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January 8, 2015

CONFIDENTIAL
Ottawa County Board of Commissioners
c/o Administrator, Al Vanderberg
12220 Fillmore Street
West Olive, Michigan 49460

Re: Historical Biblical Verse Billboard and Dedication Plaque at Hager Hardwood Park

Dear Commissioners:

Apparently, in 1960, when Titus W. and Frances M. Hager donated the land for Hager Park to the Ottawa County Road Commission's Park Trustees, they commissioned a dedication plaque that was affixed to a rock in the park ("Rock Plaque"). The Rock Plaque reads as follows:

HAGER HARDWOOD FOREST

TO THE GLORY OF GOD IN MEMORY OF OUR
FOREFATHERS AND THEIR PIONEER SPIRITS

DONATED TO THE OTTAWA COUNTY PARK TRUSTEES
BY FRANCES M. AND TITUS W. HAGER
1960 A.D.

At the same time, according to newspaper articles, Titus Hager suggested that a sign be installed at the entrance to the park reflecting the content of the Bible's Psalm 19, verse one. Whether Mr. Hager or the Road Commission erected the sign is not clear, but a hanging billboard ("Billboard") was installed with the verse, which reads as follows using the King James Version:

"The heavens declare the glory of God and the firmament sheweth his handiwork."

No conditions or restrictive covenants requiring maintenance of the Rock Plaque or Billboard have been found in any of the multiple Hager deeds to the property.

The next fifty-four (54) years have passed with little or no controversy regarding this Billboard or the Rock Plaque. That changed recently when an advocacy group demanded that the Billboard be removed and threatened litigation if it were not. Ottawa County Parks Director John Scholtz contacted the Ottawa County Parks Commissioners for advice and then made the decision to have the Billboard removed and taken into storage.

A number of community members have objected to the removal of the Billboard and have demanded its reinstallation. Since I represent the County in civil litigation and would be assigned the matter if it ended up in court, my opinion was solicited.

The following are my opinions:

1. The Rock Plaque does not violate the First Amendment.

Although there is no apparent present controversy on this issue, I am going to start with this opinion because it is a good segue into relevant First Amendment law pertaining to the Billboard.

In *Tong v. Chicago Park Dist.,*316 F.Supp.2d 645 (N.D. Ill 2004), the Court dealt with a "brick donation" fundraiser that the Chicago Parks District had undertaken. The District invited donors to add a simple message that was important to their family, which the District would then engrave on the brick to be permanently placed in a section of one park. The Tong family wanted to donate a brick with their names and the message: "Missy, EB & Lexi Tong–Jesus is the cornerstone. Love, Mom and Dad." The Chicago Park District rejected the message on the premise that to permanently install a brick with such a religious message in a public park would violate the anti-establishment side of the First Amendment to the United States Constitution.

The federal court in Chicago disagreed and found that since the Park District had invited a donor message, it could not engage in viewpoint discrimination without violating the First Amendment's clause prohibiting the discouragement of religion. Since the message included an identification of the donors, the Court cited to United State Supreme Court precedent finding that there is little chance that the public would be confused and believe the Tong's message was being endorsed by the Chicago Park District and any confusion in that regard was at best, incidental. 316 F. Supp.2d at 658, citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993). Furthermore, since the District did not have detailed regulations regarding the content of the donor brick messages, any prohibition was too

discretionary in park officials and, therefore, constituted an illegal prior restraint of First Amendment protected expression.

The Rock Plaque falls almost perfectly within the holding of *Tong*. Clearly, at the time, the Ottawa County Road Commission must have permitted donor plaques with a message expressing the donor's motivation. The Hagers selected a slightly religious and mostly social message that is clearly linked to them and to their motivation for the donation—exactly like the Tongs' message. Accordingly, there is absolutely nothing constitutionally wrong the Rock Plaque, no matter what any group might say and it may remain in Hager Park without qualification or legitimate First Amendment concerns.

2. Ottawa County is not required to put the Billboard back up.

A county, like a private owner of property, may legally preserve the property under its control for the use to which it is dedicated. *Rosenberger v. Rector and Visitors Of The University of Virginia,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). Thus, in its parks, Ottawa County is under no obligation to allow individuals to plant, nor once installed—to maintain, permanent signs, even those expressing First Amended protected speech. Accordingly, if we assume for the moment that Mr. Hager erected the Billboard prior to his donation, Ottawa County is under no obligation to maintain the sign.

There is no evidence that Mr. and Mrs. Hager legally conditioned the gift of the parkland upon the erection or maintenance of the Billboard. To the contrary, the absence of such language in the deeds is compelling evidence that they did not so condition the grant. Even if they had, Ottawa County may not accept a property with a requirement that it maintain a religious billboard. The easiest example to understand this concept would be if the donors of the Rosy Mound Lake Michigan parcel had been Islamic and had included a covenant in their deed requiring the County to maintain a billboard that said "there is no God but Allah." Ottawa County could not legally accept such a grant unless it did so under the understanding that the Park would contain a limited public forum permitting any group to erect a billboard proclaiming its religious views and containing a disclaimer that none of the billboards were endorsed by Ottawa County government nor necessarily expressed the personal views of its officials or employees. In other words, the County could only accept a gift that required religious signage if it created a "philosophical park" open to all viewpoints on the particular philosophy being explored.

To date, Ottawa County has never created such a philosophical park, and therefore, it is under no obligation to do so now.

3. **Ottawa County may put the sign back up if it creates a limited public forum consistent with the topic of Psalm 19:1; invites other messages regarding nature and whether there is or is not a God; adds language that none of these messages are endorsed by Ottawa County government; and places an end date on all of these messages so none of them become permanent monuments.**

Consistent with the discussion above, Ottawa County could put the sign back up, but ONLY if it turns at least the surrounding portion of Hager Park into a limited public forum dedicated to the ability of citizens of the County to put up billboards in the same philosophical vein as Psalm 19:1, which is to say billboards that draw a link between what geology and biology tell us about the origins of the earth—and ONLY if signage is installed disclaiming any public endorsement of any particular billboard's expression—and ONLY if each of these billboards, including the Psalm 19:1 Billboard are eventually taken down and replaced with others. In other words, if the Ottawa County Board of Commissioners decides to put the sign back up, it may only do so if it converts a potion of Hager Park into a version of the philosophical park discussed above.

Thereafter, other individuals wishing to weigh in on the cosmological debate would have to be invited erect similar signs expressing their personal viewpoints on this cosmological theme. The United States Supreme Court has said the following about such limited public forums:

> Once [the State] has opened a limited forum ... the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' ... nor may it discriminate against speech on the basis of its viewpoint.... Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Rossenberger, supra, at 829.

Thus, once the County consciously decided to place a sign in Hager Park that contains a religious viewpoint on creation, it would have to allow others to add billboards addressing that subject from a different viewpoint. There are hundreds of examples I

could come up with, but billboards such as the following would have to be allowed in Hager Park as well:

"I look to the heavens and see only emptiness. I see no evidence of a God."

"I look to the heavens and see evidence of God but I look at the mess on earth and assume he is dead."

"The heavens reveal the glory of Allah."

The Parks Commission would have to develop a strict set of detailed guidelines regarding any prohibited sign content or any refusal by the Parks Commission or Parks Department of a proposed billboard would constitute an illegal prior restraint of religious speech and be automatically enjoined no matter how otherwise valid the prohibition could have been if proper guidelines had been in place. See *Tong, supra.* This is necessary so that individual county employees or board members are not making distinctions based solely on their discretion.

Moreover, the County would have to develop a rotational system so that those wishing to express their sentiment had the same opportunity to have their sign erected and were allowed to keep it erected during the same period of time and so that no billboard would achieve permanent status. This is important because the United States Supreme Court has ruled that even privately financed monuments cannot be erected permanently without achieving the status of permanent, governmental speech, which may not be religious or anti-religious in nature. See *Pleasant Grove City v. Summum,* 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed. 2nd 853 (2009). Accordingly, the Psalm 19:1 Billboard could not stay up indefinitely.

Interestingly, in reading the newspaper articles about the 1970's addition of the stone outlined map of the United States during the expansion of Hager Park, there was discussion of its unique status among parks in the United States. Ironically, if the Billboard is to be reinstalled by Ottawa County, Hager Park will again become a unique park, which is to say that to my knowledge, it would become the only cosmological/philosophical message park in the United States.

Obviously, the County would have to think carefully of all of the possible negative ramifications of such a park. Certainly, such a park is likely to draw vandals. Certainly, it is likely to draw provocative billboards. Certainly, it is likely to draw controversy and litigation. Certainly, the peaceful family/non controversial nature of Hager Hardwood Park as solely a picnic and hiking park would be irrevocably altered.

4. The Billboard has a religious, not historical purpose.

As is reflected in the letter of the Hager's, which the County has recently received and as is confirmed by the newspaper articles at the time, Titus Hager's purpose in the Billboard was to express his own personal religious view about nature's revelation of the glory of God. Indeed, those who support its retention in Hager Park undoubtedly also have strong religious feelings in support of the message. Any suggestion that this message was or is secular in nature, frankly, demeans it and would also down play its source, which is the Bible itself.

This fact distinguishes this situation from the Second Circuit Court of Appeals' recent protection of a twisted pair of I-beams from the 9-11 wreckage of the World Trade Center which are on display in the public memorial 9-11 museum. In *American Atheists, Inc. v. Port Authority of New York and New Jersey,* 760 F. 3d 227 (2nd Cir. 2014), the Court recognized that while the artifact had religious significance to many workers at the 9-11 site in the aftermath of the tragedy. In fact, religious services were held at the foot of the artifact as a cross and religious sign to some that God's mercy was present at the site. However, the Court found that the motivation of those who installed the artifact in the museum was historical; namely, that this artifact was assembled with others both religious and nonreligious in a collection of mementos that collectively told the story of 9-11 and its aftermath.

There is no historical park collection of which the Billboard is or would be a part. There is no evidence that the Billboard was the scene of historical rallies and meetings. Moreover, unlike the twisted I-beams, the Billboard is important for its direct Christian message with ongoing religious significance, not as a mere artifact of past significance.

I am, of course, available to discuss this opinion with you or other Ottawa County officials and commissions and intend to be present when the opinion is discussed on Tuesday, January 13, 2015, at a session of the Ottawa County Board of Commissioners.

Finally, I would note that there is nothing in the law that has changed since the 1960's. The simple fact is that no one has complained about the presence of the Billboard in fifty-four years. While that may reflect the fact that Ottawa County is changing, it doesn't reflect a change in the law. The First Amendment is as old as our country and had these issues been raised in 1960, this legal opinion would have been the same.

This letter is exempt from disclosure under the Freedom of Information Act because it is subject to the attorney/client privilege. Discussion of this letter may be held in closed session under Section 8(h) of the Open Meetings Act, which excludes from the open meeting requirements, discussion of materials exempt from disclosure under the Freedom of Information Act.

In view of the potential controversy surrounding this subject, I would suggest that the Board start its discussion of this Opinion in closed session so that commissioners may ask follow up, related questions. Thereafter, I would suggest that I be invited to give the Board in open session a synopsis prior to any public discussion and any decision by the Board regarding the Billboard's fate. In my experience, this is the most orderly method for organizing debate on and consideration of a controversial subject.

Very truly yours,
SILVER & VAN ESSEN, P.C.

Douglas W. Van Essen

Cc: Greg Rappleye, Corporation Counsel
John Scholtz, Ottawa County Parks Director

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January 27, 2015

CONFIDENTIAL
Ottawa County Board of Commissioners
c/o Al Vanderberg, Administrator
12220 Fillmore Street
West Olive, Michigan 49460

Re: Update to Opinion Letter on Historical Biblical Verse Billboard at Hager Hardwood Park

Dear Commissioners:

This is an update to my January 8, 2015 Opinion Letter on the above referenced subject. Since the first opinion, several developments have unfolded. First, various members of the extended Hager family have contacted the County. The grandchildren of Titus W. and Frances M. Hager, while underscoring the deep faith of their grandparents and their original desire that the Psalm 19:1 billboard ("Sign") be installed in the park, believe that their grandparents would not have wanted this controversy to afflict the County and would certainly not want to see the County involved in an expensive, divisive litigation over the Sign's continued presence in Hager Park. Therefore, the family has requested that they take temporary possession of the sign, until such time as they donate the Sign and see it placed in an appropriate setting. Some members of the Hager family also believe an interpretive/historical sign installed by the County memorializing the Sign, its importance to their grandparents and its presence in the park for years and then the reasons for its removal might be a fitting memorial to their grandparents and their values as well as the importance of the sign to many people over the years. Parks Director John Scholtz has developed a facsimile of what such a sign might look like.

Additionally, a parochial interest group has volunteered to provide lawyers at its expense to defend Ottawa County if it reinstalls the Sign in the Park without the limitations described in my January 8, 2015 letter. However, the group would want control over the litigation and would not agree to indemnify the County if the group loses the case for the County and the County is ordered to pay the plaintiff's attorneys' fees and costs, which the court would be obligated to order if litigation ensues and the plaintiff is victorious.

Let me address the second development first. Ten years ago, a lawsuit challenged the legality of a disclaimer offered by the Dover Public School Board to the teaching of evolution within its schools. The Dover disclaimer said that the District was teaching the theory of evolution only because it was forced to do so by the State Department of Education; that evolution theory was flawed and that intelligent design was an alternative theory that students were encouraged to study on their own. The District was sued by a family called "Kitzmiller" and the matter litigated in the federal district of Pennsylvania. The Kitzmillers were represented by the ACLU, which argued that the disclaimer violated the anti-establishment clause of the First Amendment because in attacking evolution as a flawed theory that it would prefer not to teach and encouraging the study of intelligent design which it clearly preferred to teach, the public school district was encouraging a religious viewpoint on the origins of man.

A parochial interest group founded and funded by Dominos' Pizza magnate, Tom Monahan, agreed to provide lawyers to defend the District and its disclaimer, but only if it could control the litigation. It also refused to agree to indemnify the District if it lost the case. The District accepted the offer.

The Disclaimer could have been saved if it had been edited by knowledgeable constitutional scholars to temper the attack on evolution and to mute the endorsement of intelligent design as the preferred theory. However, because the litigation was controlled by the Christian interest group with its own agenda, the edits were not made; the case went to a forty day trial and the District lost, resulting in an award of $2 million in attorneys' fees to the Kitzmillers' lawyers. All of the school board members were recalled and the new school board agreed to drop the District's appeal in exchange for an immediate payment to the ACLU of $1 million in its legal fees.

I cannot recommend that Ottawa County accept the present parochial interest group's offer of a "free" defense. To grant control over litigation to an outside group is an irresponsible thing for a public entity to do that can lead to devastating results, as the *Kitzmiller* case demonstrates. In fact, the County would start with one foot in the hole in the litigation if a Christian interest group represents it, since its very position that placement of the sign in Hager Park is not a pro-religious statement—a necessary position under the First Amendment—would be belied by the fact that a Christian group is defending the County. That the present group is not willing to indemnify the County—as Tom Monahan's group was not willing to indemnify the Dover School District—signals that they don't have confidence in the outcome. Letting biased lawyers who lack confidence in the outcome control one's case is, frankly, always a lousy idea. Risking hundreds of thousands of dollars in taxpayer dollars on such a venture is clearly ill advised—again, as the former school board members in Dover painfully discovered.

The other development—the interpretive/historical picture sign--in my opinion, has the markings of an acceptable compromise. It brings the present situation in line with the 9-11 museum case, *American Atheists, Inc. v. Port Authority of New York and New Jersey,* 760 F. 3d 227 (2nd Cir. 2014) mentioned in my first opinion. Like the I-beam cross installed in the 9-11 museum, a sign memorializing the presence of the billboard for so many years and the significance of the billboard to the Hager donors and many residents over the years is not an endorsement of religion but a recognition that many in our community are religious and for many years drew inspiration from this sign. That it stood for many years without controversy is as notable as the present controversy and as long as both facts are included in the sign, the sign has a historical and communal purpose without presenting any reasonable inference that Ottawa County or its Parks Department are promoting a particular religious point of view. Such a development seems consistent with what a majority of the Hager family members seem to want and it would create a lasting memorial to the motivations of Titus and Frances Hager in their generous gift.

I cannot promise that such an interpretive/historical picture/sign won't engender litigation. However, as noted above, I believe it could be defended as the I-beam's presence in the 9-11 Museum in New York City was successfully defended. Some of the Commissioners at the last meeting were clearly looking for a positive action to take from which they could take a stand that could be legally defended. I believe that the installation of a sign such as John Scholtz has developed represents such a positive action. As before, I am, of course, available to discuss this opinion with you or other Ottawa County officials and commissions and intend to be present when the opinion is discussed on Tuesday, January 27, 2015, at a session of the Ottawa County Board of Commissioners. This letter is exempt from disclosure under the Freedom of Information Act because it is subject to the attorney/client privilege. Discussion of this letter may be held in closed session under Section 8(h) of the Open Meetings Act, which excludes from the open meeting requirements, discussion of materials exempt from disclosure under the Freedom of Information Act.

Very truly yours,
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cc: Mr. Greg Rappleye
Mr. John Scholtz