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WILLARD A. HEALY
1919-1991

Joseph Timpano, Comptroller
Town of New Hartford
Butler Hall
New Hartford, NY 13413

Re: Fees in lieu of mitigation

Dear Mr. Timpano:

A request has been made by Chief Raymond Philo, of the New Hartford Police Department, for the purchase of lap-top computers to be used by on-duty Town policemen at St. Luke's Memorial Hospital Center, Sangertown Mall, and at other locations within the Generic Environmental Impact Statement (GEIS) corridors (Seneca Turnpike/Commercial Drive and Burrstone and French Road/Champlin Avenue).

The two GEIS studies, among other impacts, identified problems and needs for the full performance of duties assigned to the Town Police Department. In particular, both studies analyzed the response of the Police Department to needs within each of the two corridors. In this review and analysis, special needs were noted at Sangertown Mall and at St. Luke's Hospital; special needs have been identified by the staffs at both the Sangertown Mall and the Hospital, since the completion of the two GEIS studies.

As a result of the GEIS studies and the consequent identification of special needs by Sangertown Mall and the Hospital, a request from each of them has been made to the Town to have on-duty police officers on-site at both Sangertown Mall and the Hospital. Both Sangertown Mall and the Hospital, in making the request for on-duty on-site police officers, offered to reimburse the Town in full for the cost to the Town for these officers during the periods in which they are on duty at the two sites.

The fact the Town acceded to these requests is a further acknowledgement by the Town and by a major employer in each of the two GEIS corridors that special needs have developed within these two corridors that are beyond the normal Town government functions, that is, the growth in both GEIS corridors requires more of a presence and, in the case of Sangertown Mall and the Hospital, a permanent presence, of police protection. This was not anticipated by the Town in ordering the two GEIS studies, but it does enlighten the Town of the special needs required by the heavy development in the two corridors.

The request for lap-top computers arises because Town police officers now are present on foot within the structure at Sangertown Mall and the buildings at St. Luke's Hospital. In detaining suspects within these facilities, the police officers need to have immediate access to computer information on line at the New Hartford Town Police Headquarters and at the Bureau of Criminal Investigation in Albany; the lap-top computers will provide immediate access to Town police officers on duty within the buildings at Sangertown Mall and the Hospital.

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Obviously, the width of development and the rapidity of development within the two corridors has caused a significant impact on the provision of police protection by the Town Police Department. It is not possible, jurisdictionally, for a developer or even a group of developers to create a municipal police department - security guards, yes, police officers, no. Yet, the need for special police protection is so obvious to Sangertown Mall and the Hospital that they offered to reimburse the Town for the full cost of on-duty Town police officers within the physical structures of Sangertown Mall and the Hospital.

Developers in the two GEIS corridors have offered fees in lieu of mitigation for their environmental impacts, including impacts on the Town's ability to provide police protection.

The request by the Town Police Chief to pay for the lap-top computers from fees in lieu of mitigation deposited by developers in both GEIS corridors seems appropriate under the circumstances. By this letter, I am stating to you as Town Comptroller, that the use of fees in lieu of mitigation to pay for the purchase of lap-top computers for the Town Police Department, a need clearly identified by the two major employers within the two GEIS corridors, is appropriate.

It is my opinion, and it has been my opinion, that fees in lieu of mitigation are an appropriate method to be used by developers to mitigate their off-site impacts within the two crowded corridors; mitigation is required under 6 NYCRR Part 617 (Regulations under the State Environmental Quality Review Act), and to deny a developer the right to mitigate its environmental impacts of significance would deny, in effect, the right of the developer to use its land for its highest and best use.

As I have advised you, members of the Town Board, members of the Town Planning Board, and Town Staff, "impact fees" are neither allowed by statute in New York State nor by Court decision.

Providing a means for a developer to mitigate its environmental impacts of significance, identified in the SEQRA process, is, I believe, appropriate under SEQRA.

There is no stated enablement in the Environmental Conservation Law or under SEQRA, for "fees in lieu of mitigation"; nor has there been a reported Court case in New York State affirming the legality of a developer mitigating its environmental impacts of significance (off-site) through the payment of a fee in lieu of mitigation, determined by a Generic Environmental Impact Statement and Findings. The possibility exists, therefore, that a Court proceeding could determine mitigation under SEQRA through the payment of fees in lieu of mitigation, determined by a GEIS and Findings, is illegal, i.e., an "impact fee" as contrasted with "mitigation" required by SEQRA. Such a Court determination would require the repayment of the fees received from developers in lieu of mitigation. To date, no developer has challenged these fees in lieu of mitigation; in fact, developers have acknowledged the protection of their investment accorded by the Town GEIS studies and by actions taken by the Town and by other agencies as a result of the GEIS studies.

It is my opinion, therefore, that unless and until a Court determines the offering by developers of fees in lieu of mitigation under the SEQRA process is illegal, such fees in lieu of mitigation offered by developers when there is no ability to mitigate the off-site impacts are an appropriate means by which the Town can address the cumulative impacts of heavy and rapid development within a confined corridor and a means by which developers can mitigate the environmental impacts of their development and go forward with the project.

It is appropriate for the Town to pay for the lap-top computers from the segregated accounts maintained for both GEIS corridors for fees in lieu of mitigation offered by developers for the impact of their projects on the ability of the Town Police Department to provide the necessary police protection within the two corridors. The Town should pay the \$4,198.00 for the purchase of the lap-top computers from the police account of fees in lieu of mitigation.

Very truly yours,

RAYHILL & RAYHILL

By:
Philip A. Rayhill

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