

STATE OF ILLINOIS)
) SS:
 COUNTY OF COOK)

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

INDEPENDENT VOTERS OF ILLINOIS)
 INDEPENDENT PRECINCT ORGANIZATION)
 and AVIVA PATT,)
 Plaintiffs,)
 vs.) Case No. 09-CH-28993
 STEVE LUX, City Comptroller,)
 JESSE WHITE, Illinois Secretary) Honorable
 of State, and DANIEL HYNES,) Richard J. Billik, Jr.
 Illinois Comptroller,)
 Defendants.)

TRANSCRIPT OF PROCEEDINGS had in the
 above-entitled cause taken at Room 2601 of the
 Richard J. Daley Center, 50 West Washington Street,
 on the 4th of November, A.D. 2010, at 4:33 p.m.

BEFORE: HONORABLE RICHARD J. BILLIK, JR.



1 APPEARANCES:

2
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10 MR. CLINTON KRISLOV,
11 MS. EVE-LYNN J. RAPP

12 -and-

13 DESPRES, SCHWARTZ & GEOGHEGAN, LTD.,
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19 MR. THOMAS GEOGHEGAN,
20 MR. MICHAEL P. PERSON,

21 appeared on behalf of the Plaintiffs;
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23
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1 APPEARANCES: (Continued)

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11 MR. WESTON W. HANSCOM,
12 MS. LYNN K. MITCHELL,
13 MS. AMBER KELLEY and
14 MR. JAMES McDONALD,
15 appeared on behalf of Defendant
16 Steve Lux, City Comptroller;
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1 APPEARANCES: (Continued)

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11 MR. THOMAS A. IOPPOLO,

12 appeared on behalf of Defendants

13 Jesse White, Illinois Secretary of State,

14 and Daniel Hynes, Illinois Comptroller.

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23 REPORTED BY: ELIA E. CARRION, C.S.R.

24 CERTIFICATE NO. 084.004641.



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1 THE COURT: All right. This is 09-CH-28993.
2 And counsels, would you care to reintroduce
3 yourselves, please.

4 MR. KRISLOV: Thank you, your Honor.
5 Clint Krislov, Eve-Lynn Rapp, Tom Geoghegan, and
6 Michael Persoon.

7 MR. IOPPOLO: Good afternoon, your Honor. I'm
8 Thomas Ioppolo from the Attorney General's office on
9 behalf of the State defendants. We're kind of in
10 the background, I guess, here.

11 MR. HANSCOM: Judge, Weston Hanscom. I'm here
12 with Lynn Mitchell, Amber Kelley, and Jim McDonald
13 from the City of Chicago Corporation Counsel's
14 office.

15 THE COURT: All right. Thank you. I'm ready
16 to proceed. Thank you very much.

17 The matter set today for ruling and the Court
18 noting that the matter coming before the Court on a
19 motion filed by one defendant Steve Lux, as
20 Comptroller, referred to as the City Comptroller for
21 the City of Chicago, referred to as the City or
22 Chicago, pursuant to 735 ILCS 5/2-615; for an order
23 dismissing the second amended complaint filed by
24 plaintiffs Independent Voters of Illinois



1 Independent Precinct Organization and Aviva Patt
2 (collectively referred to as the plaintiffs); the
3 matter has been briefed; a hearing held; and the
4 Court, being advised in the premises, states, as
5 follows:

6 According to the second amended complaint, on
7 December 4, 2008, City of Chicago Council approved a
8 "proposal" to lease the City's parking meter system
9 to a private party under an agreement entitled
10 Chicago metered parking concession -- Parking System
11 Concession Agreement dated as of December 4, 2008 by
12 and between City of Chicago and Chicago Parking
13 Meters, LLC," referred to as the Concession
14 Agreement. (See second amended complaint at 10.)
15 Plaintiffs contend that under the Concession
16 Agreement, the City "transferred all metered parking
17 system assets" to the Concessionaire, City of
18 Chicago Parking Meters LLC, referred to as CPM or
19 the Concessionaire, "free and clear of any
20 encumbrances," giving it "the control of the parking
21 meter system, all system property, and all revenue
22 produced from the parking meters." (See second
23 amended complaint at 11.) It is alleged that on
24 February 13, 2009, the concession transaction



1 "closed" transferring "control of City's
2 approximately 36,000 on-street parking meters to the
3 Concessionaire for a 75-year period" in exchange
4 "for a \$1,156,500,000 payment to the City." (See
5 second amended complaint at 14 to 15.) The second
6 amended complaint contains a statement that the
7 "Concession Agreement imposes improper and illegal
8 obligations on the City and State governments."
9 (See second amended complaint at caption 5, at page
10 4.) Plaintiffs claim that the Concession Agreement
11 obligates the City to expend public funds to police,
12 enforce, and maintain the privately held and
13 privately-controlled parking meter system," which
14 "violates the public purpose provision of Article
15 VIII of the 1970 Illinois Constitution." (See
16 second amended complaint at 24.) Moreover,
17 plaintiffs contend that the Concession Agreement
18 "illegally" delegates the City's police power."
19 Sub-paragraph (a), to issue parking tickets and
20 citations which must be enforced by the City and
21 (b), to regulate traffic and parking." (See second
22 amended complaint at C, page 8.) The second amended
23 complaint seeks a declaration that certain described
24 provisions of the Concession Agreement are illegal



1 on unconstitutional, and also seeks to enjoin the
2 City Comptroller from making expenditures of public
3 funds to enforce the privatized parking meter
4 system. (See second amended complaint at prayer for
5 relief, sub-paragraphs (a) and (b) at 22.)

6 Plaintiffs also seek to enjoin the defendant State
7 Comptroller from "making expenditures in connection
8 with the Illinois Secretary of State suspending or
9 impairing Illinois State driver licenses based upon
10 violations arising from the City's now privately
11 owned parking meter system." (See second amended
12 complaint at 2.)

13 In his second -- in his section 2-615 motion,
14 defendant City Comptroller argues that the two legal
15 theories asserted in the second amended complaint
16 "(1) that the Concession Agreement
17 unconstitutionally requires the expenditure of
18 public funds for the Concessionaire's purely private
19 benefit; and (2) that the Agreement delegates the
20 City's police power, lack a sufficient basis in the
21 additional provisions specified" in the second
22 amended complaint. (See City Comptroller's
23 Memorandum at 1 to 3.) It is also contended that
24 "the terms of the Concession Agreement leave no



1 doubt about the existence of a valid public
2 purpose." (See second amended complaint at 7) --
3 pardon me, see City Comptroller's Memorandum at 7.)
4 According to the defendant City Comptroller, "First,
5 pursuant to the Agreement, the Concessionaire paid
6 the City over \$1.1 billion in cash up front.
7 Second, pursuant to the Agreement, the
8 Concessionaire became responsible for the operation,
9 management, and maintenance of the metered parking
10 system, thereby saving the City the expense of
11 performing those functions." (See City
12 Comptroller's Memorandum at 3 and 7.) The City
13 Comptroller further asserts that "as a matter of
14 law, the Concession Agreement does not illegally
15 delegate the City's police power" and the Agreement
16 specifically reserves the "police and regulatory
17 powers" in the City. City see -- (see City
18 Comptroller's Memorandum 3 to 5, and 12 to 15.)
19 Although the Concessionaire receives under the
20 Concession Agreement the right to collect revenues
21 derived from the metered spaces, the City
22 Comptroller argues that the City retains the
23 exclusive right to establish all parking rules and
24 regulations and continues to exercise its police



1 power to issue parking tickets which generate fines
2 that are paid to the City. (See City Comptroller's
3 Memorandum at 3 to 5; and see also Agreement at
4 Sections 2.1, 3.1(a), and 7.1.)

5 A motion to dismiss pursuant to 735 ILCS
6 5/2-615 tests the legal and/or factual sufficiency
7 of the pleading in question. Anderson versus
8 Vandendorpel, 173 Illinois 2d 399, 407 to 408. In
9 order to withstand a section 2-615 motion to
10 dismiss, a plaintiff's complaint must set forth a
11 recognized cause of action, must include ultimate
12 facts which support each and every element of the
13 cause of action. Doe versus Calumet City, 161
14 Illinois 2d 374, 381. When considering a pleading
15 being challenged by a section 2-615 motion, "legal
16 conclusions and factual conclusions which are
17 unsupported by allegations of specific facts will be
18 disregarded in ruling out a motion to dismiss."
19 LaSalle National Bank versus City Suites, Inc., 325
20 Illinois Appellate 3d 780 and 790. An exhibit which
21 is attached and incorporated into the complaint may
22 also be considered in reviewing the challenge to the
23 pleading, and where inconsistent, controls over the
24 factual allegations in the complaint. McGuire



1 versus Ameritech Cellular Corp., 314 Illinois
2 Appellate 3d 83, 86.

3 Plaintiffs contend that their second amended
4 complaint "sufficiently alleges with particularity,"
5 the claim that the Concession Agreement
6 unconstitutionally obligates the City to expend
7 public funds to "police, enforce, and maintain a
8 private parking meter system" in violation of
9 Section 8 -- pardon me, Article VIII, section 1(a)
10 of the 1970 Illinois Constitution. (See second
11 amended complaint at 19 to 20; plaintiffs' response
12 at 4.) According to plaintiffs, they have
13 sufficiently alleged that the Concession Agreement
14 violates the public purpose provision by "mandating
15 the City's continued obligation to publicly finance
16 the enforcement of the Concessionaire's private
17 meters." (See plaintiffs' response at 5.)

18 To proceed under the public purpose provision
19 of Article VIII section 1(a) of the 1970 Illinois
20 Constitution, "facts must be alleged indicating that
21 the governmental action has been taken which
22 directly benefits a private interest without a
23 corresponding public benefit." Paschen versus
24 Village of Winnetka, 73 Illinois Appellate 3d 1023,



1 at 1028, 1029; O'Fallon Development Corporation
2 versus City of O'Fallon, 43 Illinois Appellate 3d
3 348 to 354. "The term 'public purpose' is not a
4 static concept. It is flexible and is capable of
5 expansion to meet conditions of a complex society
6 that were not within the contemplation of the
7 framers of our constitution." (See The Southwestern
8 Illinois Development Authority versus National City
9 Environmental LLC, 199 Illinois 2d 225 to 237 and
10 citing to Gutknecht versus Chicago Regional Port
11 District, 4 Illinois 2d 363. "A purely private
12 taking could not withstand the scrutiny of the
13 public use requirement; it would serve no legitimate
14 purpose of government and would thus be void." The
15 Southwestern Illinois Development Authority, 199
16 Illinois 2d at 238 quoting Hawaii Housing Authority
17 versus Midkiff, 467 U.S. 229, at 245. In deciding
18 whether the involved purpose is public or private,
19 "courts must be largely influenced by the course and
20 usage of the government, the object which taxes and
21 appropriations have been customarily and by long
22 course of legislation levied and made, and what
23 objects have been considered necessary to the
24 support and for the proper use of the government."



1 In re Marriage of Lappe, 176 Illinois 2d 414 and 430
2 quoting Hagler versus Small, 307 Illinois 460, 474.
3 An analysis concerning the validity of the ordinance
4 pertaining to the Concession Agreement begins with
5 the premise that it carries a presumption of
6 validity. (See City of Chicago versus Pooh Bah
7 Enterprises, Inc., 224 Illinois 2d 390 and 406;
8 Village of Lake Villa versus Stokovich, 211 Illinois
9 2nd 106, 122; see also City Comptroller's Memorandum
10 at 4 to 6.

11 Plaintiffs contend that they have referred in
12 their second amended complaint to certain provisions
13 of the Concession Agreement to support their claim
14 of a violation of the public purpose provision of
15 Article VIII Section 1(a) of the 1970 Illinois
16 Constitution. In their second amended complaint
17 plaintiffs allege that:

18 Under paragraph 21, Concession Agreement
19 Section 7.6(a) sets forth the City's enforcement
20 obligations under the Agreement. Section 7.6(a)
21 requires the City to enforce the now private parking
22 meter system by (a) ticketing and fining persons who
23 fail to pay the now privately owned meters, and (b)
24 reporting to the Secretary of State for suspending



1 private -- suspending drivers licenses for failing
2 to pay parking meter violations. (See second
3 amended complaint at 21.)

4 Section 7.6(a) of the Concession Agreement
5 provides, in relevant part, that:

6 The City covenants that it will enforce parking
7 rules and regulations, as in effect from time to
8 time, in accordance with the provisions of 7.6 and
9 acknowledges that its failure to do so may result in
10 losses to the Concessionaire and thereby may
11 constitute a compensatory event. The City agrees to
12 establish, maintain, and undertake procedures for
13 the enforcement of parking rules and regulations
14 that are designed to deter parking violations,
15 including procedures for the collection of unpaid
16 parking tickets. The City shall establish and
17 maintain a system for the adjudication and
18 punishment for those persons that commit parking
19 violations. (See second amended complaint at 21;
20 see also Concession Agreement at Section 7.6(a)).

21 Plaintiffs further allege that:

22 Under Section 7.6 of the Concession Agreement,
23 the City has thus appropriated \$9,769,687 of public
24 funds for procedures for the enforcement of parking



1 rules and regulations that are designed to deter
2 parking violations and further alleges that "The
3 City's expenditure of public funds to pay police to
4 issue parking tickets and boot vehicles that belong
5 to people who have unpaid private debts owed to a
6 private company violates the public purpose
7 provision of Article VIII of the 1970 Illinois
8 Constitution." (See second amended complaint at 23
9 to 24.)

10 The City Comptroller argues that with respect
11 to the Concession Agreement, "it has not taken on
12 any new enforcement functions - only that the
13 Agreement continues to obligate the City to enforce
14 its parking laws." (See City Comptroller's
15 Memorandum at 8 to 9, and at 22.) It is not alleged
16 that the City is expending funds to take any action
17 under Section 7.6(a) that it did not engage in prior
18 to the Concession Agreement, and that includes the
19 enforcement of its parking rules and regulations by
20 having its personnel issue tickets and its offices
21 process them so that the City can collect proper and
22 appropriate fines pursuant to applicable parking
23 laws. (See Concession Agreement Sections 3.1(a),
24 3.2(e), 7.1; see also City Comptroller's Memorandum



1 at 8 to 10, 22, and reply at 3 to 4.) The
2 contention that the City has agreed, in effect, to
3 continue to enforce its own parking laws through its
4 personnel and offices does not establish a basis for
5 an illegal or unconstitutional premise because it
6 does not consider the public purpose, which exists
7 for the City to continue to exercise its police
8 power to regulate traffic and parking. To ensure
9 that the City's parking rules and regulations are
10 adhered to by its personnel and offices, with or
11 without the Agreement, serves a public purpose that
12 is not superseded by the benefit that plaintiffs
13 contend that the Concessionaire receives from the
14 City exercising its police power according to the
15 submissions. Incidentally, it is not alleged that
16 the City's police power is utilized under the
17 Concession Agreement to generate fines that are paid
18 to the Concessionaire. A declaration and injunction
19 against the City with respect to the use of funds to
20 exercise its police power lack support in the
21 factual allegations pled and in the authority that
22 has been submitted. Plaintiffs' conclusory
23 statement and/or allegation that the terms in
24 Section 7.6(a) involving the City's agreement to



1 continue to enforce its parking laws through its
2 personnel and offices are violative of the public
3 purpose provision of Article VIII Section 1(a) of
4 the 1970 Illinois Constitution does not state a
5 sufficient basis to withstand the section 2-615
6 motion to dismiss. (See generally Friends of the
7 Parks versus Chicago Park District, 203 Illinois 2d
8 312, 323; see also Pool versus City of Kankakee,
9 indicating that "it can no longer be doubted" that
10 the regulation of streets and traffic is in the
11 interests of public health, safety, welfare,
12 convenience, and necessity and thus for a public
13 purpose.) However, a claim that the City is
14 delegating an aspect of its police and regulatory
15 power under the Concession Agreement, a claim that
16 the City is not exercising an aspect of its police
17 or regulatory power claim or a claim that the City's
18 exercise of its police or regulatory is conditioned
19 upon or compromised by the payment of compensation
20 or reimbursement under the Agreement requires a
21 different analysis under the allegations in the
22 second amended complaint for purposes of the section
23 2-615 motion practice.

24 Plaintiffs' second amended complaint further



1 refers to certain provisions of the Concession
2 Agreement which plaintiffs allege "illegally
3 delegates the City's police power (a) to issue
4 parking tickets and citations which must be enforced
5 by the City, and (b) to regulate traffic and
6 parking. (See second amended complaint at page 8.)

7 According to plaintiffs' authority, "The City,
8 as the representative of the state, is invested with
9 power to enact and enforce all ordinances necessary
10 to prescribe regulations and restrictions needful
11 for the preservation of the health, safety, and
12 comfort of the people. The exercise of this power
13 affects the public and becomes a duty, the
14 performance whereof is obligatory on the City. No
15 contract can be made which assumes to surrender or
16 alienate a strictly governmental power which is
17 required to continue in existence for the welfare of
18 the people. This is especially true of the police
19 power, for it is incapable of alienation." In *City*
20 *of Chicago versus Chicago Union Traction Company*,
21 *199 Illinois 259* quoted in *City of Chicago versus*
22 *O'Connell*, *278 Illinois Appellate 591, 606 to 607*.
23 "It is true that a municipality cannot contract away
24 the right to exercise the police power to secure and



1 protect the morals, safety, health, order, comfort,
2 or welfare of the public, nor limit or restrain by
3 any agreement the full exercise of that power."
4 City of Chicago versus Chicago City Railway Company,
5 272 Illinois 245 quoted in O'Connell, at 607. See
6 also Village of Lake Bluff versus Dalitsch, 415
7 Illinois 476, 485 indicating "any contract whereby
8 the State of a municipality surrenders its police
9 power over the streets is invalid.

10 Plaintiffs allege in their second amended
11 complaint that "Conflicting with the non-delegation
12 of police powers, Concession Agreement, Section
13 3.2(e) grants the Concessionaire the right to issue
14 parking tickets or citations for violations of the
15 parking rules and regulations, and [sic] obligates
16 the City to enforce these Concessionaire-issued
17 citation/tickets as if they were tickets or
18 citations issued by the City." (See second amended
19 complaint at 36.)

20 Plaintiffs refer to Section 7.6(b) of the
21 Concession Agreement and allege that: "The City
22 will not discriminate between tickets issued for
23 metered parking violations and tickets issued for
24 other parking violations or between tickets issued



1 by the City and tickets issued by the Concessionaire
2 pursuant to section 3.2(e). (See second amended
3 complaint at 37.) While consideration of additional
4 submissions and evidentiary inferences may show that
5 there may well be a valid public purpose that will
6 have to be considered for a delegation of police
7 power that is being challenged, the allegations now
8 pled, at least for purposes of a section 2-615
9 motion, sufficiently state a claim. The Chicago
10 Municipal Code section 9-64-220(b) does not provide
11 an adequate basis for dismissal of any claim in the
12 second amended complaint on the present record and
13 on a section 2-615 motion. See City Comptroller's
14 Memorandum at 14. According to the City
15 Comptroller, dismissal of the claim alleged against
16 the Concessionaire because it is involved in
17 enforcing the City's traffic laws is appropriate
18 because a traffic control aide can issue a ticket
19 under the Code provision and in doing so "need only
20 determine whether a vehicle is in a legal spot,
21 whether the vehicle is in the spot during posted
22 parking hours, and whether the operator of the
23 vehicle has paid the required parking fee." This
24 contention is unpersuasive on the record for



1 purposes of a section 2-615 challenge to dismiss
2 plaintiffs' claims relying on sections 3.2(e) and
3 7.6(b) of the Concession Agreement. (See second
4 amended complaint at paragraphs 37 to 40; City
5 Comptroller's Memorandum at 14.)

6 Moreover, plaintiffs alleged in the second
7 amended complaint at section 14.3 of the Concession
8 Agreement "unlawfully conditions the use of the
9 City's Reserved Powers - i.e., its ordinary police
10 powers over the public streets and ways - upon
11 payment of compensation to the Concessionaire. The
12 City must, therefore, pay for the right to use its
13 police powers instead of ordinarily, properly, and
14 freely exercising them for the public's health,
15 safety, and convenience." (See second amended
16 complaint at 41.) Second amended complaint also
17 contains an allegation that under section 14.3 "if
18 the City eliminates any significant parking spaces
19 to facilitate expanded sidewalks for pedestrian use
20 or allow for express bus or bike lanes and thereby
21 diminishes the fair market value of the
22 Concessionaire Interest, it must pay compensation to
23 the Concessionaire, notwithstanding that any such
24 action may be taken for the public health, safety,



1 and convenience. If the City is without funds to
2 take such action, this exercise of the police power
3 would be barred under the Concession Agreement."

4 (See second amended complaint at 49.) The City
5 Comptroller's explanation that "section 14.3 is a
6 form of financial obligation - not a relinquishment
7 of the City's police powers, which are fully
8 retained as Reserved Powers "is not persuasive to
9 prevail on a section 2-615 challenge to the
10 plaintiffs' allegations.

11 The City Comptrollers' reference to the case,
12 United States Trust Company of New York versus
13 New Jersey, 431 U.S. 1, to support the advanced
14 proposition that the Concession Agreement "is a
15 valid financial obligation" is not determinative on
16 the present record. In reviewing the matter after
17 an evidentiary presentation at the trial court
18 level, the Supreme Court reversed the repeal of a
19 statutory covenant that limited the ability of the
20 New Jersey and New York Port Authority to subsidize
21 rail transportation from certain revenues and
22 reserves which were contracted for pursuant to a
23 bond issue. According to the City Comptroller, the
24 Court found that the contract entered into with the



1 bondholders to be a financial obligation and not a
2 violation of the State's reserve powers. On the
3 present submissions and record developed so far,
4 this Court cannot determine as a matter of law that
5 the pertinent provisions of the Concession Agreement
6 that plaintiffs object to constitute merely a
7 financial obligation as the City Comptroller
8 suggests and that such a characterization renders
9 plaintiffs' claims legally deficient for the reasons
10 argued by the City Comptroller.

11 Plaintiffs also refer to other provisions in
12 the second amended complaint that they claim violate
13 the public purpose provision of Article VIII Section
14 1(a) of the 1970 Illinois Constitution. In
15 referring to Section 3.1(a) in their second amended
16 complaint, plaintiffs state that:

17 The City shall at all times during the Term,
18 defend (i) its lawful right to impose fees and
19 charges for the privilege of parking motor vehicles
20 in Metered Parking Spaces and to impose and collect
21 fines for violations of parking rules and
22 regulations related to Metered Parking Spaces and
23 (ii) the rights granted to the Concessionaire
24 hereunder, or any portion thereof, against any



1 Person claiming any interest adverse to the City or
2 Concessionaire in the Metered Parking System, or any
3 portion thereof, or the Reserved Powers of the City,
4 except where such adverse interest arises as a
5 result of the act, omission, negligence, misconduct,
6 or violation of the law of the Concessionaire, its
7 affiliates, or their respective representatives.

8 (See second amended complaint at 25; see also
9 Concession Agreement at 3.1(a)).

10 City Comptroller -- the City Comptroller's
11 contention that Section 3.1(a) contains "things that
12 the City would do even if the provision did not
13 exist, precisely because doing them is in the public
14 interest," is not convincing for purposes of
15 striking the entire provision, particularly since
16 the provision appears to refer to defending the
17 rights granted to the Concessionaire. (See City
18 Comptroller's Memorandum at 10.) The allegations
19 referring to the Concessionaire in 3.1(a) are
20 sufficient to withstand the section 2-615 motion to
21 dismiss. (See second amended complaint at 25.)

22 Plaintiffs also allege that "The City is
23 further obligated by the terms of the Concession
24 Agreement to use public funds in order to reimburse



1 the Concessionaire for lost maintenance, repairs,
2 and expenses in relation to the parking metered --
3 the private parking meters," and refer to section
4 4.6 of the Concession Agreement. (See second
5 amended complaint at 26.) The reference to section
6 4.6 to support the allegation of the use of public
7 funds for the maintenance of private parking meters
8 is insufficient. Plaintiffs do not state an
9 adequate factual obligation for the proposition in
10 paragraph 26 of the second amended complaint that
11 public funds are being used to maintain the City's
12 parking meters, and section 4.6 appears to pertain
13 to certain parking lots that are not alleged to have
14 been transferred under the Concession Agreement.
15 The reference to Section 4.6 in paragraph 26 is
16 stricken.

17 Plaintiffs' allegation that Section 7.6(b)
18 obligates the City "to spend public funds to enforce
19 parking meter tickets issued by CPM as if the
20 tickets were issued by the City" is not stricken for
21 the reason argued in the motion. The statement
22 appears to relate to the preceding allegations
23 referred to in Section 7.6(a), but seems to involve
24 the actions of the Concessionaire under its claimed



1 rights under the Concession Agreement. (See
2 section -- see second amended complaint at 27.)

3 The City Comptroller refers to the decision in
4 the case, Poole versus the City of Kankakee, 406
5 Illinois 521, and quotes from the decision the
6 proposition that "It can no longer be doubted that
7 the regulation of streets and traffic is in the
8 interest of public health, safety, welfare,
9 convenience, and necessity, and thus for a public
10 purpose." (See City Comptroller's Memorandum at 5,
11 9, and reply at 8; see also Poole 406 at 523 to
12 528.) Nonetheless, the Poole case does not provide
13 support for dismissal of the entire second amended
14 complaint under the standards of a section 2-615
15 motion. (See City Comptroller's Memorandum at 5, 9,
16 and reply at 8; and see also Poole 406 Illinois at
17 523 to 524 and indicating that the matter was
18 decided after "evidence was heard."

19 Further, the City Comptroller's reliance on the
20 Adamowski versus Chicago Railroad Authority,
21 14 Illinois 2d 230, for the contention that all of
22 the allegations at issue are factually or legally
23 insufficient because a public purpose can be found
24 "in a relief of traffic conditions" is not



1 convincing. (See City Comptroller's Memorandum at
2 5.) The Adamowski case involved a challenge to the
3 Railroad Terminal Authority Act which provided for
4 the creation of a municipal agency to redevelop
5 railroad terminal areas and facilities. The
6 legislation was not considered to be a violation of
7 a public purpose even though certain private
8 railroad companies may have derived a benefit. (See
9 Adamowski, 14 Illinois 2d at 234 to 236 indicating
10 that the "Authority will own and operate the
11 facilities; the railroad companies will be its
12 lessees. These circumstances neither neutralize nor
13 destroy the public purpose and public use that the
14 General Assembly has found to exist.") The
15 Concession Agreement here involves the City and the
16 Concessionaire, a private entity, rather than an
17 entity created by legislative enactment that
18 operated under that legislation. Moreover the City
19 Comptroller's assertions with respect to the public
20 purpose and benefits do not have convincing support
21 in the record that has been presented thus far to
22 allow for the findings under the Adamowski decision.
23 (See Adamowski 14 Illinois 2d at 234 to 236; see
24 also City Comptroller's Memorandum at 9.)



1 The City Comptroller's reference to the
2 decision in Paschen, 73 Illinois Appellate 3d 1023,
3 for the proposition that "where a public purpose is
4 apparent from the facts alleged in the complaint or
5 in the exhibits to the complaint," the complaint may
6 be dismissed pursuant to 735 ILCS 5/2-615 is not
7 controlling based upon the allegations and claims in
8 the second amended complaint. (See City
9 Comptroller's Memorandum at 6 and 7.) A pertinent
10 issue in the Paschen case that is raised by the City
11 Comptroller's submissions involves whether the
12 allowance of an alley for access to a bank facility
13 violated, among other matters, the public purpose
14 provision of Article VIII Section 1(a) of the 1970
15 Illinois Constitution. The First District noted
16 that there was merely a conclusion alleged that the
17 bank was given "special rights" and there was "no
18 factual allegation showing how the public interest
19 will not continue to be served" in view of the
20 access to the alley simultaneously by bank
21 customers. (See Paschen at 1029.) On the other
22 hand, the well-pled allegations in the second
23 amended complaint involve the consideration of an
24 agreement more than a hundred pages in length



1 containing more than 150 provisions and covering a
2 duration significant in length, that comprises a
3 purported transaction involving over \$1.1 billion.
4 For purposes of review of a section 2-615 challenge,
5 the underlying factual basis for the claims alleged
6 in the pleading has not been shown to be similar to
7 the conclusions pled in the Paschen case.

8 Other authority also referred to by the City
9 Comptroller to challenge the claims alleged in the
10 second amended complaint appear to have been decided
11 on a different and more developed record. (See for
12 example, in re Marriage of Lappe, 176 Illinois 2d at
13 426 to 432 indicating that reports were considered
14 on the constitutionality of certain provisions of
15 the Public Aid Code; Empress Casino Joliet
16 Corporation versus Giannoulis, 231 Illinois 2d 62,
17 and 74 to 76 considering the constitutionality of
18 legislation pursuant to summary judgment motion
19 practice. Crain Enterprises, Inc. versus City of
20 Mound City, 189 Illinois Appellate 3d 130 involved
21 the validity of municipal ordinances pursuant to
22 trial proceedings; Cremer versus Peoria Housing
23 Authority, 399 Illinois 579 reviewing the
24 constitutionality of legislation after a joint



1 answer was filed and pursuant to "a hearing on the
2 merits."

3 Notwithstanding the factual sufficiency of
4 certain allegations in the second amended complaint,
5 plaintiffs have referred to certain authority in
6 their submissions that, although instructive, is not
7 necessarily determinative on all the matters raised
8 in this section 2-615 motion practice. For example,
9 although finding no public benefit in the case, The
10 Southwestern Illinois Developmental Authority versus
11 National City Environmental LLC, 199 Illinois 2d 225
12 and 236 to 238, the Court was reviewing an eminent
13 domain proceeding involving property to be given to
14 a private facility to expand its parking. It has
15 not been demonstrated that such a factual situation
16 is similar to the allegations at hand that have been
17 pled so far in the second amended complaint.

18 Moreover, in the O'Fallon case, after noting that a
19 city may lease or license the use of its property,
20 found that following the -- allowing the corporate
21 logo to remain on the City's water tower served no
22 public purpose and was used solely to serve as
23 advertising for private gain to the private entity.
24 The factual situation alleged here has not been



1 shown to be sufficiently similar to the record
2 reflected in the O'Fallon decision. In another
3 case, State of Kansas versus Hutchinson, 144 Kansas
4 700, a company installed traffic signs without
5 expense to the City but offered advertising space
6 for rent on them without any indication that the
7 City participate in the revenues received and the
8 advertising sides of the structures were found to
9 have "no relation to the public interest," but were
10 "designed to divert attention of street
11 users' street uses." (See 144 Kansas at 702.) Here
12 the contention is that the Concessionaire paid the
13 City in advance \$1.1 billion and agreed to maintain
14 the parking meters under the terms of the Concession
15 Agreement, and there is no allegation that any
16 private feature of the parking meters that were
17 transferred "obstructs the free use" of the roads
18 "for traffic purposes." (See Hutchinson at 702 to
19 703.)

20 Additionally, the City Comptroller contends
21 that count 1 fails to state a cause of action "even
22 if plaintiffs were entitled to a declaration that
23 the Concession Agreement is illegal," because this
24 determination would not provide any support for an



1 injunction against "the City's expenditure of funds
2 to enforce and maintain the parking meters system."
3 (See City Comptroller's Memorandum at 22.) However,
4 according to the prayer for relief in the second
5 amended complaint and the Court's rulings herein, it
6 does not appear that the relief being sought is as
7 broad as the City Comptroller suggests. (See second
8 amended complaint and prayer for relief at (b)).

9 It is hereby ordered, based upon the forgoing,
10 the party's submissions, and the applicable law,
11 that:

12 Defendant City of Chicago City Comptroller's
13 motion to dismiss pursuant to 735 ILCS 5/2-615 is
14 granted in part and denied in other respects. Any
15 allegation and claim directed to the City that it is
16 spending public funds in violation of Article VIII
17 Section 1(a) of the Illinois Constitution because
18 the City's personnel and offices issue and process
19 tickets to persons for failing to comply with the
20 City's parking rules and regulations under the
21 allegations that refer to Section 7.6(a) of the
22 Concession Agreement do not constitute a legally
23 sufficient cause of action to support the relief
24 requested, particularly the injunctive relief. That



1 claim that seeks to enjoin the City from using funds
2 in order for its police and other personnel to issue
3 tickets and process tickets to enforce its parking
4 laws that are in effect and were in effect prior to
5 the Concession Agreement, and/or were in effect
6 prior to the Concession Agreement, was entered into
7 is stricken. The allegation in paragraph 26 of the
8 second amended complaint directed to the City's
9 reimbursement of the Concessionaire under section
10 4.6 of the Concession Agreement for maintenance
11 costs for any parking lot that the City owns and was
12 not designated as part of the Concession Parking is
13 stricken since it does not support a claim that
14 there is -- that there are public funds being used
15 for the maintenance of the parking meters in
16 violation of Article VIII Section 1(a) of the
17 Illinois Constitution. The remaining aspects of the
18 motion as directed to the second amended complaint
19 are denied.

20 You may prepare an order.

21 MR. KRISLOV: We will, your Honor. One thing
22 that we had done as part of our filing, we had
23 included or -- thank you very much. We had also
24 included a proposed third amended complaint which



1 added the paragraph 51 dealing -- which I think it
2 would be upheld as, under your ruling, because that
3 deals with the Concessionaire's -- the City's
4 obligation to compensate the Concessionaire if the
5 boot number was increased above three tickets and if
6 the fines were reduced to less than ten times rates,
7 I would ask for leave to file the third amended
8 complaint.

9 I don't think that that'll change the outcome
10 of your ruling, and I think the City, while I'm sure
11 they don't agree with -- I'm sure they'll find that
12 they agree eventually with your ruling, but I don't
13 think that they will object to allowing us to file
14 the third amended complaint and treat it in respect
15 as governed by your ruling, as I think your ruling
16 would not change under that.

17 MR. HANSCOM: Judge, I take it as a part of
18 this order we would be filing an answer within a
19 certain number of days.

20 THE COURT: That's what I -- that was my next
21 comment, was that I'd like to get an answer on file,
22 and then we can move forward with a date in the
23 future where we can set some type of reasonable case
24 management order and on the matters that would



1 remain.

2 MR. IOPPOLO: Your Honor, we still had --

3 THE COURT: I just wanted to follow up.

4 Again --

5 MR. HANSCOM: Maybe what we could do, Judge, is
6 I think counsel is probably right. I mean, how
7 about if we put it down that we would be filing an
8 answer to the third amended complaint --

9 THE COURT: That's what I was going to propose.

10 MR. HANSCOM: -- and if for some reason in
11 studying that we find there's a problem with that
12 one change, I guess we could just reserve leave to
13 bring that up, but -- just because I haven't been
14 able to think it through, but I think counsel's
15 probably correct. So we could just do an answer to
16 the third amended complaint --

17 THE COURT: And the provisions dealing with the
18 required -- the aspects of my ruling today. You can
19 plead it for repeal for review purposes, but insofar
20 as those allegations, to the extent the claim is
21 based on those allegations that focus on the City's
22 personnel, its personnel and offices in issuing
23 tickets, those matters would not necessarily have to
24 be answered --



1 MR. KRISLOV: Right.

2 THE COURT: -- under 7.6(a), I believe.

3 MR. KRISLOV: They would -- I think that for
4 completion we should leave the complaint as it is.

5 THE COURT: That's what I'd like to do, and I'd
6 like to get an answer on file in due course from the
7 City --

8 MR. KRISLOV: Right.

9 THE COURT: -- and then we can proceed. That's
10 what I -- that would be the most economical and
11 efficient, I think.

12 MR. HANSCOM: That sounds fine. If -- then the
13 only thing would be making sure we agree about which
14 ones are the ones that are out so that in our answer
15 we could --

16 MR. KRISLOV: Right, although I think in their
17 answer they can just indicate which ones, I think --
18 I mean, that's the usual course to say pursuant to
19 the Judge's ruling, we do not have to answer this
20 paragraph because it's been stricken. I mean --

21 THE COURT: And with respect to the one
22 specific area, 7.6(a), and the allegations and
23 claims that are based on the City issuing its --
24 using its personnel and its offices to issue tickets



1 and process those tickets.

2 MR. HANSCOM: That sounds, fine, Judge.

3 THE COURT: All right, now, I'm sorry.

4 MR. IOPPOLO: And --

5 THE COURT: Excuse me. And then there's the
6 reference in, to paragraph, I believe it's 26, which
7 refers to a provision in the Concession Agreement,
8 to the extent there is a continuing obligation on
9 the City to maintain the parking meters under the
10 Agreement that can still be replead.

11 MR. KRISLOV: Okay.

12 THE COURT: All right, but what can't -- as it
13 now stands is a reference to 4.6 that deals with
14 parking lots --

15 MR. KRISLOV: Right, garages.

16 THE COURT: -- that don't support the
17 allegation, all right, now, if the contention is
18 actually what's argued in the brief --

19 MR. KRISLOV: Right.

20 THE COURT: -- not alleged --

21 MR. KRISLOV: Understood.

22 THE COURT: -- that the City spent money to do
23 some repairs in the past when the agreement was put
24 into effect, that may be a different analysis 'cause



1 that occurred already.

2 MR. KRISLOV: Right.

3 THE COURT: And the relief I'm being asked to
4 entertain is declaratory injunction going forward.

5 Now, to the extent there may be a claim that
6 somebody alleged for reimbursement, I don't know
7 that -- that has not been pled nor is that
8 factually -- for expenditures that the City incurred
9 in maintaining the parking meters that they
10 transferred, all right, pursuant to the Concession
11 Agreement, that has not been pled, because that
12 wouldn't come within the declaratory or injunctive
13 relief, that would be seeking some kind of
14 reimbursement.

15 But in any event, what has been pled, though,
16 with respect to 4.6 is as referenced in paragraph 26
17 is, is stricken.

18 MR. KRISLOV: Gotcha.

19 MR. HANSCOM: So then would we be filing an
20 answer to the third amended complaint that was
21 already tendered with the brief?

22 MR. KRISLOV: Yes. If we're -- probably more
23 on just constructive art and pleading, if what we do
24 maintain, if we're going to allege that there's a



1 reimbursement with respect to the meter system,
2 we'll just add paragraphs and propose to add them in
3 a fourth amended complaint or something like that.
4 So we can answer the third amended complaint as
5 dealt with by the Judge's ruling, and then if we're
6 going to allege more with regard to maintenance of
7 meters in the complaints, we'll pose it as a --

8 THE COURT: We can entertain that at a case
9 management conference.

10 MR. KRISLOV: Right.

11 THE COURT: When do you think you can get the
12 third amended on file? 7 days or?

13 MR. KRISLOV: No, no, it was too late to file
14 it today, but actually it's an attachment to our
15 brief, so we can file it tomorrow.

16 THE COURT: All right. Well, then take the
17 time you need to respond to it, and then what I'd
18 like to do is within 7 days after -- 7 to 10 days
19 after that filing to hold the case management
20 conference and hopefully the two offices will have
21 conferred prior to that anyway, and that way I can
22 address certain matters. That's what I'd like to
23 do, so take the time you need to respond to it and
24 then -- by way of the answer, all right.



1 MR. KRISLOV: 7 to 10 days after the --

2 THE COURT: Well, within 7 days after the
3 answer so I can hold a case management conference
4 in --

5 MR. IOPPOLO: Our motion, Judge, on the state
6 defendants, our motion -- I'm substituting for other
7 people in my office, I'm sorry, but I think you had
8 deferred the briefing on the State Comptroller's
9 motion to dismiss. Is there any way we could have a
10 status hearing maybe before we decide what to do
11 with that or?

12 THE COURT: Well, if you would like to talk to
13 counsel and set a date either prior to or we'll deal
14 with it at the case management conference.

15 MR. IOPPOLO: So my colleagues can at least get
16 this ruling and see what --

17 THE COURT: I don't know if it's been briefed
18 yet anyway. I think there's just a motion.

19 MR. KRISLOV: The State filed its motion and
20 we've got the response so we can deal with that in
21 the case management.

22 THE COURT: Either that or confer, you know,
23 prior to and send over an order, or I'll address it
24 at the case management conference.



1 MR. IOPPOLO: I think at the case management is
2 fine.

3 THE COURT: I trust that we'll get an answer on
4 file, and then we can proceed accordingly. All
5 right.

6 We'll set the case management conference at
7 10 o'clock, if that's reasonable for the offices.

8 MR. IOPPOLO: What date?

9 MR. KRISLOV: We have to figure it out.

10 MR. IOPPOLO: Okay, thank you.

11 MR. KRISLOV: Okay, they would like
12 December 16th for their answer. That's fine with
13 us.

14 THE COURT: Why don't we try to do a case
15 management December 21st, if we can.

16 MR. IOPPOLO: Okay.

17 THE COURT: If that's reasonable, at
18 10 o'clock.

19 MR. HANSCOM: That sounds fine.

20 MR. KRISLOV: Sure.

21 MR. HANSCOM: Thank you, Judge.

22 MR. KRISLOV: Thank you, your Honor.

23 (WHICH WERE ALL THE PROCEEDINGS HAD
24 IN THE ABOVE-ENTITLED CAUSE ON THIS



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1 STATE OF ILLINOIS)
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5 I, ELIA E. CARRION, a Certified Shorthand
 6 Reporter of the State of Illinois, do hereby certify
 7 that I reported in shorthand the proceedings had at
 8 the hearing aforesaid, and that the foregoing is a
 9 true, complete and correct transcript of the
 10 proceedings of said hearing as appears from my
 11 stenographic notes so taken and transcribed under my
 12 personal direction.

13 IN WITNESS WHEREOF, I do hereunto set my
 14 hand at Chicago, Illinois, this 8th day of
 15 November, 2010.

16
 17
 18 Certified Shorthand Reporter

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 20 C.S.R. Certificate No. 084.004641
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