Townhomes include 70 dwelling units that are leased at subsidized rents and supported by HUD's Section 8 Program.

34. The 1982 Contract had a term of 20 years, *see* 1982 Contract § 1.2(a), during which IBID fulfilled its contractual obligations and offered safe, decent, affordable housing to qualifying households in the UC Townhomes.

35. Once the 20-year term expired, IBID was entitled to choose to renew its contract with HUD or opt-out of the housing assistance program.

36. IBID renewed its Housing Assistance Payments Contract with HUD several times, most recently in a Renewal Contract executed on or around April 8, 2021 (the "2021 HUD Contract"). *See* the 2021 Contract, attached as Exhibit 3 to the Appendix.

37. The 2021 HUD Contract renewed the terms of IBID's prior agreements with HUD, unless specifically stated otherwise, *see* 2021 Contract § 5, Appendix, Ex. 3, and has a term of **one year, beginning on July 9, 2021**. *See id.* § 2(a).

38. IBID is contractually entitled to terminate the 2021 HUD Contract so long as it

provides written notice to the Contract Administrator and the participating resident households.

See id. § 8(a).

39. Additionally, IBID is statutorily entitled to opt-out of the housing assistance program at the Property so long as it provides at least one year's prior notice to HUD and to the participating resident households. *See* 42 U.S.C. § 1437f(c)(8)(A); 24 C.F.R. § 983.206(c).

40. There are no other preconditions to IBID's right to decline further participation in offering affordable housing opportunities at the Property.

41. The one-year term was a material provision of the 2021 HUD Contract and IBID would not have entered into it for a longer term or if IBID were restricted from being able to terminate its participation in the housing assistance program.

B. IBID begins extensive and good faith outreach to Councilmember Gauthier and other City officials.

42. In or around November 2019, IBID met with then Councilmember-Elect Gauthier to discuss IBID's intention to opt-out of the HUD housing assistance program at the UC Townhomes in order to sell the Property.

43. After four decades of owning and operating affordable housing units at the Property, IBID believed that it would be consistent with the City's professed vision for the area and the Property's commercial zoning and value to market the Property to potential developers as a high-density commercial and life sciences hub.

44. In a good faith effort to ensure the beneficial development of the Property and that current residents would continue to receive access to affordable, safe, and decent housing, IBID repeatedly met and communicated with Councilmember Gauthier, her staff, and other City officials over twenty months.

45. On or around December 16, 2019, IBID principal Brett Altman met with

Councilmember Gauthier, Anne Fadullon—a mayoral cabinet-level official and Director of the City’s Department of Planning and Development—and staff to discuss IBID’s plans for the Property. When asked, Director Fadullon acknowledged that IBID’s decision to opt-out was permitted under applicable rules and regulations and that the City did not have the authority to compel IBID to continue participating in the housing assistance program at the Property. Director Fadullon also stated that the City did not have the resources to acquire the Property itself.

46. In or around February 2021, IBID met with Councilmember Gauthier and others to advise them that IBID intended to give HUD and the UC Townhome residents notice of its decision to opt-out of HUD’s housing assistance program at the Property in June or July of 2021.

C. IBID accommodates the Councilmember’s concerns and works diligently to ensure the UC Townhomes residents’ continued access to affordable housing.

47. IBID and its affiliates are proud of the four decades during which they have worked with HUD and the City to provide safe and decent affordable housing to individuals living at the UC Townhomes and take seriously their commitment to continue supporting such endeavors, especially in diverse communities like West Philadelphia, which are poised to benefit from the City’s continuing economic growth.

48. To that end, and although it is not legally required to do so, IBID decided to make several accommodations in order to ensure that the UC Townhomes residents continued to have access to affordable housing even after IBID no longer participated in the HUD housing assistance program at the Property. For example, IBID committed to:

- a. retain a professional relocation firm to assist the residents with their relocation needs;
- b. pay for all residents’ relocation costs, including housing-related deposits, packing assistance, and moving assistance;

- c. convert, to the extent permitted under HUD program guidelines, the project-based rental assistance at the Property to certificates that could be used at other West Philadelphia properties;
- d. conduct a meeting between Councilmember Gauthier and the Property broker to discuss the importance of maintaining affordable housing at the site and the potential for entering into a CBA prior to developing the site; and
- e. participate in the drafting of a potential CBA and including the CBA as part of the transaction between IBID and the potential buyer.

49. IBID informed the individuals at the March 24, 2021 meeting that it was making these and other accommodations.

50. Pursuant to the 2021 HUD Contract and all applicable laws and regulations, and as noticed to Councilmember Gauthier and the City, on or about July 8, 2021, IBID held an on-site meeting with UC Townhomes residents to advise them of IBID's decision to opt-out of the HUD Section 8 Program, timing with respect to the residents' vacating the Property, and the relocation and other services that IBID would make available to them.

51. In order to better assist the residents and provide them with the necessary information, IBID additionally arranged to hold in-person intake meetings with all residents, which were completed in August, 2021.

52. On or around July 19, 2021, IBID notified Councilmember Gauthier and others that IBID's broker would be issuing an offering memorandum to certain potential buyers who had expressed interest in acquiring and redeveloping the Property. IBID also advised the Councilmember that it had met with the UC Townhomes residents to discuss the relocation process.

53. In part to address concerns raised by Councilmember Gauthier, IBID included the following language in the marketing materials for the sale of the Property to benefit the residents at the Property:

Currently, there are 70 affordable housing units on the site. Ownership has initiated the residential relocation process and the site will be delivered vacant at settlement. To the extent the offerer proposes to undertake a residential component within the development, the Seller will look favorably on proposals that include an affordable housing element on the site. To the extent that the offerer proposes to undertake a single purpose or mixed-use development, the Seller will also look favorably on proposals that contain a commitment from the offerer to enter into a Community Benefits Agreement (CBA) that ensures minority and local participation in the pre-development, construction, and ongoing operation of the development including the creation of business opportunities, job training, and employment for residents of the local community as well as economic inclusion and diversity reflective of the local community in all aspects of the transaction, including development, management, and construction.

After notifying the residents and Councilmember Gauthier and releasing the marketing materials, and in addition to preparing for selling the Property, IBID proceeded to develop a plan which would support increasing the availability of project-based rental assistance in the community from 70 affordable housing units to up to 108 affordable housing units.

D. Councilmember Gauthier introduces legislation to bar the commercial sale of the Property.

54. On September 30, 2021, without warning to IBID, Councilmember Gauthier proceeded unilaterally to bar IBID's right to sell the Property for commercial development by introducing Philadelphia City Council Bill 210778 for consideration in the Rules Committee of the Philadelphia City Council.

55. The Overlay Bill, introduced and approved without adequate notice or process, targeted the Property by name with surgically-drafted and extraordinary requirements designed to effectively eliminate any potential for IBID to sell the Property for its commercial use, of which the Councilmember knew because of IBID's transparency and communications with her.

56. The purpose of the Overlay Bill was spelled out in its title: to amend the Philadelphia Zoning Code to create a new “Affordable Housing Preservation Overlay District”; to amend the Philadelphia Zoning Maps to apply the Overlay District exclusively to a **single property**—3900 Market Street, IBID’s Property; and to “establish a temporary demolition moratorium” on the Property. *See* Bill No. 210778 (Sept. 30, 2021), attached as Exhibit 4 to the Appendix.

57. The bill was clearly designed to absolutely prevent IBID from selling the Property for its highest and best use as allowed under its CMX-4 zoning. Aside from the mention in the title, there was no language explaining (let alone implementing) the demolition moratorium.² And references in the bill’s text to the new RMX-3 (Residential Mixed Used) zoning designation apparently were designed to effect a downzoning of the Property, although (and despite their mention in the title) the bill did not include copies of the revised Zoning Maps. As such, the bill as introduced did not explain what property was being re-mapped to which zoning district. The most onerous provision limited commercial uses to the first floor of a multi-level building—effectively, therefore, mandating the Property’s use for affordable housing. Each of these provisions rendered any commercial sale of the Property impossible.

58. Additionally, imposing the proposed Overlay District on the Property would effectively bar IBID’s plans to sell the Property for its highest and best use in two key ways:

- a. any development on the Property would need to include a minimum of 77 units (more than the Property currently supports) to be available as housing affordable to residents earning up to 20% of the Area Median Income.

² This is problematic in part because land-use moratoria that are not tied to specific health and safety justifications are prohibited under Pennsylvania law. *See generally Naylor v. Twp. of Hellam*, 565 Pa. 397 (2001).

b. most extraordinarily, as stated, all non-residential uses and parking were limited to the ground floor of buildings on the Property, effectively prohibiting any principal use of the Property that is non-residential.

See Appendix, Ex. 4.

59. In sum, the Overlay Bill impermissibly targeted the Property—and only the Property—for specific downzoning requirements and re-mapping, all of which were designed to frustrate IBID’s otherwise lawful sale of the Property in accordance with the existing CMX-4 zoning requirements.

60. Councilmember Gauthier’s announcement and introduction of the Overlay Bill had the immediate effect of preventing IBID’s sale of the Property.

61. This was in part because, through use of the councilmanic prerogative, IBID and any interested buyer knew that the Overlay Bill was virtually certain to be passed unless Councilmember Gauthier decided otherwise. Consequently, Councilmember Gauthier could, in effect, compel IBID to acquiesce to her demands under the threat of the final passage of an Overlay Bill that would effectively destroy the commercial value of the Property.

E. The Philadelphia Planning Commission ignores its staff’s advice and recommends passage of the Overlay Bill.

62. On October 21, 2021, the Philadelphia Planning Commission held a meeting on the proposed Overlay Bill.

63. Under the Home Rule Charter, all proposed zoning legislation is required to be submitted to the Planning Commission, where the bill is reviewed by the Commission’s expert staff and discussed in a public meeting. Ultimately, the Commission votes whether to recommend the bill’s passage by City Council. The purpose of this requirement is to vet zoning legislation with land-use experts who are responsible for studying, drafting, and maintaining the City’s long-term

plans for development and zoning.

64. The meeting began with a presentation on the Overlay Bill by Commission staff.

After summarizing the Overlay Bill's provisions, they specifically recommended ***not supporting*** the Overlay Bill. Nicole Ozdemir, Staff presenter for the Commission's consideration of Bill 210778, said the following:

So PCPC commission staff support not only increasing the City's supply of affordable housing, but particularly understands the importance of having affordable housing available in this specific neighborhood and at this location. However, it is difficult for staff to support these efforts via the Bill. The rezoning Bill **could be considered a taking of the owners' property rights**. Secondly, while the staff supports the goal of keeping residents in their homes, **the demolition moratorium will expire shortly after the HUD agreement expires, and so will not be helpful in meeting that goal**. The residents could still potentially be evicted, and the developer could just sit and wait out the moratorium with a vacant site.

Furthermore, the level of affordability required in the Bill **will be difficult for a new developer to achieve, certainly without government subsidy**. Additionally, the Bill requires other uses outside of residential or accessory parking to be limited to the ground floor. While this is a large site that could have multiple structures, **it limits the possibility of having comprehensive mixed-use buildings, which is what the current base zoning calls for and what is recommended in the comprehensive plan**.

With the utmost respect for the councilmember, the staff recommendation is **not for approval**.

See Tr. of Oct. 21, 2021 City Planning Meeting at 2–3 (emphasis added), attached as Exhibit 5 to the Appendix. Upon information and belief, the Planning Commission staff has never before described a proposed bill as a “taking.”

65. After the staff's presentation, Councilmember Gauthier took the unusual step of presenting at the meeting herself and implored the Commission to recommend the Overlay Bill for approval. *Id.* at 4–6, Appendix, Ex. 5.

66. Commissioners' comments followed. *Each Commissioner speaking* expressed misgivings about the Overlay Bill's legality and its soundness as a matter of policy. Commissioner

Johns said that “maybe this is not the greatest bill”; Commissioner Capita predicted the bill would “run[] into issues”; and Commissioner Gonzalez—knowing that the Overlay Bill’s passage was a foregone conclusion—cautioned, “if this bill moves forward . . . , I think that there should be some talk about some of the restrictions[;] . . . I think that some of the recommendations are not economically viable.” *Id.* at 8, Appendix, Ex. 5.

67. Despite their concerns, and the contrary recommendations of their staff, the Planning Commission recommended the Overlay Bill for approval.

F. The City Council Rules Committee holds a defective hearing on the Overlay Bill and recommends its passage to the full Council, imbuing the Overlay Bill with the force of law.

68. The City Council Rules Committee held a so-called public hearing on the Overlay Bill on October 26, 2021. This hearing was patently defective for procedural reasons.

69. The Overlay Bill was introduced to the Rules Committee without attaching zoning maps incorporating the proposed changes to the subject property, and without providing any substantive language explaining the Overlay Bill’s apparent demolition moratorium. These deficiencies constituted violations of City Council Rules and the Home Rule Charter, rendering the required public notice of the legislation inadequate and the introduction of the legislation invalid. The public, in essence, was prevented from knowing the full substance of the bill the Committee was debating.

70. Furthermore, the outcome of the October 26 hearing was a foregone conclusion. Because of Councilmember Gauthier’s use of the councilmanic prerogative, other Councilmembers deferred to her desired outcome for the Overlay Bill. For example, Councilmember David Oh said that he planned to support the Overlay Bill even though he was unsure “at the end of the day the legality of it.” *See* Tr. of Oct. 26, 2021 Rules Committee Hearing at 111, attached as Exhibit 6 to the Appendix.

71. Despite serious concerns, procedural inadequacies, and substantive deficiencies, the Rules Committee deferred to councilmanic prerogative and unanimously voted to recommend passage of the legislation by the full Council. Councilmanic prerogative made a mockery of the Rules Committee hearing.

72. Once recommended by the Committee, the Overlay Bill became a “pending ordinance” that has the full effect and force of law as it relates to land use regulations and applications for zoning permits and variances. In other words, the Overlay Bill’s provisions govern the sale of the Property unless and until it is rejected by the full Council or withdrawn by Councilmember Gauthier. Phila. Code § 14-304(3)(g).

G. The Overlay Bill is amended in belated and futile attempts to remedy the legislation’s illegality, and ultimately passed by City Council.

73. Having succeeded in imposing onerous regulations on a single privately-owned parcel in order to stop the owner’s meaningful commercial sale of the Property, Councilmember Gauthier turned to amending some of the most extreme provisions of the Overlay Bill, clear evidence that she recognized the invalidity of those requirements. However, the damage was already inflicted on IBID by virtue of the Rules Committee’s unanimous vote recommending the Overlay Bill, which made it a ‘pending ordinance’ with the full effect and force of law.

74. As of the date of filing, the Overlay Bill has been amended four times, and was passed by City Council on March 10, 2022. At no point have any amendments been presented to the public before consideration, or debated in a public hearing of City Council. Even while the amended legislation was being considered or voted on, a public participant at the hearing would not be able to view the legislation’s text because all Council meetings are being conducted virtually.

75. The Overlay Bill was first amended at the October 26 Rules Committee hearing.

See Oct. 26 Tr. at 180, Appendix, Ex. 6 (Councilmember Mark Squilla moving to amend the Overlay Bill, noting only that “a copy of the amendment has been circulated to all members of the Committee”). This amendment added a lengthy preamble to the Overlay Bill’s title discussing the history of development in University City and the importance of affordable housing; added “legislative findings” substantively reiterating the preamble; reduced the minimum number of affordable units from 77 to 70; added text describing the demolition moratorium, barring demolition for one year except in certain enumerated cases related to public safety; and attached the revised Zoning Maps, confirming the intended downzoning of the Property from CMX-4 to RMX-3. *See* the Oct. 26 amendment attached as Exhibit 7 to the Appendix.

76. The Overlay Bill was next amended on November 4, 2021, when the bill received its “First Reading” before a hearing of the City Council. At some point during the hearing, Councilmember Gauthier introduced a “floor amendment” to the Overlay Bill, noting that she circulated the amended text to the other Councilmembers, and moved its approval (to which none objected).

77. In addition to correcting typos, the November 4 amendment made three notable changes: first, the Overlay District was amended to encompass a single other lot immediately to the Property’s north (“3901 Market”), which currently includes a high-density residential development and, upon information and belief, already complies with the new zoning requirements; second, the district now requires 20% of units to be reserved for a Statutorily-Defined Group of Individuals; and third, the bill no longer downzones the Property from CMX-4 to RMX-3. *See* the Nov. 4 amendment attached as Exhibit 8 to the Appendix. Under the amendments, however, the demolition moratorium still applies exclusively to the Property, and non-residential use still is restricted only to the ground floor. These two conditions, in and of

themselves, bar IBID's sale of the Property for its highest and best use. *See id.*, Appendix, Ex. 8.

78. At some point, the Overlay Bill was amended a third time. The legislative text available for public viewing on the City Council's website contained changes from the version introduced at the November 4 Council session, although the changes were minor and mostly non-substantive.

79. The Overlay Bill was amended yet again on January 20, 2022 to connect the Overlay Bill to Councilmember Gauthier's other affordable housing bill, which establishes a Mixed Income Neighborhood overlay. *See* the Jan. 20 amendment attached as Exhibit 9 to the Appendix. As with the previous amendments, however, the demolition moratorium still applies exclusively to the Property, non-residential use is still restricted only to the ground floor, and 20% of units in new residential developments must be reserved for affordable housing. *See id.*, Appendix, Ex. 9. Ultimately, none of the amendments ameliorated the Overlay Bill's discriminatory and deleterious targeting of IBID. Even as amended, the Overlay Bill barred IBID's lawful use and enjoyment of its property rights in a targeted and invidious regulation designed to undermine any meaningful opportunity for commercial sale of the Property.

80. On March 10, 2022, Councilmember Gauthier introduced the Overlay Bill, as amended on January 20, 2022, for final passage. The Overlay Bill is officially designated as Bill No. 210778-AA and is attached as Exhibit 9 to the Appendix. City Council passed the Overlay Bill the same day. Not surprisingly given the command and complicity of the councilmanic prerogative, the only councilmember who voted against the Overlay Bill was Allan Domb—an **at-large** member of City Council with no territorial district like Councilmember Gauthier.

81. Zoning is supposed to be predicated upon a comprehensive plan and represent the reasoned application of land-use principles in furtherance of a municipality's vision for its

development and growth, taking into account existing land use patterns and natural forces.

82. The Overlay Bill undoes and undermines that vision, and legislates changes to the City's zoning laws—contrary to public policy and expert recommendations—based on the specific use of a specific property for the sole purpose of frustrating a private property sale.

83. Even worse, the Overlay Bill was introduced and passed in an expedited process that was implemented to enact this onerous legislation outside the public's eye.

H. Councilmember Gauthier acted *ultra vires* by holding hostage IBID's planned sale of the Property through use of the councilmanic prerogative.

84. Councilmember Gauthier possessed virtually sole authority to draft and introduce the Overlay Bill and ensure its passage through abuse of the practice of councilmanic prerogative.

85. Councilmanic prerogative is not expressly permitted in the Home Rule Charter or the Rules of City Council.

86. Instead, councilmanic prerogative is an official custom whereby members of Council defer to those members who represent specific districts as to zoning and other real property legislation that affects their particular district.

87. Other members of Council deferred to Councilmember Gauthier throughout the introduction of the Overlay Bill and the Rules Committee's recommendation of its passage, and continued to do so through the Overlay Bill's final Council passage.

88. The malignancy inhering in the councilmanic prerogative is its intrinsic reciprocity. If councilmember B were to oppose or vote against the district councilmember A's bill, when councilmember B was proposing a bill for his or her district, councilmember A would assuredly oppose and vote against councilmember B's bill.

89. Therefore, Councilmember Gauthier engaged in an official course of conduct via use of the councilmanic prerogative to prevent IBID from exercising its constitutionally protected

property and contract rights and to deprive IBID of its due process and equal protection rights.

90. Conduct taken through use of or in reliance on the councilmember prerogative is not action taken in a legislative capacity but, instead, action taken without any legislative sanction and *ultra vires* to the legislative process.

CAUSES OF ACTION

COUNT I

(Violation of the Fifth and Fourteenth Amendments to the United States Constitution, Takings Clause) 42 U.S.C. § 1983

91. IBID incorporates herein by reference the foregoing paragraphs as though fully set forth herein.

92. The Fifth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, provides that “private property [shall not] be taken for public use, without just compensation.” U.S. Const. amend. V.

93. The Supreme Court of the United States has recognized that the Declaratory Judgment Act, 28 U.S.C. § 2201, “allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.” *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 71 n.15 (1978).

A. The *Cedar Point* Taking

94. In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), the Supreme Court held:

Government action that physically appropriates property is no less a physical taking because it arises from a regulation . . . It is whether the government has physically taken property for itself or someone else – by whatever means – or has instead restricted a property owner’s ability to use his own property. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred and *Penn Central* has no place . . . The right to exclude is “one of the most treasured” rights of property ownership . . . [W]e have stated that the right to exclude is “universally held to be a fundamental element of the property right,” and is “one of

the most essential sticks in the bundle of rights that are commonly characterized as property.”

Id. at 2072 (citations omitted).

95. On its face, the Overlay Bill requires IBID to lease at least 20% of the dwelling units on the Property to individuals or households earning up to 40% of the Area Median Income.

96. This requirement eviscerates IBID’s fundamental right to exclude a Statutorily-Defined Group of Individuals from its Property.

97. It is, therefore, a *per se* taking of private property without compensation in violation of the Takings Clause.

98. Indeed, the staff of the Planning Commission concluded that the Overlay Bill constituted an improper taking.

99. As applied to IBID, the Overlay Bill effects an uncompensated and unwarranted physical taking of its property by requiring IBID to open its private property, without its consent, to a statutorily-defined group of persons on pain of civil fines and penalties.

B. The *Lucas* Taking

100. In *Lucas v. S.C. Coastal Council*, 112 S. Ct. 2886 (1992), the Supreme Court held:

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.

* * *

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Id. at 2893, 2895 (citations omitted; italics in original).

101. By preventing the demolition of the Property and by limiting all non-residential use of the Property to the ground floor, the Overlay Bill and Councilmember Gauthier have effectively destroyed the economically beneficial, highest and best use of IBID’s Property in the booming

commercial, research and development, luxury housing, and life sciences center of which it is an essential and critical part.

C. The *Penn Central* Taking

102. In both *Cedar Point* and *Lucas*, the Supreme Court held that the takings were *per se* violations of the Takings Clause.

103. In *Penn Central Transp. Co. v. New York City*, 98 S. Ct. 2646 (1978), the Supreme Court applied a “flexible test . . . balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action” for determining whether a taking had occurred. *Cedar Point*, 141 S. Ct. at 2072.

104. Here, the Overlay Bill is intended for the benefit of a “particular class of persons, rather than the interest of the general public.” *Shaner v. Perry Twp.*, 775 A.2d 887, 892 (Pa. Commw. Ct. 2001).

105. The Overlay Bill interferes with IBID’s investment-backed expectations by effectively prohibiting IBID from selling the Property for its highest and best use after its HUD contract has expired.

106. In this way, the Overlay Bill “goes too far” and affects a taking of private property without compensation in violation of the Fifth Amendment. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

D. Conclusion

107. The Overlay Bill has eviscerated IBID’s ability to sell the Property for its highest and best use as allowed under its CMX-4 zoning, and compels it to permit a Statutorily-Defined Group of Individuals to rent units on the Property, and will continue to do so in the future.

108. Given the foregoing, the only proper and possible remedy for the constitutional

taking injury alleged in this case is declaratory and injunctive relief, preventing the application of the Overlay Bill against it.

COUNT II
(Violation of the Fourteenth Amendment to the
United States Constitution, Equal Protection)
42 U.S.C. § 1983

109. IBID incorporates herein by reference the foregoing paragraphs as though fully set forth herein.

110. The Fourteenth Amendment to the United States Constitution prohibits any state from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV § 1.

111. The Overlay Bill singles out the Property to bar IBID from selling it as permitted under existing zoning requirements.

112. The requirements the Overlay Bill imposes on the Property are not imposed on similarly-situated properties that are like the Property in all relevant aspects, including the adjacent properties—all of which are zoned identically to the Property—and other properties in the community and the City whose use includes affordable housing.

113. There is no reasonable basis for the restrictions imposed by the Overlay Bill.

114. Rather, the Overlay Bill is irrational and wholly arbitrary, and is the product of improper intent, unjustifiable bias, and obstructive behavior on the part of Defendants.

115. Therefore, the Overlay Bill has deprived IBID of its right to equal protection.

116. By intentionally and unlawfully discriminating against IBID, and depriving IBID of its right to equal protection, Defendants have caused IBID substantial and irreparable harm.

117. IBID is entitled to declaratory and injunctive relief preventing the application of the Overlay Bill against it.

COUNT III
(Violation of the Fourteenth Amendment to the
United States Constitution, Substantive Due Process)
42 U.S.C. § 1983

118. IBID incorporates herein by reference the foregoing paragraphs as though fully set forth herein.

119. The Fourteenth Amendment to the United States Constitution prohibits any state from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV § 1.

120. IBID has a protected property interest in the Property. IBID owns the Property and under current land use regulations is entitled to sell the Property for its highest and best use.

121. Defendants’ enforcement of the Overlay Bill against IBID and the Property constitutes an arbitrary exercise of discretion for unlawful purposes, and an infringement of IBID’s protected property interests that is so arbitrary as to shock the conscience.

122. Therefore, Defendants have deprived IBID of its protected property interests without due process of law.

123. By depriving IBID of due process, Defendants have caused IBID substantial and irreparable harm.

124. IBID is entitled to declaratory and injunctive relief preventing the application of the Overlay Bill against it.

COUNT IV
(Violation of the Contracts Clause of the United States Constitution)
42 U.S.C. § 1983

125. IBID incorporates herein by reference the foregoing paragraphs as though fully set forth herein.

126. The Contracts Clause in the United States Constitution prohibits states from passing

any “[l]aw impairing the Obligation of Contracts.” U.S. Const. art. I § 10.

127. On or around April 8, 2021, IBID entered into the 2021 HUD Contract with HUD.

128. The 2021 HUD Contract governs the terms by which IBID is participating in providing affordable housing units at the UC Townhomes.

129. Among other provisions, the 2021 HUD Contract has a term of one year, 2021 Contract § 2(a), Appendix, Ex. 3, after which IBID is entitled to determine whether to execute another renewal contract or opt-out of the affordable housing program. *See, e.g.*, 2021 Contract § 8(a), Appendix, Ex. 3.

130. By passing the Overlay Bill, Defendants impaired IBID’s 2021 Contract with HUD.

131. This impairment was substantial because it undermined the contractual bargain between IBID and HUD by effectively eliminating IBID’s right to opt-out of the affordable housing program, interfering with IBID’s reasonable expectations when entering into the agreement, and preventing IBID from safeguarding or reinstating its rights.

132. Moreover, the Overlay Bill does not reasonably or appropriately advance a significant or legitimate public purpose because it applies only to two adjoining properties, including IBID’s, and undermines IBID’s efforts to secure affordable housing for the current residents at the site and others in the neighboring community.

133. Accordingly, the Overlay Bill violates the Contracts Clause.

134. By substantially interfering with IBID’s 2021 HUD Contract, Defendants have caused IBID substantial and irreparable harm.

135. IBID is entitled to declaratory and injunctive relief preventing the application of the Overlay Bill against it.

COUNT V
(Violation of Article I, Section 10 of the United States Constitution)
42 U.S.C. § 1983

136. IBID incorporates herein by reference the foregoing paragraphs as though fully set forth herein.

137. Article I, Section 10 of the United States Constitution prohibits states from enacting bills of attainder.

138. A bill of attainder is legislation that targets an individual or small, identifiable group of individuals, and punishes them without permitting them resort to judicial process.

139. The Overlay Bill targets IBID's Property by name and, as amended, extends some of its requirements to only a single neighboring property.

140. Moreover, the Overlay Bill punishes IBID by effectively confiscating the Property for a state-supported purpose, *i.e.*, preventing IBID from exercising its property rights and compelling it to maintain the existing affordable housing at the Property.

141. Accordingly, the Overlay Bill constitutes an unlawful bill of attainder.

142. By targeting IBID with a bill of attainder, Defendants have caused IBID substantial and irreparable harm.

143. IBID is entitled to declaratory and injunctive relief preventing the application of the Overlay Bill against it.

COUNT VI
(Claim for Relief pursuant to the Declaratory Judgment Act and
for a Temporary Restraining Order and
Preliminary and Permanent Injunctive Relief)

144. IBID incorporates herein by reference the foregoing paragraphs as though fully set forth herein.

145. IBID is entitled to a Temporary Restraining Order, as well as a Preliminary and

Permanent Injunction. Because the Overlay Bill has passed through City Council, it has the force of law for purposes of zoning regulation and enforcement. IBID will suffer irreparable injury as a result of the existence, operation, enforcement, and threat of enforcement of the Overlay Bill. IBID has no adequate remedy at law.

146. IBID is the owner of the real property to which the Overlay Bill expressly and specifically applies and was in the process of fielding offers and bids for the purchase of the Property from potential buyers when Councilmember Gauthier introduced the Overlay Bill to halt that process. IBID, therefore, has a direct, substantial, and present interest in the operation and possible enforcement of the Overlay Bill, which constitutes an actual controversy related to the invasion of IBID's constitutionally protected property rights.

147. IBID requests a declaration of its rights with respect to the controversy, and a declaration that the Overlay Bill violates the United States Constitution in the ways alleged and described above. Without such declaration, IBID will lose its right to sell the Property.

148. The harm to IBID as a result of Defendants' threatened enforcement of the unconstitutional Overlay Bill is substantial.

149. Unless Defendants are enjoined or other relief granted, IBID will be deprived of its constitutionally protected property rights.

150. No harm or prejudice will result to Defendants if this relief is granted.

151. IBID has no adequate remedy at law.

152. IBID is likely to prevail on the merits.

WHEREFORE, IBID requests the following relief:

- a. a judgment declaring Defendants' actions to introduce, recommend, enact, and enforce the Overlay Bill discriminatory, unconstitutional, arbitrary, unreasonable,

and unlawful;

- b. a temporary restraining order, as well as a preliminary and permanent injunction, enjoining Defendants from taking any and all enforcement action against IBID relating to the Overlay Bill and arising out of its use of the Property;
- c. compensatory damages;
- d. punitive damages against Councilmember Gauthier in her individual capacity;
- e. an award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and
- f. such other and further relief as the Court deems just and proper.

Date: March 14, 2022

Respectfully submitted:

BALLARD SPAHR LLP

By: /s/ David H. Pittinsky

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Attorneys for Plaintiff

VERIFICATION

I, Brett Altman, hereby verify that:

- (a) I am an authorized representative of I.B.I.D. Associates Limited Partnership (“IBID”);
- (b) I am authorized to make this Verification on behalf of IBID; and
- (c) The facts set forth in the foregoing Verified Complaint are true and correct to the best of my knowledge, information, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 12, 2022

