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

INDEPENDENT VOTERS OF ILLINOIS INDEPENDENT PRECINCT ORGANIZATION, and AVIVA PATT Plaintiffs,	)	Case No. 09 CH 28993 Honorable Judge Richard J. Billik, Jr.
v.	)	
AMER AHMAD, City Comptroller, and CHICAGO PARKING METERS, LLC Defendants.	)	

Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment

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Plaintiffs, Independent Voters of Illinois Independent Precinct ("IVI-IPO") and Aviva Patt ("Patt") (collectively "Plaintiffs" or "Taxpayers"), submit this Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment ("Memorandum"), along with Plaintiffs' Undisputed Statement of Material Facts ("SoF"), attached as Separate Appendix I, seeking a declaration that the "Chicago Metered Parking System Concession Agreement dated as of December 4, 2008" (the "Concession Agreement" or the "Agreement"), attached as Separate Appendix II, by and between Defendants City of Chicago ("City") and Chicago Parking Meters, LLC ("CPM" or the "Concessionaire") (collectively "Defendants"), violates the 1970 Illinois Constitution and Illinois law, and in support thereof, state as follows:

INTRODUCTION

The Parties agree that Plaintiffs' taxpayer derivative action, which seeks to challenge the Concession Agreement and enjoin the City's illegal obligations that result there from, presents no disputed material facts and only pure issues of law, so that summary judgment can be appropriately determined at this time. Specifically, Plaintiffs' Sixth Amended Complaint ("Complaint") alleges that the Agreement illegally obligates the City to (1) delegate to CPM, a private company, its non-delegable police power; (2) compensate CPM for permission to exercise its sovereign police power and legislative authority; and (3) expend public funds for CPM's purely private benefit, all in violation of the Illinois Constitution and law.

On November 4, 2010, this Court, on the City's Motion to Dismiss Plaintiffs' Second Amended Complaint ("Motion to Dismiss")[1] upheld these three contentions, with only minor

[1] Plaintiffs' Sixth Amended Complaint is materially identical to Plaintiffs' Second Amended Complaint, only adding allegations related to CPM and an additional paragraph, related to the City's illegal obligations under Section 7.6(c) of the Agreement.

exception. *See* November 4, 2010 Transcript of Proceeding ("Nov. 4, 2010 Trans."), SoF Ex. 6.[2] The Court held the Complaint's assertions sufficiently alleged that the Agreement unlawfully conditions the use of the City's police powers ("Reserved Powers" under the Agreement) on compensation to CPM, unlawfully delegates the authority to issue tickets and regulate traffic and parking to CPM, and violates the "Public Purpose" provision of the Constitution, with respect to the City's obligation to spend public funds to defend the Concessionaire and enforce CPM's enforcement rights. *Id.* at 22:5-10; 24:20; 24:11-18, respectively. By denying the City's Motion to Dismiss, the Court determined that Plaintiffs' Complaint "set forth a recognized cause of action [and] ultimate facts which support[ed] each and every element of th[eir] cause of action", *id.* at 10:10-13, and there are no new issues, facts or law that would warrant a modification of the Court's previous rulings at summary judgment.

Indeed, Defendants do not dispute the factual existence of the Agreement or allege any ambiguity in the text of its terms. SoF ¶¶ 12-29. Further, both the City and CPM admit that the Agreement has obligated, and will continue to obligate, the City to expend public funds and compensate CPM, as the Agreement requires, SoF ¶¶ 15-24; 47-48, so the Agreement is invalid by its terms. In addition to this facial invalidity, Plaintiffs' attached SoF expands on Plaintiffs' earlier allegations and further demonstrates that in actual practice, as well as by its terms, the Concession Agreement is illegal as a matter of law; thus summary judgment should be granted in Plaintiffs' favor.

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[2] The Court only dismissed Plaintiffs' allegations related to Sections 4.6 and 7.6(a) of the Agreement, which Plaintiffs have replead in their Sixth Amended Complaint in order to reserve for appeal. *See* Nov. 4, 2010 Trans., SoF Ex. 6 at 32:12-24; 33:1-19.

ARGUMENT

I. The Summary Judgment Motion Standard

Summary judgment in favor of the moving party is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005; *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). Summary judgment is proper where the parties agree on the relevant facts and the record presents purely questions of law. *J.M. Beals Enter., Inc. v.Indus. Hard Chrome, Ltd.*, 194 Ill. App. 3d 744, 748 (1st Dist. 1990). Although a party opposing summary judgment need not prove his case at the summary judgment phase, he is required to present some factual basis that would arguably entitle him to a judgment in his favor. *Fuentes v. Lear Siegler, Inc.*, 174 Ill. App. 3d 864, 866 (2d Dist. 1988). As Plaintiffs' Motion, Memorandum, SoF and its attached exhibits unequivocally demonstrate the illegality of the Concession Agreement, on its face and in practice, summary judgment should be granted in Plaintiffs' favor.

II. The Court Has Already Determined the Legal Sufficiency of Plaintiffs' Claim and There is No Genuine Factual Dispute About the Operation and Effect of the Concession Agreement, Which Presents Purely a Question of Law

The Court should grant summary judgment in Plaintiffs' favor because the Court has already determined that Plaintiffs set forth a valid cause of action, SoF Ex. 6 at 10:10-13, and the Parties agree that no material issue of fact need to be tried. SoF ¶¶ 37-39. *See Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1070 (1992) (explaining that "(1) a defendant's section 2-615 motion admits the truth of the facts alleged in support of the claim but denies the legal sufficiency of those facts; [and] (2) a defendant's section 2-1005 motion admits the legal sufficiency of the claim but denies the truth of the facts alleged) (citing *Janes v. First*

Federal Savings & Loan Association, 57 Ill.2d 398, 406 (1974)). Since the parties do not dispute the truth of the facts alleged, but rather, agree that Plaintiffs present only a challenge to the Agreement on its face (supplemented by the empirical evidence), *see* December 15, 2011 Status Transcript of Proceeding ("Dec. 15, 2011 Trans."), SoF Ex. 7 at 11:5-7 (CPM suggesting that the Parties "should proceed to summary judgment [because w]e both agree on...that's how the case should be decided."); *see also* October 25, 2010 Transcript of Proceeding ("Oct. 25, 2010 Trans."), SoF Ex. 4 at 16:18-22 (City explaining that "the second amended complaint is basically a facial challenge...So I don't think it's as it's as though we have facts that are really at issue. It's a matter of looking at the terms and seeing whether they are valid or not."), summary judgment is appropriate. *See State Farm Fire and Casualty Co. v. Martinez*, 384 Ill.App.3d 494, 498 (1st Dist. 2008) (when parties desire to file cross-motions for summary judgment, "only a question of law is involved, and [the parties] invite the trial court to decide the issues based on the record" before it.).

Even if Defendants could dispute the facts, which they cannot, "the construction of a statute, ordinance, or constitutional provision is a question of law which is independently determined by the reviewing court." *Harris Bank of Roselle v. Vill. of Mettawa*, 243 Ill. App. 3d 103, 113 (1993) (citing *Monahan v. Village of Hinsdale*, 210 Ill.App.3d 985, 993(1991)). Here, there is no issue of material fact that the text of the Agreement requires the City to: delegate its enforcement functions to CPM, Agrmt. §§ 3.2(e); 7.6(b); compensate the Concessionaire when the City exercises its sovereign authority to control the public streets or otherwise act in the public interest, Agrmt. §§ 14.3; 3.12(e) and Article 7, or whether the City has a duty to expend public funds to enforce CPM's private rights, Agrmt. §§ 3.1(a); 7.6(b), and summary judgment should be granted in Plaintiffs' favor. *See Farm Credit Bank v. Whitlock*, 144 Ill. 2d 440, 447

(1991) (holding that if the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law).

III. Plaintiffs are Entitled to Summary Judgment Because the Concession Agreement Unlawfully Barters Away and Conditions the City's Exercise of its Non-Delegable Police Powers to Regulate and Legislate for the Protection of the Public, as a Matter of Law.

The City's contractual obligations to delegate to CPM its sovereign police powers to regulate the streets and to compensate CPM if it wishes to exercise such power, both on its face, and in effect, is forbidden by the Illinois Constitution and Illinois law. The 1970 Illinois Constitution Article VII § 6(a)'s grant to the City of Chicago, as a home rule municipality, the police power "to regulate for the protection of the public health, safety, morals and welfare", is inalienable and non-delegable; neither a State nor its municipalities may surrender or limit such power. *State Public Utilities Comm'n ex rel. Quincy Ry. Co. v. City of Quincy*, 290 Ill. 360, 365-66 (1919)(rejecting ordinance fixing railway rates for 20 years because it bound future city councils and abdicated legislative discretion); *see also People v. Robertson*, 302 Ill. 422, 427 (1922) (proclaiming that the police power is one which "is inherent in the State and which the State cannot surrender."). Nor can the City "barter away the right to use the police power, [or] by any contract divest itself of the power to provide for acknowledged objects of legislation falling within [its] domain." *City of Quincy*, 290 Ill. at 365-66 (holding the general police power possessed by the city is a continuing power" and that even "[t]he ***discretion*** of the Legislature cannot be parted with, any more than the power itself.")(Emphasis added.)

"The power to control public streets and to provide for the adjustment of conflicting rights and interests therein is a police power." *People by Attorney Gen. of State v. Barbuas*, 230 Ill. App. 560, 570 (Ill. App. Ct. 1923). "State or municipal power to control and regulate the streets is in trust for the general public...and neither the State, nor the municipality can divest

itself of this trust." *Vill. of Lake Bluff v. Dalitsch*, 415 Ill. 476, 485 (1953) (upholding a de minimis dedication of side roadway excluding auto use); *see also O'Fallon Dev. Co. Inc. v. City of O'Fallon*, 43 Ill.App.3d 348, 353 (5th Dist. 1976)(holding all municipal property is "held for the welfare and benefit of its inhabitants, and is, in this sense, public property."); *Village of Oak Park v. Flanagan*, 35 Ill.App. 3d 6,10 (1st Dist. 1975) (explaining it is the duty of the city "to regulate the use of the streets and traffic upon them to prevent the obstruction of them")(citing *City of Chicago v. McKinley*, 344 Ill. 297 (1931)).

As such, the state may not alienate its sovereign power to control public streets in the public interest through a statute. *See North Park Public Water Dist. v. Village of Machesney Park*, 216 Ill.App.3d 936, 940 (1990) (holding even the franchise rights of utilities cannot limit the City's police power over the public streets and such lines must be moved at the utility's expense) (citing *Rosemont Bldg. Supply, Inc. v. Illinois Highway Trust Auth.*, 45 Ill. 2d 243, 253-54, (1970)). It follows that the "power of the city to protect the public in the use of its streets cannot be abrogated by ordinance[,] relinquished by contract", or conditioned on compensation. *Peoples Gas Light & Coke Co. v. Chicago*, 413 Ill. 457, 465-66 (1953) (rejecting a gas company's attempt to require the city of Chicago to reimburse it for the removal and relocation costs of its facilities, resulting from the city's construction of an initial subway system)(citation omitted).

Plaintiffs unequivocally demonstrate that the Concession Agreement's surrender of the City's inalienable police power is impermissible on its face and even more egregious in practice.

A. The Plain Terms of the Agreement Illegally Delegate the City's Non-Delegable Powers, in a Vast Variety of Ways

i. Sections 3.2(e) and 7.6(b) of the Agreement Impermissibly Delegate the City's Non-Delegable Police Power to Regulate the Public Way

The Agreement's delegation of control over the City's real enforcement power, Agrmt. §3.2(e) and 7.6(b), impermissibly limits the City's authority and is invalid on its face. Defendants do not dispute that Section 3.2(e) of the Concession Agreement delegates to CPM the right to actually exercise the City's law enforcement powers: *e.g.* to, "issue parking tickets or citations for violations of the parking rules and regulations with respect to the Concession Metered Parking Spaces and Reserved Metered Parking Spaces". Agrmt.§ 3.2(e); City Ans., SoF Ex. 2 at ¶¶ 12, 36; CPM Ans., SoF Ex. 3 at ¶¶ 12, 36. Nor do they dispute that Section 7.6(b) mandates that the City must enforce CPM-issued tickets as its own: *e.g.* the City "will not discriminate between tickets issued...by the City and tickets issued by the Concessionaire pursuant to Section 3.2(e)." Agrmt. § 7.6(b), City Ans., SoF Ex. 2 at ¶ 37; CPM Ans., SoF Ex 3 at ¶ 37. The City also concedes that the regulation of parking vehicles is a "police power", *see* 625 ILCS 5/11-208, SoF ¶ 8 (referring to "regulating the standing or parking of vehicles" as a "police power"), and the Court has already rejected the City's argument that this is an appropriately delegated function. *See* Nov. 4, 2010 Trans., SoF Ex. 6 at 20:14-24; 21:1-5, (rejecting City's argument that Section 3.2(e) appropriately delegates only a limited "ticket[ing] aide" function rather than the City's legislative authority because CPM or its agents "need only determine whether a vehicle is in a legal spot,...during posted hours, [and] has paid the required parking fee.").

A declaration of Sections 3.2(e) and 7.6(b)'s invalidity is therefore appropriate because such delegation of authority to regulate and prevent the obstruction of City streets and traffic must remain unencumbered in order to promote public safety, welfare and convenience. *See Flanagan*, 35 Ill.App. at 10 (holding it is the duty of the city "to regulate the use of the streets

and traffic upon them to prevent the obstruction of them")(citation omitted). Indeed, by permitting CPM to issue parking tickets and citations, the Agreement has contractually limited the City's ability to best protect and serve the public interest, rendering the plain terms of the Agreement invalid as a matter of law. *See Peoples Gas*, 413 Ill. at 466 (holding that the "power of the city to protect the public in the use of its streets cannot be abrogated by ordinance or relinquished by contract", in any way that derogates the city's police power).

ii. Section 14.3 and Article 7 of the Agreement Impermissibly Impede the City's Exercise of its Police Power by Conditioning the City's Exercise of Its Legislative Powers Upon Compensation to CPM

Section 14.3 and Article 7's obligations that the City compensates CPM for exercising its inherent legislative authority constrain the City's legislative discretion and are also invalid on their face. Section 14.3 of the Agreement expressly provides that "the provisions of Article 7, including the provision there relating to the payment of Settlement Amounts by the City, are designed to ***compensate the Concessionaire for changes resulting from the exercise by the City of its Reserved Powers*** in a manner that will maintain the fair market value of the concessionaire Interest over the Term". Agrmt. § 14.3 (emphasis added). The City admits that the Agreement's reference to "reserved powers" reflects the City's ordinary exercise of its police powers, *see* Oct. 25, 2010 Trans., SoF Ex. 4 at 11:15-18, and does not dispute that the Agreement requires the City to compensate CPM if it seeks to utilize its "reserved powers", SoF ¶¶ 15-24, thereby admitting that the Agreement conditions the City's police powers over the streets on its ability to compensate the CPM.

On its face, the Agreement also requires the City to compensate CPM if the City, in the public interest, makes any adjustments to the parking meter system, such as by:

- permitting competing parking facilities, Agrmt. §3.12;

- changing meter rates or times of operation, Agrmt. §7.8;
- removing meters, Agrmt. §7.10;
- temporarily or permanently closing meters, Agrmt. §7.10; or
- exempting certain individuals from paying Metered Parking Fees otherwise applicable to members of the general public. Agrmt. §7.11.

The Agreement also requires compensation to the Concessionaire if the City desires to amend its enforcement rules and regulations in the public interest, such as by:

- increasing the number of tickets, above three, before a vehicle is eligible for immobilization, Agrmt. §7.6(c); or
- lowering the fine and penalty charges to less than ten times the then weighted average hourly Metered Parking Fee, Agrmt. §7.6(c).

The Agreement further requires compensation for any action, such as a "Parking Tax Imposition Increases", which result in "Adjustments to Revenue Values", Agrmt.§ 7.8, in the form of a quarterly "City Settlement Payment." Agrmt. § 7.5.

Thus, in addition to Sections 3.2(e) and 7.6(b)'s pure delegation of police powers, summary judgment is appropriate because the Agreement's compensation obligations, described *supra*, impermissibly force the City and its legislators to consider the cost that the Agreement will impose on every City decision, effectively constraining the City's authority to legislate in the public interest. *See State Public Utilities Comm'n ex rel. Quincy Ry. Co. v. City of Quincy*, 290 Ill. 360, 365-66 (1919)(invalidating ordinance binding future city councils for 20 years because it surrendered the legislature's discretion).

As addressed in *City of Quincy*, such contemplation and consideration, as to how the effect of City legislation would require compensation to a private entity, is an abdication of legislative discretion and invalid as a matter of law:

> the Legislature cannot surrender or limit such powers, either by affirmative action or by inaction, or abridge them by any grant, contract or delegation whatsoever. ***The discretion of the Legislature cannot be parted with, any more than the power itself***...Thus the general police power possessed by a city is a continuing power, and is one of which a city cannot divest itself, by contract or otherwise."

290 Ill. 360 at 356-66 (emphasis added).

Similarly, as addressed in *Peoples Gas*, the City's ostensible reservation of its "reserved power" is equally meaningless if only exercisable based on the City's ability to compensate a private party:

> If the city could not change the grade or the width of its streets, ***except upon condition that it make compensation to the railway company***...and other companies occupying the streets under a contract with the city, for inconvenience and expense thereby occasioned, the duty of the city to protect the public in its use of the streets, and from time to time, as the community develops, to keep the streets in such condition as will accommodate public safety and convenience, would be seriously interfered with. All corporations thus occupying the streets take their grants from the city upon the condition that the city has reserved to it the ***full and unconditional power*** to make any reasonable change...in its streets, as the public necessity and convenience demand.

Peoples Gas, 413 Ill. at 465 (emphasis added); *People ex rel. City of Chicago v. Chicago City Ry. Co.*, 324 Ill. 618, 623-24 (1927)(same);[3] *see also North Park*, 216 Ill.App. at 941 (holding that the water district was not "entitled to compensation for the cost of relocating its mains").

As in *Peoples Gas*, the express terms of the Agreement, which "anticipate that the City will exercise its Reserved Powers", Agrmt. § 1.43, impermissibly requires the City to consider its ability to compensate CPM, before it can legislate "for the protection of the public health, safety,

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[3] As in the present case, in *Chicago City Ry. Co.*, Defendant private rail company recognized that by its reserved power, "the city ha[d] the power to compel the relocation and removal of its tracks to the new location," but similarly argued these reserved powers could only be exercised by the city's eminent domain authority, thus requiring compensation. 324 Ill. at 623-24. The Illinois Supreme Court flatly rejected defendant's argument.

morals and welfare". Moreover, the Agreement then conditions the City's legislative authority, on its ability to make considerable[4] payment to CPM, only permitting the exercise if such payment can be made. *See* Agrmt §14.3 and Art. 7. Therefore, on its face, the terms of the Agreement illegally bind the City to fixed meter parking rates, times and hours of operation, unless the City is able and willing to compensate CPM. *See City of Danville v. Danville Water Co.*, 178 Ill. 299, 313 (1899) (holding that the city's ordinance "cannot be construed to authorize [the city] to make a contract to pay a fixed rate for a supply of water" because "common council...cannot restrict and curtail the legislative powers of succeeding common councils"). Such a delegation of discretion surrenders the City's sovereign authority and is impermissible as a matter of law. *See Poole v. City of Kankakee*, 406 Ill. 521, 535-36 (1950)(holding that if the city failed to reserve to itself a wide discretion it would have been impermissibly bound); *City of Quincy*, 290 Ill. at 366 ("[t]he discretion of the Legislature cannot be parted with, any more than the [police] power itself.").

B. The Actual Effect of the Agreement's Delegation and Compensation Obligations Prevent the City From Acting In the Public Interest

On October 25, 2010, the Court expressed its interest and concern as to whether the City's new obligations under the Agreement would *actually affect* the City's legislative decisions and exercise of its police power. *See* Oct. 25, 2010 Trans., SoF Ex. 4 at 3:4-24. Finding this possibility "relevant", the Court inquired whether "the City would consider expanding or removing parking meters...for whatever reason...[and would] have to take into consideration [the compensation] provision of the agreement that it would not have to if not for its insertion in

[4] Indeed, these compensation costs are substantial and deterring. Those that trigger "Revenue Value Adjustments" under Article 7 of the Agreement require the City to replace the revenue lost each quarter. Others, that under Section 14.3, cause adjustments to the fair market value of the Agreement essentially require the immediate payment of a lump sum representing the 75-year present value of the change.

the agreement." *Id.* Plaintiffs unequivocally demonstrate, by the real life experience in the period since the Agreement has been in effect, the validity of the Court's concern, that the Agreement's actual effects on the City's legislative authority are real and profound, and dispel any contention that the Agreement's "reserved powers" could possibly protect its sovereign authority.

i. In Effect, Sections 3.2(e) and 7.6(b) of the Agreement Limit the City's Ability to Enforce Public Safety Over the Streets in the Public Interest

The Court's previous recognition that the Agreement, on its face, contracts away more than merely the City's enforcement powers, *see* Nov. 4, 2010 Trans., SoF Ex. 6 at 20:14-24; 21:1-5, is further reinforced by the experiences under its operation, which, in effect, demonstrate that the Agreement also surrenders the City's ability to regulate and promote the streets in the public interest. SoF ¶¶ 37-80.

In addition to the fundamental invalidity of Sections 3.2(e) and 7.6(b)'s facial delegation of the City's police powers, problems result under the Agreement's execution when CPM and the City dispute the scope of each other's authority to regulate the meter system. *See e.g.* May 4, 2010, CPM CEO Dennis Pedrelli ("Pedrelli") Ltr. to City Corporation Counsel ("Corp. Counsel"), SoF Ex. 8 (informing the City that "the City's behavior with respect to Enforcement has interfered with the exercise of [CPM's] rights under Section 3.2(e)" and that the "Agreement does not provide that the Concessionaire requires the City's authorization to conduct Enforcement). CPM's ability to declare the *City*'s *authority* an "interfere[ence]", evidences the Agreement's illegal delegation of the City's sovereign authority. *See Chicago City Ry. Co.* 324 Ill. at 624 (holding that a municipality cannot surrender its authority to "control and regulate its streets").

Additional problems occur when CPM's lack of compliance with its contractual obligations under the Agreement *create* public safety and regulation issues. *See* Mar. 24, 2009,

Department of Revenue ("DoR") Director Bea Reya-Hickey ("Reya-Hickey") Ltr. to Pedrelli, SoF Ex. 9 (highlighting various defaults in CPM's enforcement, such as CPM's failure to equip enforcement personnel with GPS and communications devices); *see also* Nov. 24, 2009, DoR Managing Deputy Director Matt Darst ("Darst") Ltr. to Pedrelli, SoF Ex. 10 (notifying CPM that "CPM is not in compliance with … all local, state and federal vehicle licensing regulations."). Indeed, the City's inability to ensure CPM's compliance with even state and federal licensing regulations, threatens the City's obligation to "to regulate for the protection of the public health, safety, morals and welfare", Ill.CONST. art. VII, § 6(a), and to preserve the streets for the public trust. *See Dalitsch*, 415 Ill. at 485-86 (holding that municipalities, by virtue of their authority to regulate their streets, may legislate concerning the use of such streets, and any contract which surrenders this police power is invalid.).

ii. In Effect, Section 14.3 and Article 7 Relinquish the City's Legislative Discretion and *Prevent* the Execution of Publicly Beneficial Actions

As a result of the Agreement, virtually every change in the parking system anywhere in the City must be determined, not by what is in the public interest, but by what will trigger the City's obligation to compensate CPM, the amount of compensation, and the City's ability to pay within its appropriated budget. *See* SoF ¶¶ 46-80. For example, City Alderman have frequently been instructed that their request for changes (such as to eliminate a meter, increase or decrease rates in a certain location or add to handicap parking spaces) will have "significant financial detrimental effect to the concessionaire", which the City will have to appropriate for, so "careful decisions" will have to be made. December 3, 2008 City Hall Council Chambers Meeting Transcript ("Council Chambers Trans."), SoF Ex. 22 at 49:13-17; *see also* Draft ltr from Chairman Burke to City Alderman, SoF Ex. 23 (explaining the City Alderman's legislative authority to implement meter rate changes and stating "it is hoped that at the close of each

quarter there is no need for the City to compensate [CPM]"); January 30, 2009, Chief Financial Advisor Paul Volpe ltr to City Commissioners and Executive Directors, SoF Ex. 26 (explaining that the City would be "financially responsible" for adverse actions to the Concessionaire, and to "avoid any such material impact that would require payment").

The need to consider compensation to the Concessionaire, in turn, has impermissibly limited the City's legislative discretion. SoF ¶¶ 51; *see e.g.* May 11, 2009 Email Chain between former Assistant Budget Director Tom Kness ("Kness") and former Assistant to the Mayor, Juan Rosales, Re: "Impact of Lisle Pulling Meters.", SoF Ex. 28 (discussing the need to "vigorously" work with Alderman Lyle "to find an alternative to her changes" to the meter system); September 14, 2010 Memorandum from Tom Stevens to Alderman Preckwinkle, SoF Ex. 30 (asking Preckwinkle to "hold off on closing the lot" "to mitigate or eliminate the need for payment to the Concessionaire"). As addressed in *City of Quincy*, such consideration as to how the effect of City legislation would require compensation to a private entity, is an abdication of legislative discretion, prevents the City from best protecting the lives, health and property of its citizens, and is invalid as a matter of law. 290 Ill. 356-66.

Further, the effect of the Agreement has not merely forced the City to *consider* the Agreement, but has in fact *prevented* City legislators from taking desired actions, determined to be in the public interest. *See e.g.* SoF ¶¶ 51-61;64-65;70;72-73;79-79. Indeed, the City's assertion that it retains the exclusive right to establish all parking rules and regulations is clearly contradicted by the evidence that the Agreement actually does impermissibly limit the City's exercise of its legislative discretion by requiring CPM's approval before implementing City legislation. *See e.g.* July 21, 2009 Parking Meter Strategy Meeting "Rates and Hours of Operation" Slide, SoF Ex. 34 (alerting Alderman that implementing changes to "rate[s]", "hours

of operation", and "utilization" "will require CPM analysis, review, ***approval***, and contract modification.")(emphasis added); July 29, 2009 Darst email to Gene Saffold ("Saffold"), RE: "Parking Meter Status" SoF Ex. 33 (Darst stating that while the City "continues to work with CPM to implement our meter strategy...I'm still concerned that ***CPM won't budge on the rates, hours and days discussion***, but there are some items we can use as leverage in those discussions."). Emphasis added.

As a result, the ramifications of compensation have trumped City legislation. *See* DoR Parking Meter Impact Memo in Response to Alderman Burnett's January 7, 2009 Proposed Ordinance, SoF Ex.24 (rejecting ordinance to reduce meter rates and operation hours and recommending that the City "maintain[] present rates, days and hours of operation" because the City would be required to otherwise pay CPM $131, 391 for the three year revenue impact); *see also* July 17, 2009 email from Darst to Rosales, SoF Ex. 29 (acknowledging that Alderman Laurino had "introduced the ordinance and made changes to the system last year and ***we trumped them with the concession ordinance***")(emphasis added). Such surrender of legislative discretion and authority is blatantly improper, *see Poole*, 406 Ill. at 535-36 (holding a parking ordinance's failure to reserve a wide discretion in the matter of location, regulation and control would be illegal) and has impermissibly prevented the City from implementing policies determined to benefit the public welfare. *See e.g.* City's "Draft Problem/ Solution/ Implementation Chart, SoF Ex. 35 (referring to the need to obtain CPM's approval on meter ordinances that would benefit City constituents). *See Chicago City Ry. Co.*, 324 Ill. at 624("a municipality cannot surrender its power to control and regulate its streets, and [i]s not liable to companies, having the right by ordinance to place their appliances in the streets for...making public improvements to promote the public convenience and necessity").

Significantly, concern over the Agreement's consequences also forced the City to forgo a federally funded Bus Rapid Transit program (the "BRT"), praised for being beneficial to the public interest.[5] *See* SoF ¶¶ 51-61. Indeed, in December 2010, Chicago Breaking News Center's John Hilkevitch, reported that the City was forced to abandon plans to implement the pilot BRT plans and a corresponding $153.1 million federal grant, because City Hall was unable to "raise downtown parking meter rates and develop a congestion-pricing parking program aimed at reducing the number of automobiles downtown", SoF Ex. 21, which was one of the requirements of the grant. *See* December 8, 2008 Revised Draft Congestion Reduction Demonstration Project Briefing for Chicago Parking Meters, LLC Power Point, SoF Ex. 18. From the onset, the City recognized that the BRT plan, which required "setting the vacancy target [of parking meters at] less than 90% may create problems with the Concession", *see* June 23, 2008 email from Office of the Chief Financial Officer Senior Financial Analyst, Marty Johnson ("Johnson") to Schrader, SoF Ex. 16, and the City ultimately rejected the BRT program because it "would not serve the private operator if [the BRT required the City] to raise rates to a level where utilization [] drops of precipitously." Council Chambers Trans., SoF Ex. 22, at 49:13-17. In this way, the Agreement, and thus CPM, rather than the public interest, control the decision making over the public parking system.[6]

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[5] Benefits of the BRT program were numerous and the City believed the BRT brought a "collection of improvements to infrastructure, vehicles and scheduling, that [would] combine to provide bus service with reduced travel times, increased service predictability, and improved customer amenities." *See* Sept. 23, 2008 CTA Announcement, SoF Ex. 14.

[6] Any number of real world examples, similar to this one, show how the City's use of its police power is inhibited by the Agreement. For example, when the City hosts the G8 and NATO this year, security concerns not only from the City but from the Secret Service will result in loss of parking revenue to the Concessionaire, with the accompanying request for compensation. If the Concessionaire decides that it loses too much revenue to diplomats refusing to pay for parking, it would likewise seek compensation. If a water main broke and required repair, closing one side of a street, the Concessionaire would again seek compensation. If the fire department closed a street to rescue residents from an enflamed high rise, the Concessionaire would seek compensation. All these conditions on the use of the City's police power are unlawful and in violation of the 1970 Constitution.

Even more, every time there is disagreement regarding the City's exercises of its Reserved Powers, the scope of CPM's authority, or otherwise, the City is forced to engage in a kind of litigation with the Concessionaire. *See* Agrmt. Art. 19. If the City and CPM cannot agree, the dispute must be decided by a neutral arbitrator, Agrmt § 19.4, which might take years to resolve. Indeed, to have ultimate decision over the City's exercise, or not, of its reserved powers delegated to an outside arbitrator, is no more acceptable than having the City Council's decisions on any other legislative matter, assigned to an arbitrator, and is itself an illegal delegation. As a result, future City Council may unjustifiably be on hold, waiting the result, and unable to best promote the public interest and welfare. *See City of Danville*, 178 Ill. at 313 ("No contract is reasonable by which the government authority abdicates any of its legislative powers...those who hold them in trust today [*sic*] are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors.").

Finally, there is no dispute that, despite the City's attempt to avoid the need to compensate CPM, *see* SoF ¶¶ 62-63; 66-70, the City has already made substantial compensation payments, as a result of exercising sovereign authority. *See* SoF ¶¶ 46-48. This further evidences that the City's inalienable authority is conditioned on its ability to raise enough money to buy back the right to use its police power, and if the City lacks the necessary funds, the Concessionaire can prevent the City from exercising its legislative discretion in the public interest, effectively possessing the authority to say what the law would be. *See* Oct. 25, 2010 Trans., SoF Ex. 4 at 12:15 (City itself declaring that "A municipality many not delegate its authority to say what the law would be.").

As a result, under this "reverse toll-road" Agreement (in which the public must pay a private entity for using its own system) the City has and will continue to be forced to give

consideration to the effects of the Agreement, in every aspect of the City's legislation and regulation of the parking meter system, making the Agreement invalid in practice as well as on its face. *See Rosemont Bldg. Supply Inc.*, 258 N.E.2d at 577 ("Assuming that both provisions are otherwise valid, it is our opinion that their effect is to cause an unlawful designation of legislative authority.").

IV. Plaintiffs are Entitled to Summary Judgment Because the Concession Agreement Unlawfully Requires the City to Expend Public Funds for CPM's Purely Private Benefit, as a Matter of Law.

The Agreement's requirement that the City expend public funds to enforce parking meter tickets issued by CPM as if they were issued by the City, Agrmt. § 7.6(b), and to enforce the Concessionaires' private rights, Agrmt. § 3.1(a) , violates Article VIII § 1(a) of the 1970 Illinois Constitution (the "Public Purpose Provision") because such requirements fundamentally benefit CPM's private interest in protecting its revenue, rather than subserving any public interest.

The Public Purpose Provision requires that "public funds, property or credit shall be used *only* for a public purpose." Ill.CONST. art. VIII, § 1(a). Emphasis added. This requirement is demanding: "[while it is clear that the state and units of local government can lend their credit and resources to private entities so long as a public purpose is thereby served, it is clear that public funds and property cannot be devoted to a purely private purpose." *O'Fallon*, 43 Ill.App. at 354-55 (internal citations omitted) (holding that the city violated the Public Purpose Provision by subjecting publicly owned property to a private company's purely private use because "no public purpose is furthered and no public benefit results from private advertising" on public property).

While a legislative body may have broad discretion in determining what constitutes a public purpose, that discretion is not unlimited, and courts will intervene when public property is

devoted to a purely private use. *City of Elmhurst ex rel. Mastrino v. City of Elmhurst*, 272 Ill. App. 3d 168, 172 (1994); *see also Poole*, 406 Ill. at 526 ("final determination of whether a use or purpose is within limits of legislative discretion is a judicial function). "[T]he crucial test is whether the attempted public use of the municipal property subserves the public interest and benefits a private individual or corporation only incidentally." *O'Fallon*, 43 Ill.App.3d at 355; *see also Poole*, 406 Ill. at 527 ("a public use means public usefulness, utility, advantage, or benefit"). Accordingly, "[t]o allow municipal property to be put to a purely private use is uniformly held to be Ultra vires the authority granted to municipalities." *O'Fallon*, 43 Ill.App.3d at 355.

The City's specific obligations, under Sections 3.1(a) and 7.6(b), to defend the Concessionaire and CPM's enforcement rights presents no significant benefit to taxpayers or the City of Chicago and provides more than merely an "incidental" benefit to CPM. Foremost, Section 3.1(a)'s requirement that the City must defend "the rights granted *to the Concessionaire*" bares no public benefits that could justify the City's expenditure in line with the Illinois Constitution's mandatory Public Purpose Provision. Indeed, as this Court has already recognized, any argument that Section 3.1(a) is valid because it contains "things that the City would do even if the provisions did not exist" is "not convincing...particularly since the provision appears to refer to defending the rights granted to the Concessionaire", *see* Oct. 25, 2010 Trans., SoF Ex. 4 at 24:10-21, and doesn't otherwise benefit the public. Simply stated, the *Concessionaire's rights* are unrelated to the public interest. *See City of Elmhurst,* 272 Ill. App. 3d at 172 (holding that "defraying the costs of purely private litigation [for even] the holder of a public office, but unrelated to, or not arising out of the exercise of the duties of that office, cannot be considered a proper public purpose."); *see also People ex rel. Healy v. Clean St. Co.*,

225 Ill. 470, 482 (1907) (holding invalid a "distinct privilege which the public are not interested in" despite that the city received the benefit of waste removal and a portion of the money collected by the private company).

Similarly, Section 7.6(b)'s requirement that the City spend public funds to enforce parking meter tickets issued by CPM, as if they were tickets issued by the City, is not for a public purpose. Rather, Section 7.6(b)'s *actual* purpose is *solely* to protect a private corporation's revenue for the next 75 years. *See* City Council Chambers Trans., SoF Ex. 22, at 53:14-18 (Chief Financial Officer Volpe, explaining to City Alderman, the City's responsibilities under the Agreement, and stating, "I want to be clear...we have an obligation as well to protect [CPM's] revenue."). Such enforcement and defense requirements are for CPM's own private benefit and are insufficient to warrant the required public expense. *See O'Fallon*, 43 Ill.App. 3d at 355 (citing *State v. City of Hutchinson*, 62 P.2d 856, 866 (1936) (holding that the private corporations action's were only for its "own private, pecuniary profit and constitute a purely private use of public property")).

Furthermore, even if this Court believes that there was some, incidental benefit to the City, or that the public encroachment was not very large, these required expenditures cannot be justified. *See Hutchinson*, 62 P.2d at 866 (explaining"[t]hat the encroachment is not very large does not affect the principal" that the expenditures is impermissible); *see also Southwestern Illinois Dev. Auth. v. Nat'l. City Envtl.*, 199 Ill.2d 225, 240 (2002) (Illinois Supreme Court holding that a taking was invalid because "it was clearly intended to assist a [private party] in accomplishing their goals" and because "members of the public are not the ***primary intended beneficiaries***") (emphasis added). Indeed, Sections 3.1(a) and 7.6(b) of the Agreement do not have a valid public purpose, are essential only to CPM's exclusive benefit, provide no direct

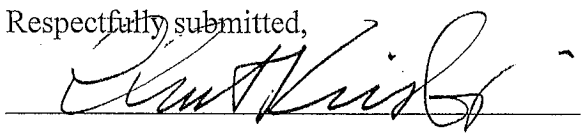
benefit to the public and are therefore invalid as a matter of law. *See Healy*, 225 Ill. at 482 (holding that "[b]y the ordinance and contract the city authorities sought and attempted to turn over the use of certain portions of the street for the exclusive benefit of private individuals, and their action in this regard must be held illegal and void.").

CONCLUSION

For all of the foregoing reasons, this Court should grant Plaintiff's Motion for Summary Judgment, declare the Concession Agreement illegal and enter judgment against Defendants City of Chicago and Chicago Parking Meters, LLC, declaring that one or more of the following terms of the Agreement: §§ 3.2(e); 3.12; 7.5; 7.6(b); 7.8; 7.10; 7.11;14.3; and Art. 19, are illegal.

Dated: February 6, 2012

Respectfully submitted,



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