

October 8, 2010

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Attorneys at Law

311 South Wacker Drive
Suite 3000
Chicago, Illinois
60606-6677
Tel 312.360.6000

Gerald P. Callaghan
Partner
Direct 312.360.6555
Fax 312.360.6574
jcallaghan@
freebornpeters.com

Chicago

Springfield

Mr. John O'Connell
Village of Hodgkins
8990 Lyons Street
Hodgkins, IL 60525

Re: *Brookfield Zoo Water Service*

Dear John:

In preparation for the Brookfield-North Riverside Water Commission meeting on October 13, I have studied the rights of the Water Commission to provide service directly to the Brookfield Zoo and the rights of the zoo to receive water directly from the Commission.

The Commission clearly has legal authority to provide water directly to the zoo. Section 11-135-8 of the Commission's enabling statute (65 ILCS 5/11-135-1 *et seq.*) states that the Commission has "the right to supply water to any municipality, political subdivision, private person or corporation, in addition to the municipalities which have formed the commission, and to construct water transmission and distribution lines within a radius of 25 miles outside the corporate limits of member municipalities for the purpose of furnishing water to any additional entities which contract with the commission for a supply of water, upon such payment, terms and conditions as may be mutually agreed upon." The Commission acts in accordance with this authority in that it serves the Villages of LaGrange Park and Lyons, which are non-members, in addition to the Villages of Brookfield and North Riverside, who formed the Commission.

It is well settled in the law that the Brookfield Zoo, as the consumer, has the right to choose between two available water systems. Indeed, there is a First District Appellate Court opinion addressing this very issue. In *People ex re. Chicago Title & Trust Co. v. Mission Brook Sanitary Dist.*, 76 Ill. App. 2d 423, 222 N.E.2d 8 (1st Dist. 1966), the plaintiff owned property situated within the Village of Northbrook. The Mission Brook Sanitary District, within which the subject property was also located, refused to permit connection to its sewer system unless the property was also connected to its water distribution system. Northbrook, in turn, refused to approve the plat of

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subdivision because the owner had not obtained approval for sewer facilities, and stated that the owner had to obtain its water through the Village connection. The court recognized that “[a] municipal corporation selling water for private consumption does so in its proprietary rather than governmental capacity.” Indeed, the court acknowledged that “(n)o distinction is to be drawn between [a] business selling [water] when indulged in by a municipality and when engaged in by a private corporation.” And, since the supplying of water is a proprietary function, “the Sanitary District and the Village can operate water distribution systems with co-equal jurisdiction.” Ultimately, the court concluded that the property owner had the authority to determine from whom it would purchase water. The court noted that “the choice must be made by the property owner(s) or the developer(s) who elect to contract with one or the other municipality for water service.” Finally, the court ruled that economic considerations are legitimate reasons for selecting one water source over another, stating that “(s)uch choice will rest on benefits offered by the competing concerns.” The court observed that the Village offered a price of 57 1/2 cents per 1,000 gallons whereas the Sanitary District offered a price of \$1.05 per 1,000 gallons.

The Chicago Zoological Society and the Forest Preserve District have elected to purchase water from the Brookfield-North Riverside Water Commission rather than from the Village of Brookfield. Although their reasons for making this election are irrelevant under the law, it is fair to say that the relative economic costs of purchasing water from the Commission versus the Village are significant. As you know, for several years the Society has paid to the Village a water fee of \$105,000 per year plus the cost the Commission charges the Village for water. Recently, the Village added a charge of 5% to the Commission’s water rate and has proposed that the Society pay an additional water charge of \$125,000 per year plus a separate municipal services fee of \$375,000 per year. If the Society does not agree to the Village’s proposal, the Village has threatened to apply its residential water rate to the zoo, which would increase the cost of water annually by approximately \$300,000 or \$200,000 over what the zoo has historically paid. Please keep in mind that the only infrastructure provided by the Village to the zoo is a 200-foot pipe that is not even located in Brookfield.

As I am sure you can appreciate, these additional costs would be catastrophic for the Brookfield Zoo, which has been significantly affected by the economic downturn. Therefore, direct water service from the Commission is of paramount importance to the Society, the District and the financial well-being of the Brookfield Zoo.

When we spoke yesterday morning, you suggested that direct service to the zoo might not be possible because the Commission’s agreement with the City of Chicago requires each of the Commission’s customers to provide water storage capacity equal to twice the customer’s average daily use of water. I have reviewed the agreement

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between the City and the Commission. The agreement does not require each customer to provide storage capacity. Rather, Section D.I.(24) of the agreement states that such storage capacity shall be provided in the Commission's "entire system" and "(a)ll reservoirs provided by the [Commission's] water system shall be considered in meeting this requirement." Assuming the system meets this storage requirement today, it would continue to meet the requirement if the Commission were to provide direct service to the zoo. The system would remain unchanged. The zoo would continue to receive water from the same main in 1st Avenue, which is owned and operated by the Commission. The zoo would use the same quantity of water as it has in the past and would not add any new demands on the system.

That each customer of the Commission is not required to provide storage capacity is clear from the Commission's 1986 agreement for water service with the Village of Brookfield. Section VI.2. of that agreement acknowledged that the Village did not meet the storage standard in the Commission's agreement with the City. To address that condition, the Village held harmless and indemnified the Commission. This issue can be addressed the same way in the agreement between the Commission and the Society.

I look forward to presenting the request of the Society and the District at the Commission's meeting next week. In the meantime, should you have any questions, please contact me at your convenience.

Very truly yours,



Gerald P. Callaghan

GPC/lw

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cc: Chairman Edward J. Durec
Commissioner David B. Witken
Commissioner Steve R. Hyzny
Donald R. Miskell, Superintendent
Janice J. Decosola, Clerk
Stuart D. Strahl, President and CEO of Chicago Zoological Society
Ken Kaduk, Senior Vice President of Finance and Administration of the
Chicago Zoological Society
Steven M. Bylina, Jr., General Superintendent of Cook County Forest Preserve
District
Dennis A. White, Chief Attorney of Cook County Forest Preserve District

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