MUNICIPAL ATTORNEYS NEWSLETTER
Missouri Municipal Attorneys Association
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Asst. Editor Ragan Wright **January 09, Issue #1-09**

IMPORTANT MATTERS

MISSOURI IMMIGRATION LAW REQUIRES AFFIDAVITS. After January 1, 2009, New Missouri Immigration Law Requires Affidavits. Section 285.530.2 RSMo requires a political subdivision as a condition of a contract or grant in excess of $5,000 awarded after January 1, 2009, to require the business entity to affirm by sworn affidavit and provision of documentation that the business entity has enrolled and participated in a federal work authorization program with respect to its employees who work in connection with the contracted services and to sign an affidavit affirming that it does not knowingly employ any person who is an unauthorized alien in connection with the contract. You should include in your bid specifications and contract a statement that an affidavit will be required as a condition of the contract prior to or at the time of execution that the company has such a program, has provided documentation for the program, and that it will not employ unauthorized aliens in connection with the work. Note: You may obtain a model affidavit from MML headquarters.

CASE OUTLINES (MISSOURI)

MOOTNESS IS JURISDICTIONAL IN DECLARATORY JUDGMENT ACTION. Citizens submitted an initiative petition (Petitioners) to the city of Lee's Summit (City) requesting passage of an ordinance that would ban smoking in all workplaces and public places in Lee's Summit. The city charter provided that the City Council must either pass the initiative petition as submitted or submit it to the voters as set forth in the initiative petition. The City Council entered into an agreement with the Petitioners whereby the Petitioners withdrew their initiative petition and the City Council enacted an ordinance prohibiting smoking in all public places except for restaurants and bars. Then a second ordinance that repealed the exception for bars and restaurants that became effective upon approval by the voters. The City submitted this ordinance to the Jackson County Board of Election Commissioners (Board) notifying the Board that the City had called an election on November 7, 2007. The Board challenged the right of the City to hold the election by filing a declaratory judgment. The Board and the City agreed that the matter could not be challenged until the Board issued absentee ballots and that the matter would be submitted to the voters so long as the City "agreed not to argue mootness." The voters approved the ordinance and thereafter the ordinance took affect. After the election, the circuit court took up the Board's request for a declaratory judgment and held that the City could submit the ordinance notwithstanding the city charter. On appeal, the Western District held that the matter was moot even though the City had agreed not to challenge the Board's action because of mootness. The court noted that a threshold question in the review of a controversy under a declaratory judgment is whether or not the matter is a "justiciable" controversy. A case is moot if the decision would have no practical effect upon an existent controversy. In this case, the election and adoption of the ordinance makes it impossible for the court to grant effectual relief; therefore, the case is moot and should be dismissed. The Board argued that this case falls under an exception to this rule because it is likely to occur in the future and the matter is of public importance. This argument was rejected based on the vague allegations and mere possibility that

this may occur in the future. Case remanded and ordered to be dismissed. *Jackson County Board of Election Commissioners v. City of Lee's Summit*, (WD69074, 12/23/08).

Comment Howard: This is a very well written opinion and while we did not learn the answer to whether or not an ordinance referred to the voters outside of the normal initiative and referendum process was legal (a perplexing question recently discussed on the MMAA List Serv) there are aspects to this case that merit further consideration. First, the City's theory that the city charter provisions re-initiative, referendum, and the process for the City Council passing ordinances does not prohibit the City from referring ordinances to the voters outside of the normal initiative or referendum process was well taken and was adopted by the circuit court. The theory that Article VI, Section 19(a) of the Missouri Constitution allows home rule cities to exercise all powers of local government unless prohibited by the Constitution, state law, or the city charter seems to fit the situation. Lee's Summit's brief and the Board's brief in opposition should provide a good starting point for anyone who wants to take a similar position.

FLAG ANNEXATION DOWN THE ROAD WAS ILLEGAL. Recently, we learned that flag annexations had to meet the test of "compactness" in *Dodson v. City of Wentzville.* In *Curtis, et al., v. City of Hillsboro,* (ED90538, 11/25/08), we learned that a flag annexation down a road by the city of Hillsboro (City) is not compact. The trial court granted the petitioners motion for summary judgment on the grounds that the annexation was not "compact" as required by Section 70.014. On appeal to the Eastern District, the City argued that the trial court's interpretation of "contiguous and compact" was a constitutional impairment of the City and the property owner right to contract for consent annexation was rejected. The City further argued that a flag annexation down a road was not an automatic exclusion from the "compact" requirement and that argument was rejected by the court. The court further held that the exception for annexing down the road set forth in Section 71.012 by the City was misplaced, as the exception in Section 71.012 for annexations down the road applied only to Perry County. *Curtis, et al., v. City of Hillsboro*, (ED90538, 11/25/08)

Comment Howard: I say good riddance to the concept of flag annexations. While popular with local politicians, flag annexations have resulted in poor planning with city limits spreading out, making it difficult to deliver city services with low density. Good planning and applying smart growth principles will lead to greater density and better city services with less land grabs that elongate the city limits. Unfortunately, the General Assembly has made it very difficult to annex even when the city follows good planning procedures. While this case may be painful in the short run it hopefully will lead to the development community working with local government to better plan for comprehensive growth.

PROPERTY OWNERS RIGHT TO HERITAGE VALUE MUST FIRST BE CONSIDERED BY THE COMMISSIONERS. The trial court did not instruct the commissioners in a condemnation case to determine if the property owner was entitled to the heritage value for the property being condemned. The commissioners filed their return establishing the value of the property taken and both parties filed exceptions. A motion was filed by the property owners requesting that the trial court determine the heritage value that would add 50 percent to the fair market value of the property taken. The trial court refused on the grounds that both parties had filed exceptions to the commissioner's award and that the jury would determine under Section 523.039 if the property owner was entitled to heritage value. The property owner appealed this decision by filing a writ of prohibition which was granted as modified by the Missouri Supreme Court, requiring the trial court to refer the matter back to the commissioners for a determination as to whether or not the property owner was entitled to heritage value. The Court ruled that the filing of exceptions does not moot the Court's duty to determine the heritage value. Prior to making that determination, the commissioners must first determine if the property owner is entitled to heritage value. *State ex rel. White Family Partnership, et al., v. The Honorable Roldan*, (SC89148).

Comment Howard: With the fair market value getting a 50 percent boost and if there is heritage value, we can expect property owners to argue whenever possible that they are entitled to the heritage value. Initially this is a decision for the commissioners – which means you can expect vigorous arguments before the commissioners. Be prepared.

NEED TO CONNECT THE DOTS WHEN MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW. Stegman was employed as an emergency medical technician and paramedic for an ambulance district. Stegman appealed the decision of the Labor and Industrial Relations Commission's finding that she was not entitled to workers' compensation benefits for an injury she suffered while responding to an emergency summons from her employer. On appeal, the court found that the findings of fact were mere regurgitation of the facts without any integration of the facts to the law; therefore, the court could not ascertain why the Commission ruled the way it did in determining whether or not the employee should be paid when responding to an emergency from her house. *Stegman v. Grand River Regional Ambulance District*, (WD69099, 12/9/09).

STATUTE IS CLOSED ENDED BUT FALLS WITHIN SUBSTANTIAL JUSTIFICATION EXCEPTION. In 1998, the General Assembly passed SB 781 as one component of settling the long-running, federal desegregation suit involving the public schools in the city of St. Louis. Section 162.1100 of SB 781 provided for a Transitional School District (TSD) for handling the transition from the control of the federal court to the control of that to the St. Louis School District (School District). It further provided that if the School District lost its accreditation after gaining control, the control would be returned to the TSD. Section 67.1100 pertaining to the state taking over a school district applies to only one entity (St. Louis School District) that will ever meet the description of "existing school board in a city not within a county on or before August 28, 1998." This makes the statute a closed-ended classification and is facially suspect. Even though Section 162.1100 is closed-ended and facially suspect, it is not invalid because it falls within an exception. In this case, where there is a substantial justification for the treatment and creation of the TSD because it was part of a plan to end the federal district court's supervision over the public schools in St. Louis. As a result of this purpose, it does not violate the constitutional limitation against special laws. *Board of Education of the City of St. Louis, et al., v. The Missouri State Board of Education, et al.*, (SC89139)

TIME FOR FILING EXTENDED BY STATUTES. In this case the plaintiff, Bobbie Morris, filed her complaint 91 days from the date of the right-to-sue letter which happened to fall on a Sunday. Section 213.111.1 requires that any action be filed within 90 days after the right-to-sue letter is given. The trial court dismissed the action on the grounds that it was not timely filed within the 90 days as required by Section 213.111.1. On appeal to the Eastern District, the court held that Rule 44.01(a) and Section 1.040 provides that when the last day for filing is on a Saturday or Sunday the time for filing is extended to the Monday; therefore, the trial court's decision is reversed. *Morris v. Bissinger, Inc.* (ED91202, 11/25/08).

Comment Howard: This is a good case to keep in your repertoire if you have a question about how to count days for filing.

HEARSAY THAT EMPLOYEE WAS GOING TO CALL IN SICK WAS NOT COMPETENT EVIDENCE. Hearsay evidence in and of itself that an employee threatened to call in sick if the employer did not grant leave to attend to a medical problem, was not competent and substantial evidence for dismissal of employee to support decision in administrative hearing denying unemployment benefits. *Wilson v. Q Stop III and Missouri Division of Employment Security*, (ED91001, 11/04/08).

FAILURE OF PROOF IN DWI CASE. Wilson (Driver) was driving a vehicle that was involved in a one car accident in which he and his passenger were injured and taken to the hospital. A trooper was dispatched to the scene but Driver had already been taken to the hospital so the trooper went to the hospital and interviewed and obtained a blood test from the driver that showed his blood alcohol concentration was .150. The Driver was charged and convicted. On appeal, the case was reversed because the state failed to show the time when the trooper arrived at the scene of the accident; when he arrived at the hospital; or what time the blood sample was drawn. Nor, did the state call the paramedics who took the Driver to the hospital to testify as to the condition of the Driver at the scene or speak with hospital staff. *State of Missouri v. Wilson*, (WD69083, 11/04/08).

BURDEN OF PROOF FALLS ON DEFENDANT TO SHOW HE FALLS WITHIN EXCEPTION TO ORDINANCE. In March 2006, Max Croxdale (Croxdale) was issued a summons for failure to connect to the public treatment works in violation of a city of Strafford's (City) ordinance requiring connection to the city sewer system. Croxdale appeared in municipal court to the citation charging him with "failure to connect to the public treatment works" and entered a plea of not guilty. Croxdale argued that his septic system was a "private waste treatment facility" under the city code (which parrots state law) and as such, it was exempt from the city ordinance requiring connection to the city sewer system. He presented evidence that his septic system was working; but, no evidence to show that his system met the city ordinance requirements for a private waste treatment facility that meets state standards as required by the City. He was found guilty and appealed the conviction to the Southern District. On appeal, Croxdale argued that the City had the burden of proof to show his septic tank system did not meet state standards. The Southern District rejected this argument noting that since the private sewer system was an exception to the city ordinance, Croxdale had the burden of proving his septic system met the requirements of the city ordinance. *City of Strafford vs. Croxdale*, (SD28746, 11/12/08).

TRIAL COURT CANNOT DISREGARD UNCONTROVERTED EVIDENCE WITHOUT AN EXPRESS FINDING OF INCREDIBILITY. We continue to see appellate court cases reversing decisions of the trial court in license revocation cases involving driving while intoxicated. In this case, the trial court found that the director of revenue's evidence did not show that the arresting officer had probable cause to arrest the petitioner for driving while intoxicated and that the petitioner did not have a blood alcohol concentration of .08. On appeal to the Eastern District, the decision was reversed on the grounds that the trial court cannot disregard police officer's testimony that was uncontroverted "without an express finding of incredibility." *Rugg v. Director of Revenue*, (ED90855, 11/18/08).

Comment Ragan: *Rozier v. Director of Revenue,* (WD68534, 09/30/08), and this case both show a trend that is appreciated by those who are enforcing driving while intoxicated laws. Most of the decisions, even in *Wilson,* seem to be focused on the value of getting in every bit of evidence into the record for the court.

FEDERAL CASES

POLICE AND BUILDING INSPECTOR CAN FORCIBLY ENTER CONDEMNED BUILDING WITHOUT SEARCH WARRANT. The World Agriculture Forum (WAF) was being held in St. Louis in May of 2003. WAF forums held in Boston, Washington, and other places attracted anarchist groups that infiltrated peaceful demonstrators with Internet sites exhorting out-of-town activists to participate in a counter conference called "Biodevastation 7." The St. Louis police were informed by the FBI that out-of-town protesters would likely stay illegally in unoccupied or condemned buildings. The City adopted a "Building Code Violation Enforcement Plan" to identify vacant and condemned buildings to prevent unlawful occupancy. On May 16, 2003, the building inspector and several police officers went to a condemned building on 3309 Illinois St. When entry was refused the police forcibly entered and arrested five persons for occupying the condemned building. The occupants were held for 24 hours, entered Alford pleas, and were placed on probation. The inspector and police then went to 3022 Cherokee St., a building that had major structural problems and overcrowding that lacked an occupancy permit. At 3022 Cherokee St., when asked, the owner was told that if he did not provide access to the property an order would be issued immediately to vacate the building. The owner gave permission and the police and inspector entered seizing and allegedly damaging the personal property of the owner. No citations were issued to the owner. The City, the mayor, the board of police commissioners, the building and zoning commission, the building inspector, police chief, and several officers were sued by 25 protestors (Protesters) based on alleged violations of 42 U. S. C 1983, civil rights violations, and pendant state claims. The district court denied a motion asserting that the police officers were protected by qualified immunity for their actions in entering the 3309 Illinois building. On appeal, the 8th Circuit held that the actions of the police officers when entering the building at 3309 Illinois without a search warrant to arrest illegal occupants was not constitutionally unreasonable. In addition, the police may enter a condemned building without a search warrant to search for and seize contraband, evidence of crime, and items such as

flammable liquids that should not be allowed to remain in a condemned urban structure. With respect to the 3022 Cherokee property where the police officers seized certain items that were allegedly destroyed the district court denied the claim of qualified immunity which was affirmed by the 8th Circuit on the grounds that the record was not sufficiently developed. Protesters also claimed that their First Amendment rights were denied and chilled because of the building code enforcement plan. This claim was denied by the district court and affirmed by the 8th Circuit. The 8th Circuit held that the Protesters were not engaged in protected activities since they were arrested for illegally occupying a building; nor, was there selective enforcement of the City's ordinances, a prior restraint, or a disproportionate police response to the actions of the Protesters. *Cross v. Mokwa*, (No.07-3110, 11/14/08).

Comment Howard: This case answers a lot of very important questions with respect to the right to enter condemned buildings without a search warrant. For those who work with building development departments with respect to code enforcement, this case merits your careful review. The decision provides a basis for removal of vagrants and others from buildings that are condemned.

7TH CIRCUIT UPHOLDS RED LIGHT CAMERA ORDINANCE. The city of Chicago (City) enacted a red light camera ordinance that provides if the driver of a motor vehicle runs a red light or makes an illegal turn the owner of the car is subject to a $90 fine. Plaintiffs challenge in U.S. District Court the constitutionality of the ordinance based on a violation of the equal protection clause and the due process clause. The City filed a motion for summary judgment that was sustained and the plaintiffs appealed to the 7th Circuit. The 7th Circuit held that substantive due process depends on the existence of a fundamental liberty interest noting that "there is no fundamental right to run a red light or avoid being seen on a camera on a public street." The interest at stake, a $90 fine, for a traffic violation is so modest that it does not rise to the level of a property right subject to evaluation under substantive due process. The fine owed by the owner is rational in that it helps reduce the cost of enforcement and increases the proportion of all traffic offenses that are detected. The fact that the ordinance raises revenues does not condemn the ordinance. The procedures used to adjudicate these cases do not violate the due process clause since all of the defenses available under state law are available in this case. *Idris et al., v. City of Chicago et al.*, (7th Cir., 08-1363, 01/05/09).

Comment Ragan: I recommend reviewing this decision to any person interested in this issue. The opinion is well written but there are added bonuses because the legal briefs, and the oral arguments are included on this site. Please take time to listen to the oral arguments they are insightful to the process playing out on red light cameras. (Follow the case's hyperlink above.)

LEGISLATION AND OTHER MATTERS

FUNERAL PROCESSION ORDINANCES BRINGS A SPAT OF LAWSUITS. If you have adopted an ordinance limiting the right to picket funerals based on the Missouri statute you need to be aware that after the recent decision in *Phelps-Roper v. Nixon*, (8th Cir. No. 07-1295, 10/31/08) discussed in the December 08 *MMAA Newsletter*, the city of St. Joseph has been sued and the ACLU has threatened a number of other cities with lawsuits if these ordinances are not immediately repealed. As noted in the December 08 *MMAA Newsletter* the 8th Circuit's decision, while not reaching the merits, makes it very clear that short of a decision from the United States Supreme Court it will likely invalidate local ordinances similar to the Missouri statute. Obviously opponents to funeral procession ordinances were heartened by the 8th Circuit Court's decision. You may want to review the decision and consider advising your city council about the recent 8th Circuit decision and the likelihood that the ordinance will be found to be invalid if this matter is litigated making the city responsible for damages and attorney fees.

CURIOUS MIKE. Michael White wrote "Curious County Zoning Law Gets Curiouser" which is a very interesting article that appeared in the November-December *Journal of the Missouri Bar*, 2008. The article is about county zoning laws and Michael concludes that if the opportunity appears, the Missouri Supreme Court should take up this matter and either overrule past precedents that create inconsistencies or hold, like Kansas, that single-parcel zoning is no longer legislative. If you are curious this is a good article which has the potential to be referenced in some future Supreme Court decision.

RED LIGHT CAMERA ENFORCEMENT CASES HEAT UP. A recent article by Sharon Stone, assistant prosecutor for St. Louis City Court System in the October 2008 issue of *Benchmark* provides an excellent up-to-date discussion of legal issues associated with the enforcement of red light cameras. A copy of this article is on file with the MML. She notes in her article that some 21 cities in Missouri have adopted a version of a red light camera ordinance. Cases challenging these ordinances are now pending against Springfield and Arnold. Information continues to be developing throughout the country showing the impact of these ordinances with respect to accidents and whether or not they are having an impact on deadly accidents at red light intersections. We will continue to monitor red light camera cases. To obtain a copy of this article, look under MMAA materials on the "Attorney's Newsletter" portion on the MML Web site.

CODEWATCH. Mike Perry of Sullivan Publications has published a "Codewatch for 2008" that compiles new statutory provisions or amended provisions that have been passed by the General Assembly dealing with cities or counties. You may get a copy of this by contacting Mike at mike@sullivanpublications.com.

CITY CODE OVERRIDES PROPERTY OWNER COVENANTS. Thomas Laird, the city clerk for the village of Four Seasons writes that a recent Camden County Circuit Court decision held that Village law requiring pools to be fenced overrode a covenant of the Four Seasons Lakesites Property Owners Association (POA) that did not allow fences. A copy of this decision is on file with the MML.

EEOC GUIDELINES ON RELIGIOUS DISCRIMINATION IN THE WORKPLACE. EEOC has issued a new compliance manual section with respect to religious discrimination in the workplace. The manual does not change the law but instead provides guidance to employers investigating employment discrimination based on religion. A copy of the manual may be accessed online at: http://www.eeoc.gov/policy/docs/religion.html

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BOOK REVIEW (SORT OF) REDEVELOPMENT LAW. *Redevelopment, Planning Law and Project Implementation, (A Guide for Practitioners)* by Blaesser and Cody published by the ABA Section of State and Local Government Law, lives up to the subtitle as a great reference book covering a full range of topics associated with redevelopment law. This book ties together the entire redevelopment process into one 300-page book providing a quick reference to all of the key redevelopment topics ranging from land assembly, planning, environmental constraints, parking, and much more. This book would be particularly useful to those practitioners who do not engage full time in the practice of redevelopment law. What I particularly liked were the topics in which I have limited knowledge like market analysis, the sources of capital and underwriting criteria, debt and equity financing including mezzanine loans. The examples used to show the basic financing structure are very useful. This book is well worth the purchase price of $89.95. It can be purchased on line at http://www.ababooks.org/.

HOW TO OBTAIN OPINIONS

The material contained in this *Newsletter* was summarized as a service to MMAA members. Almost everything cited in the *Newsletter* is available on the Internet. There are a variety of places to search for cases on the internet. Below are several sites that I use for research. If you have questions or comments please feel free to email me at **howardcwright@mchsi.com**.

Missouri: **http://www.courts.mo.gov/page.asp?id=12086&dist=Opinions**
Federal: **http://www.ca8.uscourts.gov/onestop.html**.
Supreme Court: http://www.supremecourtus.gov/
Other sources: **www.findlaw.com** and **http://www.molawyersweekly.com/**.

The opinions cited in this Newsletter *may be subject to revision or withdrawal prior to publication.*