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MEMORANDUM

TO: Jim Hock, City Manager
City of Park Ridge

FROM: Everette M. Hill, Jr.

DATE: January 7, 2010

RE: Billboard Fees

I have been asked to provide an opinion with respect to the City's ability to permit or license highway billboards as a source of revenue.

We currently do not permit off-premise advertising in Park Ridge. This prohibition is found in the zoning ordinance at Section 14.9H.

The idea that has been proposed by the Generation Group, Inc. is that the City would amend its Zoning Ordinance to permit limited off-premise advertising (within a certain distance of expressways) and the City would then receive certain payments from the Generation Group for doing so.

The revenue would be paid pursuant to one or more of the following legislative requirements:

1. An impact fee.
2. A license fee.
3. Entry into an agreement with the sign company whereby it would pay the City a certain amount if the signs are erected.

It must be kept in mind that the new ordinance, in addition to amending to allow for off-premise advertising, would also have to incorporate a requirement for one of the above into the ordinance.

This memo will examine the possible validity of each of these mechanisms for exacting the fee.

Impact Fees

With respect to impact fees, the U.S. Supreme Court has stated:

> No precise mathematical calculation is required (to arrive at the appropriate amount), but the city must make some sort of individualized determination that the required dedication is related in both nature and extent to the impact of the proposed development. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

The Illinois Constitution goes even further in regulating impact fees. In Illinois, a rough proportionality between the projected impact and the required fee is not enough. The Illinois courts require a very "exacting correspondence." In *Dolan*, the court stated:

> If the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes 'a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations.' *Id.* at 390, citing *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill. 2d 375, 381 (1961).

In view of the above, an impact fee, however it is implemented, even if by agreement, is inappropriate to this situation.

A recent Federal Court decision with respect to a neighboring municipality is instructive in this regard. The City of Des Plaines adopted a highway sign ordinance which required, among other things that the City Manager negotiate an agreement, on such terms, conditions and locations as is appropriate, " ... including but not limited to, a licensing fee of $15,000.00 per sign payable on completion of construction ... and other financial considerations to the City as the City manager deems appropriate." *Covenant Media of Illinois v. City of Des Plaines*, 2005 WL 2277313, *4 (N.D. Ill. Sept. 12, 2005).

The court granted a preliminary injunction against enforcement of the ordinance, in part, because ". . .It does not define what is 'appropriate' or what 'other financial considerations' the City Manager may consider . . ." and because ". . . the Amended Sign Ordinance does not specify the criteria that the City Council and mayor must use in deciding whether or not to approve the agreement reached by the City Manager for a billboard permit. . . ." *Id.*

It appears to me that if we adopt an ordinance that calls for a specific impact fee and that amount were to be sufficient to have a positive impact on our budget, we will run afoul of the "exacting correspondence" test. If we do not specify the amount of the fee, but require it to be negotiated, we risk a rebuke by the court similar to that experienced by Des Plaines. This is in addition to the general prohibition against contract zoning, which will be discussed further below.

License Fee

The other approach that has been suggested is a substantial license fee. This has been raised as a possibility because the general rule in Illinois is that a home rule municipality may "license for revenue". This means that an annual license fee may be much greater than the actual cost of regulating the licensed enterprise.

However, in the previously mentioned Des Plaines case, the trial court, basing its reasoning on a 1991 Seventh Circuit Court of Appeals decision, stated the following:

> The City bears the burden of establishing that its licensing fee is reasonably related to its costs in administering the permit. *See South-Suburban Housing Cir. v. Greater S. Suburban Bd. Of Realtors,* 935 F.2d 868, 898 (7th Cir. 1991) ('Since the City must justify restrictions on commercial speech, and the cost of a permit must be reasonably related to the City's cost in administering the same, [the City] was required to carry the burden of establishing that its permit fee ... is not excessive and did not exceed the City's costs in enforcing its ... regulations'). *Id.* at *5.

It is clear that the Seventh Circuit (of which we are a part) has carved out an exception to the general rule, i.e., when free speech is implicated (as is the case with advertising) licensing fees must be reasonably related to the cost of regulating the medium. In other words, the government cannot raise money by taxing the exercise of First Amendment rights.

Entry Into a Contract

The last approach is to amend our ordinance to require that the billboard company enter into a contract with us that requires the payment of money.

In the previously cited Des Plaines case, the City had attempted to overcome the "exacting correspondence" and the "reasonably related" impact fee and license fee issues by requiring that the City Manager negotiate an agreement that included such "other financial considerations to the City as the City Manager deems appropriate." The court rejected this language stating:

> While the City is correct that nowhere in the Sign Ordinance are government officials permitted to grant or deny a permit application on the basis of the proposed content and, in fact, they are now prohibited from doing so expressly, there are no objective standards to guide the discretion of the mayor, City Manager, or City Council in approving or denying permit applications. *Id.* at *4, footnote 2.

In addition, changing our Zoning Ordinance based on the payment of money sounds very much like "contact zoning."

"Zoning determinations based on agreed conditions have not been favored in Illinois decisions", *People v. Batavia*, 91 Ill. App. 3d 716, 721 (2nd Dist. 1980), citing *Treadway v. City of Rockford*, 24 Ill.2d 488, 496-497 (1962) ("conditional zoning amendments 'have frequently been invalidated either because they introduce an element of contract which has no place in the legislative process or because they constitute an abrupt departure from the comprehensive plan contemplated in zoning'"). Courts are concerned that "municipalities not surrender their governmental authority to determine sound land use, or improperly try to control the use of land." *Nolan v. City of Taylorville*, 95 Ill. App. 3d 1099, 1103 (5th Dist. 1981). Another concern is that "(c)onditional zoning can also furnish an avenue for corruption of officials." Requiring "the payment of a lump sum of money without any basis set forth or discernible for arriving at that sum is unlawful even in respect to municipal powers over subdivision." *Andres v. Village of Flossmoor*, 15 Ill. App. 3d 655, 662 (1st Dist. 1973), citing *Rosen v. Downers Grove*, 19 Ill.2d 448, 453-454 (1960).

We are all aware that "(s)ome conditional zoning (as in special uses and planned unit developments) may be in the public good, subservient to a comprehensive plan, in the best interest of the public health, safety and welfare and enacted in recognition of changing circumstances." *Goffinet v. County of Christian*, 30 Ill. App. 3d 1089, 1095 (5th Dist. 1975). However, if the proposed legislation requires the payment of an amount of money for general purposes without any specific public benefit that is related to the project, it will be deemed invalid.

In Supreme Court in *Goffinet v. County of Christian*, 65 Ill. 2d 40, 50-51 (1976) discussed the facts in *Andres v. Village of Flossmoor*, 15 Ill. App. 3d 655 (1973). The *Goffinet* court rejected the rezoning proposed in *Andres* because it was conditional zoning that introduced "elements of contract, which have no place in the legislative process, and showed an abuse of zoning authority." *Andres* involved a zoning amendment, which, among other things, required the developer to sign a contract with the village to adhere to certain limitations, including contributions of $1,000 for general village purposes for each of eighteen (18) buildings.

The result would be different if the City were entering into an agreement for use of its own property. Such was the case in *Thornber v. Village of North Barrington*, 321 Ill. App. 3d 318 (2nd Dist. 2001), in which a claim was made that the village had engaged in illegal contract zoning by adopting an ordinance permitting the construction of a telecommunications monopole at the village hall. After finding that the ordinance complied with the *LaSalle* factors (court mandated zoning standards), the Court determined that an ordinance is not invalid contract zoning because pecuniary benefit may result (telecommunications company intended to lease from village). Such benefit was not the result of "nonuniform bartering of legislative discretion that applied unequally throughout the Village." Id. at 328. Rather, it might clearly be deemed as a lease of municipal property.

Bear in mind that an appeal of the Des Plaines case is still pending in the Seventh Circuit Court of Appeals. But while the Seventh Circuit may disagree with the trial judge's

decision, it appears to me that her decision was based on prior decisions and her reasoning is sound.

I am also aware that the Generation Group is offering the "fee by agreement" concept to us voluntarily; so that we're not "exacting" the fee from them. Nonetheless, we will be required to make a zoning change in order to enter into such an agreement with them. If we make the zoning change without a signed agreement, we still must include language in the amending ordinance that requires the payment. This approach has already been rejected in the Des Plaines case. If we enter into an agreement with the Generation Group now, whereby payment is conditioned upon a subsequent zoning change, that is a classic case of invalid "contract zoning." Even if the Generation Group did not at some future date decide to challenge our fees, it is possible that some other group, who claims to be adversely affected by the billboards or the ordinance would have standing to challenge the amendment.

If the City Council believes, despite these issues, that it is in the City's best interest to move ahead with such an amendment, I believe we should do so only upon a hold harmless agreement with the sign company that would include the posting of a cash bond or letter of credit sufficient to pay the City's legal fees in defending a challenge to our action.

If you have any questions or comments, please contact me.