ST. CHARLES
SINCE 1834

AGENDA ITEM EXECUTIVE SUMMARY

Title:	Presentation and Public Feedback for Committee Consideration to Permit Video Gaming
Presenter:	Mark Koenen

Please check appropriate box:

X	Government Operations (10/05/2015)		Government Services
	Planning & Development		City Council

Estimated Cost:	N/A	Budgeted:	YES		NO	

If NO, please explain how item will be funded:

Executive Summary:

Pursuant to the discussion at the September 21, 2015 City Council meeting, this item is on the subject meeting agenda for the purpose of public comment. Additionally, a memo is included with this summary to implement comments shared at the September 21, 2015 City Council meeting.

Attachments: *(please list)*

Memorandum

Recommendation / Suggested Action *(briefly explain)*:

Presentation and public feedback for committee consideration to permit video gaming.

For office use only:	*Agenda Item Number:* 4a

Memorandum

October 2, 2015

To: Mayor and City Council

From: John McGuirk and Mark Koenen

Cc: Chris Minick and Chief Jim Keegan

Subject: Video Gaming Information

The purpose of this memorandum is to provide information for your consideration at the October 5, 2015 Government Operations Committee (GOC) meeting regarding video gaming. Hopefully, this also provides background to complement what you will be hearing from the public that evening. There are several items we would like to share with you as follows:

1- The legal basis for the proposed City video gaming ordinance presented at the September 7, 2015 GOC meeting.
2- A discussion about the duration of trial period to study the impact of video gaming.
3- A discussion concerning signage on the external face of businesses who may receive a video gaming license.
4- Code update to address fraternal organizations, for example VFW/American Legions who may not hold a City or State liquor license.

Concerning each of the items noted above, staff would request Committee direction pursuant to discussion taking place at the GOC meeting.

Item 1- The legal basis for the proposed City video gaming ordinance presented at the September 7, 2015 GOC meeting.

St. Charles is a Home Rule Community and is relying on its Home Rule powers to enact a local ordinance regulating video gaming within the City. Article VII, Section 6 of the Illinois Constitution adopted in 1970, defines the powers of Home Rule Units. Section 6(a) provides in part that "a Home Rule Unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to the power to regulate for the protection of public health, safety, morals and welfare." As a result of Section 6(a), Home Rule Units of local government draw their power to regulate for the protection of public safety directly from the Constitution. The Home Rule power does not depend on any grant of authority by the General Assembly as was the case prior to 1970. Section 6(a) gives Home Rule Units the broadest powers possible over subjects pertaining to their government and affairs.

Section 6(h) of Article VII provides that the State may provide specifically by law for exclusive exercise by the State of any power or function of a Home Rule Unit other than a taxing power and certain other narrowly defined functions. In other words, the State can preempt the ability of a Home Rule Unit to exercise its Home Rule powers in certain

circumstances. However, the 1970 Constitution provides for preemption under very narrow circumstances. In order to preempt Home Rule powers, the legislation enacted by the State must contain express language that the area covered by the legislation is exclusively controlled by the State. Section 6(m) of Article VII provides that the powers and functions of Home Rule Units shall be construed liberally.

The *Video Gaming Act*, (230 ILCS 40/1 et seq.) which became effective on July 13, 2009, does not specifically preempt the Home Rule powers of municipalities. Local municipalities have enacted ordinances regulating video gaming within their jurisdictional limits. The staff has examined 25 to 30 ordinances and has found that they vary in complexity. Some of the ordinances are extremely detailed and creates many limitations with respect to video gaming. Others contain fewer limitations. The staff feels that the model that has been developed is a workable one and does provide some limitations that otherwise would not be available if the City simply repealed the video gaming prohibition and relied upon this State regulations.

While there are a few Video Gaming Ordinances that have been challenged in the Circuit Courts, there are as yet no reported decisions from any Appellate Court and thus no binding legal authority with respect to the validity of local Video Gaming Ordinances. Like any other area involving new legislation, the local regulation of video gaming is subject to challenge and it can never be stated with certainty that the proposed ordinance would withstand a challenge based upon the application of the Home Rule powers, the reasonableness of the license fee, or any number of other legal challenges.

As stated above, the Illinois Appellate Courts have yet to decide a case involving the validity of local ordinances regulating video gaming. However, in November of 2014, the Circuit Court of Cook County did enter a Memorandum Opinion and Order in a case involving a challenge to the Video Gaming Ordinance of the Village of Elmwood Park. A copy of that case (*Accel Entertainment Gaming, LLC vs. The Village of Elmwood Park*) is attached for your review. In that case, the local ordinance regulating video gaming was challenged by Accel Entertainment Gaming, LLC. The Plaintiff brought a four count Complaint seeking Declaratory and Injunctive relief with regard to the ordinance. One of the counts included a challenge to the Home Rule authority of the Village. The case is instructive since it provides a fairly good analysis of the Video Gaming Act and the Illinois Constitutional provisions regarding the powers of Home Rule Units.

The Court in the *Accel* case found that the State had not preempted the Village's Home Rule powers with respect to video gaming and dismissed the challenge to the ordinance. We understand that the case has been appealed and no Opinion has yet been rendered by the Appellate Court.

In summary, we believe that the enactment of the ordinance regulating video gaming in St. Charles is a valid exercise of the City's Home Rule powers.

Item 2- A discussion about the duration of trial period to study the impact of video gaming.

The September 7 proposed ordinance included the trial period for video gaming to terminate on April 30, 2020. This date was provided in response to the motion at the August 17, 2015 GOC meeting directing there be a five year sunset date. At the recent GOC meeting Ald. Bessner suggested the proposed ordinance consider a shorter trial period, for example three year duration. Based on this suggestion, we are asking the Committee if you are interested to direct staff to consider a modification to the proposed ordinance that would change the termination date of April 30, 2020 to April 30, 2018. The proposed ordinance modification would read as follow:

"**Section Six**: That this Ordinance shall be automatically repealed on April 30, 2018 unless reauthorized by an Ordinance enacted by the City Council."

Item 3- A discussion concerning signage on the external face of businesses who may receive a video gaming license.

At the recent GOC meeting Ald. Bessner asked, assuming video gaming is Council approved, if there was a means to manage and control external signage (freestanding/wall and projecting signs/window/temporary/banner/etc.) that in anyway advertised video gaming. Staff found an ordinance in Lansing, IL and West Dundee where the video gaming license prohibited the physical posting of external signage related to video gaming. The following is the Lansing code section related to video gaming:

- **"Sec. 6-23. - Unlawful advertising.**

It shall be unlawful for any person to post or display any advertisement of an obscene or immoral character, any advertisement tending to promote or cause a riot or breach of the peace, any advertisement for an unlawful gathering or advertisements of unlawful businesses, commodities or sales.

In addition, it shall be unlawful for a licensed establishment, licensed fraternal establishment or licensed veteran's establishment which has video gaming terminals to display any advertisement which is visible to the public that advertises gaming terminals are located on the premises. This prohibition extends to both print and electronic advertisement.

(Code 1969, §§ 14.308, 17.101.2; Code 1982, § 3-3; Ord. No. 12-033, § 4, 10-16-2012)"

The following is the West Dundee code section related to video gaming:

"6-6-18: VIDEO GAMING

C. Video Gaming Signage Provisions:

1. No reference to video gaming or video poker is permitted for any permanent freestanding, surface mounted or window signage for any licensed establishment.
2. Video gaming references are permitted for temporary window signage at no more than nine (9) square feet per commercial frontage. All other temporary sign provisions

are restricted from including any reference to gaming, video gaming or video poker. (Ord.2013-20, 10-7-2013)"

Staff is asking the GOC for direction whether there is an interest to update the draft video gaming ordinance to prohibit the public advertisement of video gaming. If this was the Committee's direction, please consider below in blue draft language prohibiting video gaming signage within the body of the proposed code:

"5.09.070 CONDITIONS OF LICENSE: All such Video Gaming Terminals shall at all times be kept, placed, operated, and monitored in accordance with State laws and applicable regulations, as well as all applicable provisions of the City code including, but not limited to:

A. Prohibiting persons under the age of 21 years and persons who are visibly intoxicated from entering or remaining in the gaming area, and posting signage thereof.

B. Video Gaming Terminals shall be placed in an area restricted to individuals age 21 or over.

C. The operation of Video Gaming Terminals shall only be allowed during the legal hours of operation allowed for the consumption of alcoholic beverages at the licensed establishment. Upon the suspension or revocation of a licensee's liquor license, the licensee's Video Gaming license shall automatically be suspended (or revoked in the event of a liquor license revocation) without the requirement of any further action by the City.

D. The Video Gaming area shall be physically monitored at all times during the legal hours of operation by an employee over 21 years of age.

E. It shall be unlawful for any licensee to post or display any advertisement which is visible to the public that advertises gaming terminals are located at the licensed establishment. This includes temporary or permanent signage that may include a business name, name, identification, description, display, illustration or attention-getting device which is affixed to or painted or represented directly or indirectly upon a building or other outdoor surface or lot, and which directs attention to a person, business, product, service, place, organization or entertainment. "

Additionally, Ald. Bessner share at the last GOC meeting, my comments (Mark Koenen) regarding the impact of the First Amendment in prohibiting signage related to video gaming. The City's zoning code presently addresses signage. The zoning code manages signage based on zoning districts, for example, residential/center business district/etc. and not by use. The suggested proposal provided above to prohibit video gaming signage is a condition of the license that the establishment voluntarily applies for. The City under its home rule authority can prohibit **advertising under the City's video gaming license.**

<u>Item 4</u>- Code update to address fraternal organizations, for example VFW/American Legions who may not hold a City or State liquor license.

The ordinance draft that is included with this Memo has been slightly amended to clarify the application of the ordinance to fraternal and veteran's organizations. The Video Gaming Act includes these organizations as licensed establishments. While previously

we had included them within the definition of licensed establishments in the proposed ordinance in the previous draft, they were not specifically set out in the license portion of the ordinance. The revised ordinance, which is attached, clarifies that issue.

(File Inserted from Atty. McGuirk)

ORDINANCE NO. 2015-M-_____

AN ORDINANCE PERMITTING VIDEO GAMING WITHIN THE CORPORATE LIMITS OF THE CITY OF ST. CHARLES

WHEREAS, the Video Gaming Act, 230 ILCS 40/1 *et seq.*, as amended from time to time, allows video gaming in certain establishments as provided therein; and

WHEREAS, the City of St. Charles ("City") previously passed Ordinance 2010-M-14 prohibiting video gaming within the City of Charles; and

WHEREAS, the City of St. Charles has now had the opportunity to study the issue of video gaming and has determined that allowing video gaming will remove a competitive disadvantage between the City of St. Charles businesses and businesses in neighboring communities and within the region that currently allow video gaming; and

WHEREAS, the City of St. Charles has determined that the State of Illinois has now developed regulations to monitor and control video gaming that were not in effect when it adopted Ordinance 2010-M-14 prohibiting video gaming;

WHEREAS, the City of St. Charles has determined the opportunity for video gaming will enhance the entertainment offers of licensees and enhance their income sheet, and

WHEREAS, the City of St. Charles has determined that the revenue from video gaming can be used for the purposes of economic development and improvement of capital infrastructure.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of St. Charles, Kane and Du Page Counties, Illinois, a home rule municipality in exercise of its home rule powers, as follows:

SECTION ONE: That the recitals set forth hereinabove are incorporated herein by reference as substantive provisions.

SECTION TWO: That Ordinance 2010-M-14, entitled "Ordinance Prohibiting Video Gaming Within the Corporate Limits of the City of St. Charles" is hereby repealed in its entirety.

SECTION THREE: That Title 5 of the St. Charles Municipal Code is hereby amended to add 5.09 entitled "Video Gaming"

5.09 Video Gaming

5.09.010 DEFINITIONS: All words and phrases used in this chapter and not otherwise defined herein, which are defined in the Video Gaming Act, effective July 13, 2009 (230 ILCS 40/1 et seq.), shall have the meanings accorded to such words and phrases in said Act. Unless the context otherwise requires, the following terms as used in this chapter shall be construed according to the following definitions:

A. LICENSED ESTABLISHMENT: Any licensed retail establishment where alcoholic liquor is drawn, poured, mixed or otherwise served for consumption on the premises. The term Licensed Establishment includes any licensed fraternal establishment and/or licensed veterans establishment as those terms are defined in the Video Gaming Act, 230 ILCS 40/1 et seq., as amended ("Video Gaming Act")

B. VIDEO GAMING: The ownership, placement, maintenance, operation or use of a video gaming terminal (as defined below) in a licensed establishment (as defined above) within the city.

C. VIDEO GAMING TERMINAL: Any electronic video game machine, that upon insertion of cash, electronic cards or vouchers, or any combination thereof, is available to play or simulate the play of a video game, including but not limited to video poker, line up and blackjack, as authorized by the Illinois Gaming Board, utilizing a video display and microprocessors in which the player may receive free games or credits that can be redeemed for cash. The term does not include a machine that directly dispenses coins, cash or tokens or is for amusement purposes only.

5.09.020 VIDEO GAMING ALLOWED: Video Gaming is allowed in certain Licensed Establishments within the City only in accordance with this Article. Subject to all other provisions of this Article, Video Gaming shall only be permitted and a Video Gaming License issued to a Licensed Establishment that is the holder of a class B, C or D liquor license, *fraternal establishments and veterans' establishments.* Further, subject to all other provisions of this Article, Video Gaming shall only be permitted and a Video Gaming License issued to a Licensed Establishment that, in addition to being the holder of a class B, C or D liquor license, *fraternal establishments and veterans' establishments* has been issued a supplemental class V (video gaming) liquor license.

5.09.030 ANNUAL VIDEO GAMING LICENSE REQUIRED: No establishment licensed by the Illinois Gaming Board shall be permitted to operate any Video Gaming Terminal pursuant to the Illinois Video Gaming Act unless the establishment has first obtained a license and paid an annual license fee to the City as hereafter provided. No license may issue where the license applicant owes a debt, fine, fee or penalty to the City.

5.09.040 APPLICATION REQUIREMENTS:

Application to the City for a Video Gaming License shall be made to the Chief of Police on forms furnished by the Chief of Police. The Application shall contain the following information:

A. The name, address age, and date of birth of the owner of the video gaming terminal and of the owner of the establishment where the video gaming terminal shall be located;

B. Prior convictions of the owner of the video gaming terminal and the owner of the establishment, if any;

C. The place where the video gaming terminal is to be displayed or operated and the business conducted at that place;

D. A description of the video gaming terminal to be covered by the license;

E. A copy of the applicant's complete license application, and all supporting documents, to the Illinois Video Gaming Board;

F. Evidence that licenses have been issued by the Illinois Gaming Board to the owner of the video gaming terminal and the owner of the establishment;

G. Attach a responsible gaming policy, which outlines all employee education and training programs, policies, and procedures to promote responsible gaming. If standardized training for responsible gaming becomes available at a future date, it shall be required as part of the Video Gaming License application.

H. Such other information as the City may determine is necessary as set forth in the application form.

5.09.050 TERM OF LICENSE: All Licenses shall be valid for a period not to exceed one year after issuance, unless sooner terminated, revoked or suspended as provided by law; and all licenses shall terminate on April 30 next following their issuance.

5.09.060 ANNUAL LICENSE FEE; PRORATION: The annual business license fee for a Video Gaming License shall be as follows:

One Thousand Dollars ($1,000.00) fee for the initial license and Five Hundred Dollars ($500.00) for each renewal license;
Plus
One Hundred Dollars ($100.00) for each Video Gaming Terminal.

License fees are payable at the time of application and are not subject to proration and are not refundable.

5.09.070 CONDITIONS OF LICENSE: All such Video Gaming Terminals shall at all times be kept, placed, operated, and monitored in accordance with State laws and applicable regulations, as well as all applicable provisions of the City code including, but not limited to:

A. Prohibiting persons under the age of 21 years and persons who are visibly intoxicated from entering or remaining in the gaming area, and posting signage thereof.

B. Video Gaming Terminals shall be placed in an area restricted to individuals age 21 or over.

C. The operation of Video Gaming Terminals shall only be allowed during the legal hours of operation allowed for the consumption of alcoholic beverages at the licensed establishment. Upon the suspension or revocation of a licensee's liquor license, the licensee's Video Gaming license shall automatically be suspended (or revoked in the event of a liquor license revocation) without the requirement of any further action by the City.

D. The Video Gaming area shall be physically monitored at all times during the legal hours of operation by an employee over 21 years of age.

5.09.080 VIOLATIONS AND PENALTY: It shall be unlawful for any person to violate any provision of this article. Any person found to be in violation of any provision of this article shall be subject to the penalties contained in Section 5.08.370 of this code. In addition, any and all licenses issued to the licensee shall be subject to suspension or revocation as provided in the Municipal Code or by law.

SECTION FOUR: That Title 5.08.090 of the City Code of the City of St. Charles, entitled "License Classifications", is hereby amended by adding the following additional language:

..."Class V (Video Gaming) which is a supplemental license only, which permits Video Gaming only in a Licensed Establishment, otherwise qualified to hold a Video Gaming License. Class V licenses shall only be issued to holders of class B, C or D liquor licenses, *licensed fraternal establishments and licensed veterans' establishments.*

A complete and accurate application to the City for the issuance of a Video Gaming License shall be deemed an application for the issuance of a class V supplemental license.

Class V licenses may only be issued to qualified Licensed Establishments in good standing which have continuously held a class B, C or D liquor license, *fraternal establishments and veterans' establishments* and have operated their business on a regular basis for a period of at least one (1) year prior to the date of application for a Class V license.

Class V licenses shall have the same hours of operation as provided for the underlying liquor license as set forth in Title 5.08.130."

SECTION FIVE: That Title 5.08.100 of the City Code of the City of St. Charles entitled "License Fees" is hereby amended by adding the following additional language:

Class License	Annual License Fee	Comments
V	$1,000 – Initial License $500 – Each Renewal License $100 – Per each video gaming terminal	Video Gaming

SECTION SIX: That this Ordinance shall be automatically repealed on April 30, 2020 unless reauthorized by an Ordinance enacted by the City Council.

SECTION SEVEN: That this Ordinance shall be in full force and effect from and after its passage, approval, and publication in pamphlet form as provided by law.

PRESENTED to the City Council of the City of St. Charles, Illinois, this _____ day of October, 2015.

PASSED by the City Council of the City of St. Charles, Illinois, this _____ day of October, 2015.

APPROVED by the Mayor of the City of St. Charles, Illinois, this _____ day of October, 2015.

_____
Mayor

ATTEST:

_____
City Clerk

COUNCIL VOTE:

Ayes: _____

Nays: _____

Absent: ____

14 CH 7357- Accel Entertainment Gaming, LLC v. Village of Elmwood Park, et al..pdf

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
Judge Kathleen G. Kennedy
Circuit Court 1718

ACCEL ENTERTAINMENT GAMING, LLC, an Illinois limited-liability company, Plaintiff,

v. 14CH7357

THE VILLAGE OF ELMWOOD PARK, an Illinois municipal corporation, and in their official capacities, ANGEW "SKIP" SA VIANO, president; PAI.JL VOLPE, manager; ALAN T. KAMINSKI, trustee; JEFF SARGENT, trustee; ANGELA STRANGERS, trustee; JONATHAN L. ZIVOJNOVIC, trustee; ANTHONY DEL SANTO, trustee; and ANGELO J. LOLUNO, trustee,

Defendants.

MEMORANDUM OPINION AND ORDER

This case involves home rule authority to regulate video gaming. Defendants, the Village of Elmwood Park (the Village), its president, manager, and six trustees, moved to dismiss Plaintiff Accel Entertainment Gaming, LLC's (Accel) amended verified complaint for declaratory and injunctive relief. For the reasons that follow, Defendants' motion to dismiss is granted.

Amended Complaint

Accel's amended complaint is a four-count facial challenge to the constitutionality of the Village's video-gaming ordinance (the Ordinance) and video- gaming fees.

In Count I (Declaratory and Injunctive Relief: Occupation Tax -Violation of Article VII, Section 6(e) of the Illinois Constitution of 1970), Accel seeks a declaratory judgment that the Village's $1,000 annual charge for the operation of each video gaming terminal (VGT) is a constitutionally prohibited occupation tax, as well as a preliminary and a permanent injunction prohibiting the Village from levying or collecting the charge.

In Count II (Declaratory and Injunctive Relief: Express Limitation on Power to Tax- Violation of Article VII, Section 6(g) of the Illinois Constitution of 1970, 230 ILCS 10/21, and 230 ILCS 40/80), Accel seeks a declaratory judgment that the Illinois Constitution as effectuated by Section 21 of the [Riverboat Gambling Act] and Section 80 of the [Video Gaming Act]" prohibits the $1,000 per-terminal-per-year charge, as well as a preliminary and a permanent injunction prohibiting the Village from levying or collecting the charge.

In Count III (Declaratory and Injunctive Relief: Limitation on Home Rule Authority- Violation of Article VII, Section 6(a) of the Illinois Constitution of 1970), Accel seeks a declaratory judgment that the Ordinance is facially unconstitutional because it does not regulate an area that pertains to the Village's government and affairs, as required by Article VII, Section 6(a) of the Illinois Constitution, as well as a preliminary and a permanent injunction prohibiting the Village from enforcing the Ordinance

against Accel and any licensed establishments where Accel operates and maintains licensed VGTs. In particular, Accel seeks to prohibit the Village from (a) levying or collecting $1,000 per terminal per year on any VGT that Accel installs, activates or maintains at locations in the Village; (b) requiring Accel to give the Village copies of Accel's Video Gaming Business Entity Disclosure Form, Video Gaming Institutional Investor Form, Video Gaming Personal Disclosure Form, Video Gaming Terminal Operator License Application, or any other personal or sensitive information about Accel's principals; (c) capping the total number of Illinois Gaming Board- approved licensed terminal operators that can operate in the Village; (d) capping the total number of Illinois Gaming Board-approved licensed video-gaming locations that can operate in the Village; and (e) interfering in any way with Accel's installation or activation of Illinois Gaming Board-approved VGTs at Declan's or any other licensed establishments in the Village.

In Count IV (Declaratory and Injunctive Relief: License for Revenue - Violation of Article VII, Section 6(e) of the Illinois Constitution of 1970), Accel seeks a declaratory judgment that the $1,000 annual charge is a constitutionally prohibited license for revenue, as well as a preliminary and a permanent injunction prohibiting the Village from requiring Accel to pay for the $1,000 per-terminal-per-year charge on any VGT that Accel installs, activates, or maintains at locations in the Village.

Facts

By challenging the constitutionality of the Village's Ordinance on its face, Accel has undertaken the burden of proving that no situation exists in which the Ordinance would be valid. See Tomm's Redemption, Inc. v. Hamer, 2014 IL App (1st) 131005, 2. Defendants point out that the facts surrounding Accel's VGTs in the Village are not relevant to the facial constitutional challenge. However, the question presented by Defendants' 2-615 motion to dismiss is whether Accel's allegations, when taken as true and viewed in a light most favorable to Accel, state a cause of action upon which relief may be granted. See Turner v. Memorial Medical Center, 233 Ill. 2d 494, 499 (2009). The court will not dismiss a cause of action on the pleadings unless it clearly appears that the plaintiff can prove no set of facts which will entitle the plaintiff to relief. Id. Thus, the court must consider the legal sufficiency of Accel's alleged facts, which include those that follow.

1. About September 16, 2013, the Village enacted the Ordinance and amended the Village's fee schedule for business licenses to include a $1,000 "license fee" per VGT per year.
2. The Ordinance adopts nearly verbatim portions of the Illinois Video Gaming Act (VGA) and the Illinois Gaming Board's administrative regulations. The Village created its own VGT operator license application which applicants must submit.
3. In November 2013, Accel entered into an "Exclusive Location and Video Gaming Terminal Use Agreement" with Declan's Bar and Grill in the Village.
4. On February 28, 2014, upon approval by the Illinois Gaming Board, Accel transported three VGTs from Accel's storage facility to Declan's.
5. Beginning the week of March 10,2014, Accel asked the Village to waive certain Ordinance requirements.
6. On March 25,2014, the Illinois Gaming Board activated Accel's VGTs at Declan's under the supervision of Illinois State Police officers and Illinois Gaming Board agents, and Accel entered into an updated agreement with Declan's.
7. After activation Accel had to power down the VGTs because Accel had neither paid the $1,000 license fee nor complied with the Ordinance's disclosure requirements, and the Village had not issued Accel a terminal operator's license.
8. In March 2014, the Village amended a section of the Ordinance to increase the total number of available VGT operator's licenses.
9. Accel continued to seek waivers of certain Ordinance requirements, including the $1,000 license fee, the disclosure provisions, and the cap on the number of licenses. The Village refused, and this litigation followed.
10. The Village denied Accel's request to operate VGTs at Declan's while the litigation is pending. Gaming & Entertainment Management- Illinois LLC has begun to operate its VGTs at Declan's, and Accel's VGTs have been removed.

Pertinent Constitutional and Statutory Provisions

Illinois Const., Art. VII, § 6

Powers of Home Rule Units
(a) A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

(e) A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months or (2) to license for revenue or impose taxes upon or measured by income or earnings or upon occupations.

(g) The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (l) of this section.

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a
taxing power or a power or function specified in subsection (l) of this Section. (i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

(l) The General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government or (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those
special services.

(m) Powers and functions of home rule units shall be construed liberally.

Riverboat Gambling Act
230 ILCS 10/1et seq.

Sec. 2. Legislative Intent. (a) This Act is intended to benefit the people of the State of Illinois by assisting economic development and promoting Illinois tourism and by increasing the amount of revenues available to the State to assist and support education.
(b) While authorization of riverboat gambling will enhance investment, development and tourism in Illinois, it is recognized that it will do so successfully only if public confidence and trust in the credibility and integrity of the gambling operations and the regulatory process is maintained. Therefore, regulatory provisions of this Act are designed to strictly regulate the facilities, persons, associations and practices related to gambling operations pursuant to the police powers of the State, including comprehensive law enforcement supervision.

Sec. 5. Gaming Board. (a)(1) There is hereby established the Illinois Gaming Board, which shall have the powers and duties specified in this Act, and all other powers necessary and proper to fully and effectively execute this Act for the purpose of administering, regulating, and enforcing the system of riverboat gambling established by this Act. Its jurisdiction shall extend under this Act to every person, association, corporation, partnership and trust involved in riverboat gambling operations in the State of Illinois.

(c) The Board shall have jurisdiction over and shall supervise all gambling operations governed by this Act. The Board shall have all powers necessary and proper to fully and effectively execute the provisions of this Act, including, but not limited to, the following:

(18) To authorize a licensee to sell or serve alcoholic liquors, wine or beer as defined in the Liquor Control Act of 1934 on board a riverboat and to have exclusive authority to establish the hours for sale and consumption of alcoholic liquor on board a riverboat, notwithstanding any provision of the Liquor Control Act of 1934 or any local ordinance, and regardless of whether the riverboat makes excursions. The establishment of the hours for sale and consumption of alcoholic liquor on board a riverboat is an exclusive power and function of the State. A home rule unit may not establish the hours for sale and consumption of alcoholic liquor on board a riverboat. This amendatory Act of 1991 is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution.

Sec. 2L Limitation on taxation of licensees. Licensees shall not be subjected to any excise tax, license tax, permit tax, privilege tax, occupation tax or excursion tax which is imposed exclusively upon the licensee by the State or any political subdivision thereof, except as provided in this Act.

Sec. 24. Applicability of Illinois Riverboat Gambling Act. The provisions of the Illinois Riverboat Gambling Act, and all rules promulgated thereunder, shall apply to the Video Gaming Act, except where there is a conflict between the 2 Acts.

Video Gaming Act
230 ILCS 40/1et seq.

Sec. 27. Prohibition of video gaming by political subdivision. A municipality may pass an ordinance prohibiting video gaming within the corporate limits of the municipality. A county board may, for the unincorporated area of the county, pass an ordinance prohibiting video gaming within the unincorporated area of the county.

Sec. 65. Fees. A non-home rule unit of government may not impose any fee for the operation of a video gaming terminal in excess of $ 25 per year.

Sec. 78. Authority of the Illinois Gaming Board. (a) The Board shall have jurisdiction over and shall supervise all gaming operations governed by this Act. The Board shall have all powers necessary and proper to fully and effectively execute the provisions of this Act, including, but not limited to, the following:

(1) To investigate applicants and determine the eligibility of applicants for licenses and to select among competing applicants the applicants which best serve the interests of the citizens of Illinois.
(2) To have jurisdiction and supervision over all video gaming operations in this State and all persons in establishments where video gaming operations are conducted.
(3) To adopt rules for the purpose of administering the provisions of this Act and to prescribe rules, regulations, and conditions under which all video gaming in the State shall be conducted.

Sec. 80. Applicability of Illinois Riverboat Gambling Act. The provisions of the Illinois Riverboat Gambling Act, and all rules promulgated thereunder, shall apply to the Video Gaming Act, except where there is a conflict between the 2 Acts.

Analysis

General Principles of Home Rule Authority

A well-developed home rule jurisprudence exists in Illinois. The 1970 Illinois Constitution is the starting point. "Under the 1870 Illinois Constitution, the balance of power between our state and local governments was heavily weighted toward the state. The 1970 Illinois Constitution drastically altered that balance, giving local governments more autonomy." City of Chicago v. StubHub, Inc., 2011 IL 111127, 18. In Article VII, Section 6, the Constitution defines the powers of home rule units.

Section 6 (a) provides, in part, that a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare." Ill. Const. 1970, art. VII, section 6(a). As a result of section 6(a), home rule units of local government draw their power to regulate for the protection of public safety directly from the constitution. Triple A Services, Inc. v. Rice,131Ill. 2d 217, 230 (1989). This power does not depend on any grant of authority by the General Assembly, as was the case prior to 1970.1d. Section 6(a) gives home rule units the broadest powers possible over subjects pertaining to their government and affairs. See Scadron v. Chief of Des Plaines,153 Ill. 2d 164,174 (1992).

Section 6(i) expressly provides for concurrent functioning of state and home rule government to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive." Ill. Const. 1970, art. VII, Section 6(i). The court in Scadron explained that the purpose of section 6(i) "is to eliminate or at least reduce to a bare minimum the circumstances under which local home rule powers are pre-empted by judicial interpretation of unexpressed legislative intention." Id. at 186, quoting David Baum, A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict,1972 U. Ill. L.F. 559, 571.

The 1970 Constitution provides for pre-emption of home rule powers under very narrow circumstances. Id. at 185. Additionally, under section 6(i), home rule units may continue to regulate activities even if the state has also regulated those activities. Palm v.2800 Lake Shore Drive Condominium Association, 2013 IL 110505, 32, citing Schillerstrom Homes, Inc. v. City of Naperuille,198 Ill. 2d 281,287-88 (2001). "To restrict the concurrent exercise of home rule power, the General Assembly must enact a law specifically stating home rule authority is limited." Id. (emphasis in original). Further, state regulation through a "comprehensive scheme" is insufficient to declare the state's exercise of power to be exclusive. City of Chicago v. Roman,184 Ill. 2d 504,517 (1998). To meet the requirements of section 6(h), legislation must contain express language that the area covered by the legislation is to be exclusively controlled by the state. Id. "When the General Assembly intends to preempt or exclude home rule units from exercising power over a matter, that body knows how to do so." Id. Finally, section 6(m) mandates liberal construction of the powers and functions of home rule units. Ill. Const. 1970, art. VII, section 6(m). As a result of these constitutional provisions, home rule units have the same powers as the sovereign, except when the General Assembly expressly limits those powers. See Palm, 2013 IL 110505, 32.

Current Home-Rule Analysis

The parties disagree on what currently constitutes "proper home-rule analysis." Initially, they agree that if a subject pertains to local government and affairs, and the legislature has not expressly pre-empted home rule, then municipalities may exercise their power. See Palm. The parties' analysis diverges here.

Accel contends that the court must apply what it characterizes as the Kalodimos three-factor test to determine pursuant to 6(a) whether a subject pertains to local government and affairs. See Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483 (1984). According to Accel, the purpose of the test is to determine whether the state's interest in a subject is so paramount that regulation of it is beyond the reach of municipalities. Thus, the test requires the court to consider (a) the nature and extent of the problem, (b) the units of government which have the most vital interest in its solution, and (c) the role traditionally played by local and state-wide authorities in dealing with the problem. If the state has a vital interest and traditionally exclusive role in regulating the subject, then the court may declare a subject "off-limits" to municipal regulation.

Defendants correctly point out that the Supreme Court modified the 6(a) inquiry in StubHub and acknowledged the modification in Palm. Specifically, in Palm, the court explained that it used a three-part test prior to its StubHub decision, with the "vital state policy" analysis treated as the third part of the test. But the court in StubHub recognized that "the concept of a vital state policy trumping municipal power is analytically appropriate under section 6(a)" rather than section 6(i). Palm, 2013 IL 110505, 36, citing Stub Hub, 2011 IL 111127, 22 n.2. Confusion may be understandable because the majority in StubHub seems to have gone on to use the prior test. However, Palm cleared up any confusion as follows:

> Accordingly, "[i]f a subject pertains to local government and affairs, and the legislature has not expressly pre-empted home rule, municipalities may exercise their power." StubHub, Inc., 2011 IL 111127, 22 n.2 In those circumstances, the "proper relationship" between the local legislation and the state statute is established by section 6(i), providing that home rule units "may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive." Ill. Canst. 1970, art. VII, §6(i).

Accel contends that the Kalodimos test is intact because the Palm defendants raised no "pertains to local affairs" or "express preemption" arguments, rather, they argued only the third part of the Kalodimos test: the ordinance at issue fails to maintain the proper relationship with the state statute because the ordinance renders portions of the state statute unenforceable. However, the court in Palm framed the issue as "whether the ordinance is a valid and enforceable exercise of home rule power." Palm, 2013 IL 110505, 23 n.1. Also, the dissent in Palm makes it clear that the court adjusted the test in StubHub:

> when [Palm] was briefed and argued, the traditional three-part test that had governed our analysis of home rule power for more than 30 years included consideration of whether a vital state policy should take precedence over home rule authority, even if the problem pertained to local government and affairs... Under that test, a party could challenge the constitutional validity of an exercise of home rule power without contesting that the problem addressed by the municipality pertained to its government and affairs. It was only in StubHub, that this court explicitly held, albeit in a footnote, that the existence of a vital state policy was not analytically appropriate" in cases involving concurrent authority under section 6(i). At the time [the Palm] defendants formulated and presented their arguments, they did not know that we were about to dispense with the third element of our long-standing inquiry in such cases. We can only assume that, had defendants known that our decision in StubHub, would render the third element of the traditional test a nullity in cases analyzed under section 6(i), they would not have limited their argument to that element alone.

Palm, 2013 IL 110505, 100 (Freeman, J., dissenting). Therefore, the current test is if a subject pertains to local government and affairs, and the legislature has not expressly pre-empted home rule, then municipalities may exercise their power. Palm, 2013 IL 110505, 36 citing StubHub, 2011 IL 111127, 22 n.2.

Accel fails to sufficiently allege that the Ordinance exceeds the Village's home rule authority.

The VGA lacks express legislative preemption of local video gaming regulation. Therefore, the sole question in assessing the sufficiency of Accel's complaint is whether video gaming pertains to local government and affairs. If so, then the Village may exercise its regulatory power concurrently with the state.

Home rule is based on the assumption that municipalities should be allowed to address problems with solutions tailored to their local needs." Palm, 2013 IL 110505, 29, citing Schillerstrom Homes,198 Ill. 2d at 286. Here, by legalizing video gaming, the state created the "problem" the Village seeks to address. However, the Village could avoid the "problem" altogether by passing an ordinance prohibiting video gaming within its corporate limits. See 230 ILCS 40/27. Thus, Accel contends that by participating in video-gaming a municipality consents to the state-regulated activity, takes a share of the tax revenue generated, agrees to the Illinois Gaming Board's jurisdiction, and accepts that it may play no regulatory role. Accel's argument is logical and would be supportable if expressed by the legislature. Because the VGA fails to state that a participating municipality may play no regulatory role it is improper under home-rule analysis to require a participating municipality to infer that it must accept that it may play no regulatory role. Accel also contends that local regulation would conflict with legislature's intent to give the Illinois Gaming Board complete regulatory authority over all Illinois Gaming Board-licensed gaming operations. Again, Accel makes a logical point that is not supportable because the legislature failed to express this intent.

When video gambling takes place within establishments already regulated by a municipality, that video gambling is related to local governance and enforcement, and as Defendants argue, affects

the very fabric of the local community. The state cannot, consistent with home-rule jurisprudence, create a "system" which by its nature raises issues of local concern, and then remove that system" from local oversight without expressly saying so. In Roman,184 Ill. 2d at 517-18, the court highlighted, with specific examples, the fact that the legislature knows how to pre-empt local government from exercising power over a subject:

> In many statutes that touch on countless areas of our lives, the legislature has expressly stated that, pursuant to section 6(h), 6(i), or both, of article VII of the Illinois Constitution, a statute is declared to be an exclusive exercise of power by the state and that such power shall not be exercised by home rule units. E.g., 20 ILCS 3960/17 (West 1992) (Illinois Health Facilities Planning Act); 215 ILCS 5/2.1 (West 1992) (Illinois Insurance Code); 220 ILCS 10/21 (West 1992) (Citizens Utility Board Act); 225 ILCS 60/6 (West 1992) (Medical Practice Act of 1987); 235 ILCS 5/6-18 (West 1992) (Liquor Control Act of 1934); 325 ILCS 55/7 (West 1992) (Missing Children Registration Law); 410 ILCS 5/2 (West 1992) (Burial of Dead Bodies Act); 410 ILCS 80/11 (West 1992) (Illinois Clean Indoor Air Act); 520 ILCS 5/2.1 (West 1992) (Wildlife Code); 625 ILCS 5/11-208.2 (West 1992) (Illinois Vehicle Code); 625 ILCS 5/13A-114 (West 1992) (Vehicle Emissions Inspection Law).

The legislature expressed a narrow pre-emption in the RGA, which applies to the VGA absent a conflict. Specifically, the RGA provides:

> The Board shall have jurisdiction over and shall supervise all gambling operations governed by this Act. The Board shall have all powers necessary and proper to fully and effectively execute the provisions of this Act, including, but not limited to, the following:
>
> (18) To authorize a licensee to sell or serve alcoholic liquors, wine or beer as defined in the Liquor Control Act of 1934 on board a riverboat and to have exclusive authority to establish the hours for sale and consumption of alcoholic liquor on board a riverboat, notwithstanding any provision of the Liquor Control . Act of 1934 or any local ordinance, and regardless of whether the riverboat makes excursions. The establishment of the hours for sale and consumption of alcoholic liquor on board a riverboat is an exclusive power and function of the State. A home rule unit may not establish the hours for sale and consumption of alcoholic liquor on board a riverboat. This amendatory Act of 1991is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution.

230 ILCS 10/5 (c)(18). (emphasis added). Thus, the legislature knows how to pre-empt home rule units from gambling-related regulation, but chose not to do so in any other section of the RGA or the VGA.

Accel contends that it sufficiently alleges that the Ordinance violates sections 6(a), 6(e) and 6(g) of Article VII of the Illinois Constitution based on the Kalodimos three- part test: (1) video-gaming regulation is a statewide issue not a local one, (2) the state has a vital interest in regulating video gaming (the State's regulatory structure for gambling furthers vital state interests and provides a comprehensive process for reviewing applicants), and (3) the regulation and taxation of commercial gambling have been managed exclusively by statewide rather than local authorities for over 100 years. Accel relies in particular on StubHub and County of Cook v. Village of Bridgeview, 2014 IL App (1st) 122164, as cases that recognize important limitations on municipal home-rule authority. Accel reasons that under these cases, an area traditionally regulated by the State that implicates vital state interests cannot be regulated locally. On this basis Accel contends that the regulation and the "taxation" of video gaming do not pertain to the Village's government and affairs.

Video gaming may be a statewide issue, but that does not mean it is only a statewide issue. Defendants argue that theOrdinance meets the threshold test of "pertaining to local government and affairs." Accel, relying on StubHub, asserts that the area regulated or taxed must be of local concern, a determination to be made by the court. However, the caselaw makes clear that the 1970 Constitution left this determination to the legislature. In Roman, the court quoted Professor Baum to explain:

> Some might believe that the courts play an important role in invalidating home

> rule ordinances that are inconsistent with statutes or that invade a field fully occupied by state legislation. By applying judicial doctrines relating to conflict, inconsistency, and occupation of the field, the courts can, inter alia, promote uniformity of law. However, for several reasons, the 1970 Constitutional Convention was strongly opposed to "judicial 'pre-emption' and sought a means to reduce its importance.
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> * * *Since the state always can vindicate its interests by legislating in the proper form, it seems unwise to sustain state legislation at the expense of home rule ordinances except when a state statute is in the required form or in those few cases where vital state interests would be sacrificed by permitting the local legislation to prevail until the next session of the General Assembly.

184 Ill. 2d at 518-19. Accel's arguments are not persuasive in light of the nature of home rule authority and the lack of an express limitation on local regulation in the VGA.

Accel fails to sufficiently allege that the license fee is unconstitutional.

The Village imposes on various businesses what it characterizes as annual license fees. For example, the ordinances of record show that the Village charges beverage delivery trucks $35; junk dealers and junkyards $1,500; theaters $1,000; dance halls $1,500; and cigarette and tobacco machines, jukeboxes, and videocassette rental machines $50 per machine. The fee at issue here is the Village's charge of $1,000 per VGT per year which is listed among the business license fees in the Village ordinances. Accel challenges the fee as: (1) exceeding the express limitation on the authority to tax video-gaming licensees under section 21 of the RGA as incorporated within the VGA, (2) an impermissible occupation tax, and (3) an impermissible tax to raise revenue.

Defendants assert that section 21 prohibits taxes not licensing fees, and the VGA essentially authorizes fees like this one when it limits to $25 per year the fee a non-home rule unit may impose for the operation of a VGT. Further, Defendants assert that Accel fails to allege facts to show that the charge, which is a license fee for regulatory purposes, is not reasonably related to the costs of regulation. Accel contends that calling the charge a "licensing fee" does not make it one.

A fee is defined as a "charge fixed by law for services of public officers." Crocker v. Finley, 99 Ill. 2d 444,452 (1984), quoting Black's Law Dictionary 553 (5th ed. 1979). A fee is regarded as compensation for the services rendered. Id., citing 36A C.J.S. Fee, at 248 (1961). "(A] charge having no relation to the services rendered, assessed to provide general revenue rather than compensation, is a tax." Id.

In A & H Vending Service, Inc. v. Village of Schaumburg,168 Ill. App. 3d 61 (1st Dist. 1988), the court considered the constitutionality of the Village of Schaumburg's vending-machine licensing ordinances, including license fees for the machines. The court explained that a license fee for regulatory purposes can be sustained as long as the license fee bears some reasonable relation to the cost of regulation." A & H Vending,168 Ill. App. 3d at 64. Further, those seeking to invalidate a license fee have the burden to prove "the lack of any reasonable relation between the fee and the cost of enforcement." Id. "Unless that fee is arbitrary or in great excess of the cost of enforcement and as long as the ordinances contain genuine regulatory provisions, the courts have been generous in sustaining a licensing fee for regulatory purposes." I d.

Defendants' argument succeeds here. Accel alleges no facts to show that the Village's charge of $1,000 per VGT per year is not reasonably related to the regulation it has undertaken in the Ordinance it enacted. Accel can prove no set of facts to show that the Village imposed an unconstitutional tax when it added $1,000 per VGT per year to its schedule of annual business license fees.

WHEREFORE, IT IS HEREBY ORDERED:

Defendants' motion to dismiss is granted, and Plaintiff's amended verified complaint for declaratory and injunctive relief is dismissed with prejudice.

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