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

KAMAL ANWIYA YOUKHANNA, *et al.*,

Plaintiffs,

v.

CITY OF STERLING HEIGHTS, *et al.*,

Defendants.

No. 2:17-cv-10787-GAD-DRG

Hon. Gershwin A. Drain

PLAINTIFFS' RESPONSE TO DEFENDANTS' SUPPLEMENTAL BRIEF

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ISSUE PRESENTED

Whether Plaintiffs are likely to succeed in their challenge to the Consent Judgment such that a preliminary injunction should issue preventing its enforcement during the pendency of this action since Plaintiffs will be irreparably harmed absent such relief, the injunction will not cause substantial harm to others, and granting the injunction is in the public interest.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs, 142 F.3d 468 (D.C. Cir. 1998)

Esperance v. Chesterfield Twp., 89 Mich. App. 456 (Mich. Ct. App. 1979)

League of Residential Neighborhood Advocates v. City of L.A., 498 F.3d 1052 (9th Cir. 2007)

Perkins v. City of Chi. Heights, 47 F.3d 212 (7th Cir. 1995)

Mich. Comp. Laws § 15.263

The gravamen of Plaintiffs' challenge to the Consent Judgment, and the principal basis for granting preliminary injunctive relief, is the fact that the Consent Judgment violates the City's Zoning Ordinance. *League of Residential Neighborhood Advocates v. City of L.A.*, 498 F.3d 1052, 1055-56 (9th Cir. 2007) ("Municipalities may not waive or consent to a violation of their zoning laws, which are enacted for the benefit of the public."). When approving a SALU permit via a consent decree, the City is required to take into account *all* of the applicable zoning standards for such a permit. *See* Zoning Ordinance § 25.01 ("[The City Council] shall consider the same standards as the Planning Commission . . . ."). This ensures that the City Council is not undermining the protections provided to the public by the ordinance just to get rid of a nuisance lawsuit. The City did not fulfill its legal duty here as set forth in Plaintiffs' motion (Doc. 9), as Defendants tacitly admit in their opposition (Defs.' Opp'n at 7-8 [stating that the Consent Judgment "addressed most [*i.e.*, not *all*] of the discretionary concerns"] [Doc. 14]), and as the Consent Judgment itself acknowledges (Consent J. § 2.6 ("*Except as modified by this Consent Judgment*, AICC shall comply with all City codes . . . ."); § 3.4 ("To the extent that this Consent Judgment *conflicts* with any City Ordinance or regulation . . . , *the terms of this Consent Judgment shall control*."] [Doc. 9-2] [emphasis added]). And there is no dispute that the Consent Judgment was <u>*not*</u> "*necessary* to rectify a *violation of federal law*." *See Perkins v. City of Chi.*

Heights, 47 F.3d 212, 216 (7th Cir. 1995). Defendants have steadfastly denied any wrongdoing (Defs.' Opp'n at 6 [Doc. 14]), and the parties stipulated that they were resolving the dispute "without any admission of liability," (Consent J. ¶ 6 [Doc. 9-2]). It's too late now to claim that this Consent Judgment was required by federal law. *See Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*, 142 F.3d 468, 477 (D.C. Cir. 1998) (rejecting argument, vacating consent decree, and stating that "consent decrees should be construed simply as contracts, without reference to the legislation that motivated the plaintiffs to bring suit"). On this basis alone the Court should vacate the Consent Judgment, *regardless of whether or not Defendants technically complied with the Michigan Open Meetings Act*. We turn now to Defendants' specific arguments.

Defendants argue that Plaintiffs are collaterally estopped from asserting any claims under the Open Meetings Act by a recent state court ruling in *Naumovski v. City Council of Sterling Heights* in which *none* of the current Plaintiffs were parties. (Defs.' Suppl. Br. at 2-4). Defendants are mistaken. As the case law cited by Defendants demonstrates, for collateral estoppel to apply here, Plaintiffs "must have had a full [and fair] opportunity to litigate the issue" in that prior proceeding. (Defs.' Suppl. Br. at 3 [quoting, *inter alia*, *Monat v. State Farm Mutual Auto Ins. Co.*, 469 Mich. 679, 682-84 (2004)]). That did not happen. None of the plaintiffs here was a party in that prior litigation, and none of the plaintiffs here is in privity

to any party in that litigation. Defendants' claim that "substantial identity, not precise identity, of parties is all that is required," citing *Local 98, Detroit, Michigan, of United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada, AFL-CIO. v. Flamegas Detroit Corporation*, 52 Mich. App. 297, 302-03 (Mich. Ct. App. 1974) ("*Local 98*"), is misleading. In *Local 98*, the court was pointing out that just because a party in the prior lawsuit is absent from the second lawsuit does not mean that those who are parties in both actions cannot be subject to collateral estoppel. As the court stated, "While Darin, a party in the previous case, is not a party here, 'it is no objection that the former action included parties not joined in the present action, or vice versa . . . .'" *Id.* Had Plaintiffs been parties in *Naumovski*, the fact that Naumovski was not a party here would not preclude the application of collateral estoppel against Plaintiffs. But this is not the case; collateral estoppel does not apply.

Defendants' request that this Court "refrain" from ruling on Plaintiffs' Open Meetings Act claim is similarly misplaced. (Defs.' Suppl. Br. at 4). The only case Defendants cite to support this argument is *Carroll v. City of Mt. Clemens*, 139 F.3d 1072 (1988), but that case involved the application of the *Younger* abstention doctrine, which is not applicable here. There are no ongoing state court proceedings involving Plaintiffs, and Plaintiffs' claim arising under the Act is properly before this Court. In short, there is no basis to abstain.

We turn now to the ruling in *Naumovski*. As an initial matter, this case does not address the gravamen of Plaintiffs' challenge here: that the Consent judgment is invalid because it "waive[s] or consent[s] to a violation of [the City's] zoning laws," *League of Residential Neighborhood Advocates*, 498 F.3d at 1055-56, as discussed above. Nor does this case address any of Plaintiffs' constitutional claims. Additionally, this lawsuit was brought by a *pro se* plaintiff who didn't bother to file a written response to the City Council's motion for summary disposition. (Defs.' Suppl. Br., Ex. 1 [*Naumovski* at 3, 8] [Doc. 34-1]). With this as a background, we turn to the substance of the Open Meetings Act claim.

To begin, the Act "is entitled to a broad interpretation to promote openness in government." *Wexford Cnty. Prosecutor v. Pranger*, 83 Mich. App. 197, 204 (Mich. Ct. App. 1978). It "was enacted to provide openness and accountability in government, and is to be interpreted so as to accomplish this goal." *Esperance v. Chesterfield Twp.*, 89 Mich. App. 456, 463 (Mich. Ct. App. 1979). It's not to be interpreted to shield government officials from actions designed to insulate their unpopular decisions from public view or criticism. It is in place to protect the fundamentals of a free democracy: to ensure that our public officials remain transparent and accountable to the people they serve. *Detroit News, Inc. v. Detroit*, 185 Mich. App. 296, 301 (Mich. Ct. App. 1990) ("[I]t is implicit in the purpose of 'sunshine laws' such as the OMA that there is real and imminent danger of

irreparable injury when governmental bodies act in secret."). It's not simply a "check-the-box" requirement to be brushed aside so casually, as Defendants urge. The Act *requires* "[a]ll decisions of a public body . . . to be made at a meeting open to the public," not just the press. Mich. Comp. Laws § 15.263(2). "[I]t implicitly requires that *all parts* of the meeting . . . also be open to the public." *Esperance*, 89 Mich. App. at 463 (emphasis added). The Act further states that "[a] person shall *not* be excluded from a meeting otherwise open to the public except for a breach of the peace committed at the meeting." Mich. Comp. Laws § 15.263(2) (emphasis added). Plaintiffs did not commit a "breach of the peace" at the meeting, yet they (along with many others) were excluded. Permitting government officials to order the removal of *all* citizens from a public meeting because *some* might cause a disturbance is, in effect, granting these officials the right to enforce an impermissible "heckler's veto." *See, e.g., Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 233 (6th Cir. 2015) (en banc) (holding that the defendants effectuated an impermissible heckler's veto by cutting off the plaintiffs' protected speech in response to a hostile crowd's reaction). In sum, the court in *Naumovski* gave short shrift to the purpose of the Act, and this decision should not insulate Defendants' unlawful actions, as Plaintiffs have argued here.

Respectfully submitted,

/s/ *Robert J. Muise*
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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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