

SC93195

IN THE MISSOURI SUPREME COURT

CITY OF KANSAS CITY, MISSOURI
PLAINTIFF/RESPONDENT

vs.

KAREN CHASTAIN, ET AL.
DEFENDANTS/APPELLANTS

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY, SIXTEENTH CIRCUIT
CASE NO. 1116-CV29139

SUBSTITUTE RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

Appellants Karen D. Chastain, Kim Williamson, Richard Tolbert, Lamar Mickens and Cynthia Mickens are listed as members of a Committee of Petitioners on an initiative petition submitted to the City Clerk of Kansas City on July 7, 2011. (L.F. 7, ¶ 2-6; Plaintiff's Exhibit 106). The petition sought adoption of an ordinance that would impose two sales taxes "to help fund" a transportation system. (Plaintiff's Exhibit 106; L.F. 11, ¶ 27).

Specifically, the proposed ordinance calls for a one-fourth percent capital improvements sales tax for 25 years and a one-eighth percent transportation sales tax for 25 years, "to help fund" the following specific routes and modes of transportation throughout the City (Plaintiff's Exhibits 104 and 106; L.F. 11, ¶¶ 26 – 28):

- Construct a 22-mile light rail spine from Waldo to a Park & Ride (P&R) lot south of Kansas City International Airport...with electric shuttle service to the terminals . . . including stops at or near Brookside, UMKC, the Plaza, Westport, Penn Valley Park & Liberty Memorial, Union Station, the Downtown Power & Light District on Main Street, City Market, NKC, Vivion Rd., Line Creek Park, and Zona Rosa generally following the Country Club right-of-way, Broadway Main St., Burlington, North Oak Trafficway, and the Interurban right-of-way;

- Construct a 19-mile commuter rail line from south Kansas City to Union Station including stops at or near a P&R lot at Blue Ridge and Hwy. 71, a P&R lot at Blue Ridge and I-470, the Bannister redevelopment site, Swope Park, and the Truman Sports Complex generally following existing rail corridors and Truman Rd.;
- Construct an 8.5-mile streetcar line from the Kansas City Zoo to Union Station including stops at or near Research Medical Center, Citadel redevelopment site, Cleaver Blvd., 39th St., Troost Ave., Hospital Hill, and Crown Center generally following the Prospect Ave., Linwood Blvd., and Gilham Rd. corridor;
- Construct an electric shuttle bus and bikeway feeder network that will connect to all rail stations with the bikeways separated from traffic and using where possible the grassy medians of city boulevards;

The proposed ordinance also requires that the tax proceeds be used “to finance bonds and secure federal matching funds. (Plaintiff’s Exhibits 104 and 106; L.F. 11, ¶¶ 26 – 28).

On July 19, 2011, the City Clerk issued a Notice of Insufficiency to the committee with respect to the initiative petition after consulting with the appropriate election authorities and determining the committee had not obtained the required number of signatures. (L.F. 9, ¶ 17; L.F. 122, ¶ 2). On July 20, 2011, the committee submitted supplementary petition papers. (L.F. 122, ¶ 3). On August 1, 2011, the City Clerk issued

a Certificate of Sufficiency after determining that enough signatures had been submitted. (L.F. 122, ¶ 4).

On August 4, 2011, the ordinance proposed by the committee was introduced as Ordinance No. 110607 and referred to the Council's Transportation and Infrastructure Committee. (L.F. 122, ¶ 6; Plaintiff's Exhibit 104). On September 29, 2011, the Council committee held a public hearing on the proposed ordinance and sent to the full Council with a recommendation that the Council not pass the ordinance. (L.F. 123, ¶ 8). On that same day, the Council passed Committee Substitute for Resolution No. 110727, As Amended, setting forth the reasons why the Council determined the City was not required to place the matter before the voters. (L.F. 122, ¶ 10; Plaintiff's Exhibit 105). On September 30, 2011, the committee filed with the City Clerk a request to place the ordinance before the voters. (L.F. 123, ¶ 11; Plaintiff's Exhibit 107).

On October 6, 2011, the City filed its Petition for Declaratory Judgment seeking an order that the proposed ordinance was facially unconstitutional because it failed to provide the revenue needed to construct the transportation system required by the ordinance, and that the City was therefore justified in refusing to place the issue before the voters. (L.F. 6). Appellants filed their Answer and Counterclaim on November 3, 2011, seeking an order in mandamus directing the City to place the proposed ordinance before the voters. (L.F. 22).

Appellants filed their Motion to Dismiss for Lack of Subject Matter Jurisdiction on December 2, 2011, arguing, among other things, that the City had an adequate remedy at law because it could repeal or amend the proposed ordinance if it was adopted by the

voters. (L.F. 40). The City filed its response on December 15, 2011. (L.F. 95). In its response, the City noted that Appellants had attached to their motion a trial court judgment in an unrelated matter that was later vacated by this Court. (L.F. 95). The City noted that the judgment cited by Appellants is void, and reliance on the judgment is improper. (L.F. 95). The City raised a number of arguments in response to Appellants' motion, including that it did not have an adequate remedy at law because elections cost money, and that even if the ordinance was adopted and the City later repealed it, the City could never recover the funds spent on the election. (L.F. 105).

The City filed its Answer and Motion to Dismiss Appellants' Counterclaim on December 5, 2011, arguing that the Appellants were not entitled to an order in mandamus because there is no ministerial duty for the City to place a facially unconstitutional ordinance before the voters. (L.F. 77 – 89). Appellants filed their response on December 14, 2011. (L.F. 90).

The trial court entered its Order Overruling the [Appellants'] Motion to Dismiss for Lack of Subject Matter Jurisdiction on February 7, 2012. (L.F. 114). On the same day, the trial court entered its Order Granting [City's] Motion to Dismiss Counterclaim Action for Mandamus. (L.F. 119).

A hearing was held on February 17, 2012. (Tr. 1). The City submitted a trial brief on the day of the hearing. (L.F. 125). In its trial brief, the City again argued that it did not have an adequate remedy at law because after the election, the City cannot recover the funds spent on the election. (L.F. 132). "Forcing the taxpayers to pay for an election on an unconstitutional ordinance serves no purpose." (L.F. 132).

The trial court entered its Judgment for the City on March 9, 2012. (L.F. 137). The court held that the proposed ordinance “is an unconstitutional appropriation ordinance under Article III, Section 51 of the Missouri Constitution.” (L.F. 139). “The City is therefore not obligated to place the facially unconstitutional ordinance before the voters, and is legally justified in refusing to place said ordinance before the voters.” (L.F. 139).

Appellants filed their appeal on March 19, 2012. On January 15, 2013, the Western District of the Missouri Court of Appeals issued an opinion affirming the trial court’s judgment. *City of Kansas City v. Chastain*, 2013 Mo. App. LEXIS 66 (Mo. App. W.D. 2013). On January 30, 2013, Appellants filed their application for transfer with the Court of Appeals. On March 5, 2013, the Court of Appeals denied Appellants’ application for transfer. On March 12, 2013, Appellants filed their application for transfer to this Court. On May 28, 2013, this Court issued its mandate sustaining Appellants’ transfer application.

ARGUMENT

I. City’s Response to Appellants’ Point I.

The trial court did not err in declaring the proposed ordinance a facially unconstitutional appropriation ordinance under Article III, Section 51 of the Missouri Constitution, because it can be determined from the text of the ordinance that it fails to provide the necessary funding for the transportation system mandated by the ordinance, in that it expressly states that the sales taxes will only “help fund”

the system and that bonds and federal matching funds will also be required, and failure to provide funding is grounds for pre-election review under Missouri law.

Standard of Review

“The appellate standard of review for declaratory judgment is the same as in any court tried case: we will affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.” *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 413 (Mo. 2001).

Appellants have cited to *Committee for Healthy Future v. Carnahan*, for the notion that constitutional and statutory provisions related to the initiative are to be liberally construed. 201 S.W.3d 503, 507 (Mo. 2006). What Appellants fail to acknowledge, however, is that the initiative power is not absolute. As the Supreme Court went on to state in *Committee for a Healthy Future*, “[t]he people, speaking with equal vigor through the same constitution, have placed limitations on the initiative power. That those limitations are mandatory is clear and explicit.” *Id.* at 507. This case is about those mandatory limitations, and whether the proposed ordinance meets the threshold requirements set out in the Missouri Constitution.

The Proposed Ordinance is Facially Unconstitutional

Article III, Section 51 of the Missouri Constitution states as follows, in pertinent part: “The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution.” It is well-settled law in Missouri that a municipality will not be forced to place legislation constituting an appropriation measure before the voters, unless the

measure provides for new revenue to cover the appropriation. *Kansas City v. McGee*, 269 S.W.2d 662, 666 (Mo. 1954); *State ex rel. Sessions v. Bartle*, 359 S.W.2d 716, 719 (Mo. 1962); *State ex rel. Card v. Kaufman*, 517 S.W.2d 78, 81 (Mo. 1974).

The ordinance proposed by Appellants is an appropriation ordinance that requires the construction of a comprehensive transportation system but fails to provide the revenue needed to build the system. The ordinance requires construction of (1) a 22-mile light rail spine; (2) a 19-mile commuter rail line; (3) an 8.5-mile streetcar line; and (4) an electric shuttle bus and bikeway feeder network. (Plaintiff's Exhibits 104 and 106; L.F. 11, ¶¶ 26-28). The ordinance sets out specific routes the various transportation modes must follow, mentioning various well-known neighborhoods and landmarks that would be served by the system, including Waldo, the Kansas City International Airport, Brookside, the University of Missouri-Kansas City, the Plaza, Westport, Penn Valley Park, Liberty Memorial, Union Station, the Power and Light District, City Market, NKC (North Kansas City), Line Creek Park, Zona Rosa, Truman Sports Complex, the Kansas City Zoo, Crown Center, Hospital Hill, Bannister redevelopment site, Swope Park and Research Medical Center. (Plaintiff's Exhibits 104 and 106; L.F. 11, ¶¶ 26-28).

The ordinance states that the sales taxes proposed in the ordinance will be used "to help fund" the mandated improvements. (Plaintiff's Exhibit 106; L.F. 11, ¶ 27). Additionally, the ordinance states that the sales tax revenue will be used to "finance bonds and secure federal matching funds." (Plaintiff's Exhibits 104 and 106; L.F. 11, ¶¶ 26-28). By stating that the sales tax revenue will only "help fund" the mandated improvements, the drafter(s) of the ordinance have acknowledged in the text of the

ordinance that the sales tax revenue will not build the entire system. The requirement for the City to use the sales tax revenue generated by the ordinance to finance bonds and secure federal matching funds is also an admission that the sales tax revenue will not be sufficient to build the required improvements. "Finance bonds" is simply another way of saying "borrow money." "Secure federal matching funds" is a directive to obtain funding from a source other than the revenue provided for in the ordinance. Accordingly, this Court need not look beyond the text of the ordinance in order to determine whether it provides all of the needed revenue. The text of the ordinance makes it clear that additional revenue will be needed. The only question is: How much?

**Article III, Section 51 Requires the Ordinance to Provide and Create
All Necessary Revenue**

Appellants have argued that because their ordinance provides *some* of the needed revenue to construct their proposed transportation system, that is enough to fulfill the constitutional requirement set out in Section 51 of Article III. They are asking this Court to engraft a "sufficiency test" into this provision of the Missouri Constitution. How much of an appropriation would be required to meet the "sufficiency" test Appellants are attempting to read into the constitution? Would \$1 dollar be "sufficient" to force an election? Would fifty-one percent of the funding meet the test? Appellants offer no answers to these questions. More importantly, such an interpretation ignores the plain language of Article III, Section 51, which provides that the initiative "shall not be used for the appropriation of money *other than of new revenues created and provided for thereby.*" The plain language of the constitution makes it clear that the prohibition

against using the initiative for appropriating funds, unless new funds are created and provided for by the measure, is absolute. The requirement to provide all of the funding is mandatory, clear and explicit. *Committee for a Healthy Future*, 201 S.W.3d at 507.

The Appellants cannot circumvent the requirement to provide the necessary revenue simply by providing some of the revenue. Unless all of the revenue is provided, the constitutional requirement is not met. If Appellants' ordinance "is to be enacted through the initiative it can only be done by making provision for *new* revenue to pay the bill." *McGee*, 269 S.W.2d at 666.

The requirement to provide *all of the revenue* is further illustrated by the facts of the *Card* case. In *Card*, the court held that the City was not required to place before the voters a Charter amendment proposed by the initiative that would have required University City to pay its firefighters the same salaries as firefighters in St. Louis. *Card*, 517 S.W.2d at 81. The amendment did not provide the revenue to pay for the additional costs involved. The court received evidence that the amendment would result "in an increase in the salaries of fire department personnel by an amount in excess of \$55,000, not previously budgeted and appropriated as required by the ordinances and charter of the city." *Id.* at 79. The court determined that the provision was unconstitutional because it failed to create and provide new revenues to fund the salary increases. Obviously, University City was already paying its firefighters, and the proposed ordinance was simply a salary increase. But the fact that the City had already appropriated a portion of the firefighters' salaries did not change the outcome in *Card*. This Court determined that the entire amount had to be provided.

The *Card* court received evidence concerning the amount of the shortfall, which was \$55,000 “not previously budgeted and appropriated.” *Id.* at 79. In this case, the Appellants circulated an “Information Sheet” during the signature gathering process which estimated that the cost of building, operating and maintaining their transportation system would be about \$2.5 billion, but the sales taxes would only raise \$1 billion, leaving a shortfall of \$1.5 billion. (L.F. 123, ¶ B.3; Plaintiff’s Exhibit 110).

Appellants claim that if this Court upholds the trial court’s judgment, it will open the door for individuals to request evidentiary hearings on the cost and revenue projections of various projects. (App. Br. 25). As stated above, the plain language of the ordinance makes it clear that it does not provide all of the revenue needed to fund the system, and that additional funding is required. No evidentiary hearing is needed to determine that the ordinance fails to provide all of the revenue. The only question is: How much is the shortfall? The City notes that Appellants’ own estimates show that at least \$1.5 billion in additional revenue is needed to fund the transportation system, but agrees with Appellants that it is anyone’s guess as to the exact amount of the shortfall. The amount of the shortfall, however, is irrelevant. All of the new revenue must be provided by the proposed ordinance before the City can be required to place the measure on the ballot.

The reason the Missouri Constitution prohibits passage of appropriation ordinances by the initiative, unless new revenue is provided, is because the constitution also requires the City to keep a balanced budget. *McGee*, 269 S.W.2d at 665; Article VI,

section 26(a).¹ “It would be difficult for a city council to comply with that constitutional provision and the budget law if appropriations could be made by the initiative process.” *McGee*, 269 S.W.2d at 665. “The people, therefore, by the constitution expressly prohibited an appropriation law being voted through the initiative unless the law at the same time provides the revenue.” *Id.*

The *McGee* court also noted that allowing an appropriation ordinance to be adopted through the initiative “would take from the City Council the control over the finances of the City.” *McGee*, 269 S.W.2d at 665, (citing section 89 of the 1925 City Charter, which is now found in section 805 of the current Charter adopted in 2006). The court noted that the City Charter empowers the City Council to “review the budget to determine the need for the expenditures required and the adequacy, reliability and propriety of estimated revenues, including hearings with the city manager and department officials.” *Id.*; *see also* § 805(a) of the City Charter. “That section also provides that the Council may increase or decrease the amounts or eliminate any appropriation as

¹ Article VI, section 26(a) provides: No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution.

requested.” *Id.*; *see also* § 805(b) of the City Charter. “The proposed ordinance would substantially change the budget law.” *Id.*

Appellants freely admit that their ordinance does not provide all of the necessary funding, contemplates taking from the City Council control over the City’s finances, and implicates constitutional provisions regarding the City’s debt limit on page 28 of their Amended Brief filed in the Court of Appeals. “Sales tax revenues generated over a twenty-five year period do not provide for the revenue necessary to carry out a capital improvement project today. The drafters recognized this fact and provided that the City would be authorized to use the sales tax revenue to ‘finance bonds’ and obtain immediate capital.” (App. Am. Br., p. 28). In other words, Appellants admit that the City would be *required* to use the sales tax revenue to borrow money in order to build the system contemplated in the ordinance. While not stated so directly in their Substitute Brief filed with this Court, Appellants do urge this Court to interpret their ordinance as accounting “for the possibility that the entire system cannot be constructed with the dedicated sales tax revenues and to instruct the city to construct as much as can be funded.” (App. Sub. Br., p. 23). Additionally, Appellants admit that the ability to build the transportation system is premised on a wish for federal funds. (App. Sub. Br., pp. 25-26). Contrary to Appellants’ argument, however, instructing the City to seek federal funding is not the same as providing or creating new revenue, as required by the constitution.

The Ordinance Expressly States it Does Not Provide All Necessary Funding

Appellants argue that while the ordinance states that the tax revenue will only “help fund” the transportation improvements, this is not a facial admission that the

ordinance does not provide all of the revenue. (App. Sub. Br., p. 23). WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1053 (1971) defines "help" as "to assist in attaining." Since the plain and ordinary meaning of the word "help" is "assist," the proposed ordinance states that the sales tax revenue generated by the ordinance will assist with funding the transportation improvements. Assisting with the funding is not synonymous with creating and providing the funding.

Appellants claim that "help fund" could be interpreted to mean that the sales tax will be used "to construct as much of the route as possible." (App. Sub. Br., p. 23). In fact, Appellants claim there is no mandate to construct the entire route. (App. Sub. Br., p. 24). By urging this Court to make such a finding, Appellants are admitting that their ordinance, on its face, does not provide all of the revenue needed to construct their transportation system. Such an admission requires a ruling in favor of the City.

Additionally, if it is true that the specific routes are merely nonbinding suggestions, why are they included in the ordinance? The landmarks and neighborhoods mentioned include virtually every area of the City; no doubt they were included to generate support from every geographic area of the City. Surely the citizens who vote to tax themselves because they believe their tax dollars will result in a new transportation system that serves their neighborhood or workplace will be angry if, after the election, the City announces there is no mandate to actually build the routes that appeared on the ballot. It would be disingenuous for the City to call an election asking the citizens to approve a transportation system that promises service to specific neighborhoods and

landmarks, knowing full well that the City will not be able to build the promised improvements.

The ordinance does mandate construction of a comprehensive transportation system, but fails to provide the funds needed to construct it.² It is clear from the text of the proposed ordinance that the sales tax revenue would only assist with the funding, but would not provide all of the funding. The ordinance is unconstitutional on its face and the City was justified in refusing to place the ordinance before the voters. Appellants' first point should be denied.

II. City's Response to Appellants' Point II.

The trial court did not err in declaring the proposed ordinance a facially unconstitutional appropriation ordinance because the ordinance is an appropriation ordinance in that it requires construction of a transportation system but does not provide all of the necessary funding.

² Appellants' argument also completely contradicts arguments made in the Court of Appeals. In their Reply Brief in the Court of Appeals, Appellants criticized a proposed streetcar line because it is not as expansive as their proposed system. "The City is advancing a proposal for a street car that connects bars and businesses in mid-town to bars and businesses in downtown Kansas City. This line, however, does not run east of Troost." (App. Rpl. Br., pp. 2-3). Clearly the specific routes set forth in Appellants' ordinance are important to them, or they would not have criticized another proposal that covers less ground.

As stated in Respondent's Motion to Strike filed contemporaneously with this brief, Appellants' second point alters the basis of their claim raised in their Court of Appeals brief that their proposed ordinance is not a facially unconstitutional appropriation ordinance, and should be struck from their brief. Rule 83.08(b). "On transfer to this Court, appellants may not add new claims." *Dupree v. Zenith Goldline Pharms., Inc.*, 63 S.W.3d 220, 222 (Mo. 2002). In any case, Respondent will address the argument. In doing so, Respondent incorporates by reference the arguments made in response to Appellants' first point, as the argument in their second point repeats some of the same arguments.

Standard of Review

Respondent incorporates by reference the standard of review set forth in its response to Appellants first point.

The Proposed Ordinance Does Not Create and Provide for the Necessary Revenue

While their first point focused mainly on the "help fund" language, their second point addresses the directive to "secure federal matching funds." Appellants cite to a federal statute that they state allows cities to apply for federal funding for transportation projects if they also have local funding in place. Appellants contend that creating and providing revenue that in turn may allow the City to ask the federal government to supply additional funds is the same as providing all the revenue. This explanation is itself an admission that the sales tax revenue does not create and provide all the revenue needed for the project. Providing the City with a directive to ask the federal government for funding is not the same as providing the funding. Appellants cannot avoid the

constitutional requirement to provide the revenue simply by directing the City to look elsewhere for the money, just as the City cannot comply with the constitutional requirement to keep a balanced budget by promising to “secure federal matching funds” to make up for any shortfall. Article VI, section 26(a).

While Appellants casually dismiss the constitutional requirement that their ordinance provide and create new revenue by suggesting that the City ask the federal government to supply the missing funds, their ordinance does not bind the federal government to do anything. Insofar as the ordinance directs City staff to apply for federal funds, it is special and administrative in character. *State ex rel. Gateway v. Welch*, 23 S.W.3d 861, 864 (Mo. App. E.D. 2000).

Prior to presentation of an initiative to the people, our single function is to determine whether the constitutional requirements and limits of power have been regarded. One such limit of power is that the initiative procedure is to be used to enact powers of legislation under which the people themselves may enact laws without resorting to the legislative branch. Thus, courts clearly can make a threshold determination of whether the proposed ordinance is legislative or administrative in character, as only legislative measures are appropriate for the initiative process.

Id. at 863 (internal citations omitted). See also *State ex rel. Whittington v. Strahm*, 374 S.W.2d 127, 129-130 (Mo. 1963).

In *Gateway*, citizens proposed a city ordinance that would call upon the state legislature to require labeling on food regarding genetic modification, and directed City

staff to write letters to state and federal authorities “in the hope of persuading those authorities to enact laws requiring the labeling of genetically modified foods.” *Id.* at 864. Noting that the ordinance did not bind those higher authorities to do anything, the court determined it was not legislative and upheld the trial court’s judgment denying an order that it be placed before the voters.

In reaching its holding, the *Gateway* court relied on an Oregon case that is perhaps even more analogous to this case. *Id.* (citing *Amalgamated Transit Union-Div. 757 v. Yerkovich*, 545 P.2d 1401 (Or. Ct. App. 1976)). In the *Yerkovich* case, citizens of Portland, Oregon sought to put before the voters an ordinance approving construction of a highway with federal and state funds. 545 P.2d at 1404. In holding that the ordinance was administrative instead of legislative, the court noted, “the City of Portland has no authority to either compel or bar the construction of any part of the interstate system; and that its approval of a project within that system accompanied by a request that federal and state authorities carry out its construction represents at best a measure of participation in an administrative process.” *Id.*

While the City agrees that it has the authority to enact a local sales tax, it cannot compel the federal government to provide the matching funds needed for this proposed system. The vague directive to “secure federal matching funds” is administrative in nature, and is not the proper subject of an initiative petition. Additionally, such a directive is also an admission that the sales tax revenue will not fund the system. Appellants’ second point should be denied.

III. City’s Response to Appellants’ Point III

The trial court did not err in entering judgment in favor of the City, because the City was entitled to declaratory judgment, in that the City did not have an adequate remedy at law.

Standard of Review of Review

Appellants claim that the trial court lacked subject matter jurisdiction because they claim that the City failed to demonstrate that it lacked an adequate remedy at law.

Courts have wide discretion in administering the Declaratory Judgment Act of Missouri. *Missouri Property Insurance Placement Facility, v. McRoberts*, 598 S.W.2d 146, 148 (Mo. App. E.D. 1978). Generally, the court's determination of authority to hear a case is a question of fact that will not be reversed on appeal absent an abuse of discretion. *Missouri Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. 2003). When the facts are uncontested, the question of subject matter jurisdiction is purely a question of law and is reviewed *de novo*. *Id.* "This court is primarily concerned with the correctness of the result, not the route taken by the trial court to reach it; the trial court's judgment will be affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground." *Id.*

City Did Allege It Lacked an Adequate Remedy at Law

Appellants argue that the City failed to state a claim for declaratory judgment because the petition does not allege that the City did not have an adequate remedy at law. Appellants are incorrect. The City alleged that the City Charter set forth a procedure allowing citizens to submit ordinances through the initiative (L.F. 8-9); that Appellants had followed the procedure set forth in the Charter (L.F. 9-10); and that Appellants had

demanded that the City Council submit its proposed ordinance to the voters. (L.F. 10, ¶ 24). The City further alleged that while the procedural steps required by the City Charter in order to place an ordinance on the ballot had been met, the ordinance did not meet the threshold requirements of the Missouri Constitution. (L.F. 13- 14). Accordingly, the City asked for a judgment declaring that it was proper for the City to refuse to place the ordinance before the voters.

Appellants filed a motion to dismiss the City's petition, arguing that the City had an adequate remedy at law. Specifically, Appellants argued that City Charter section 704³, which permits the City Council to repeal or amend an ordinance adopted at the polls under the initiative, provided the City with an adequate remedy at law.

In its responsive pleading, the City acknowledged that the Appellants had met the procedural requirements of the City Charter, but argued that because the ordinance was unconstitutional as a matter of form in violation of Article III, Section 51 of the Missouri Constitution, the City was not required to put it before the voters. (L.F. 96). In other words, the City argued that but for a determination that the ordinance was facially unconstitutional, it would be required to put it before the voters. Additionally, the City

³ City Charter section 704 states as follows: Repeal of initiated ordinances. No ordinance adopted at the polls under the initiative shall be amended or repealed by the Council within one year of such adoption except by the affirmative vote of nine (9) members thereof. Thereafter such ordinance may be amended or repealed as any other ordinance.

argued that Charter section 704 did not provide an adequate remedy at law, because even if the City repeals the ordinance after the election, it can never recover the funds spent on the election. (L.F. 105).

The City also argued in its trial brief that it did not have an adequate remedy at law because but for the City Council's determination that the ordinance was facially unconstitutional, the City Charter would require the City to place the ordinance on the ballot. (L.F. 132). Moreover, repealing the ordinance after the election is not an adequate remedy because elections cost money, and the City would not be able to recover the funds spent on the election. (L.F. 132).

The City Has No Adequate Remedy at Law

Appellants argue that the City has an adequate remedy at law because the City Council can repeal their ordinance after the election if it passes. The City is seeking a declaration to avoid holding an election on an ordinance that does not meet the threshold requirements set out in the Missouri Constitution to appear on the ballot. A post-election remedy is not an adequate remedy when the purpose of seeking the declaration is to avoid the expense of holding an unnecessary election, as well as avoid the public confusion that results when the City holds an election on a piece of legislation that can never be enacted if passed. This Court has determined that these are "compelling reasons" to grant pre-election review. *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 828 (Mo. 1990). "The cost and energy expended relating to elections, and the public confusion generated by avoiding a speedy resolution of a question militate in favor of a limited pre-election review." *Id.* "The claim that no initiative proposition has been or

can be struck from the ballot prior to election because it submits issues in a manner prohibited by the constitution is unsupported by the cases.” *Id.*

This Court has held that the appropriate remedy for challenging whether a proposed initiative meets the threshold requirements set out in the Missouri Constitution is by seeking a declaratory judgment. *McGee*, 269 S.W.2d at 666; *see also Card*, 517 S.W.2d at 81.

The procedural posture in *McGee* is identical to this case. In *McGee*, the City filed a suit for declaratory judgment seeking an order that the City was justified in refusing to place an ordinance before the voters because it was unconstitutional under Article III, Section 51. *Id.* at 662. The ordinance at issue in *McGee* would have created a firefighters’ pension fund, but did not provide revenue for the measure. *Id.* at 665. The Court upheld the trial court’s declaration that the City was justified in not placing the ordinance before the voters. When a proposed ordinance does not meet the threshold constitutional requirements, Missouri courts will not “compel a large expenditure of money to hold a useless election.” *McGee*, 269 S.W.2d at 664 (citing *State ex rel. Cranfill v. Smith*, 48 S.W.2d 891 (Mo. 1932); *see also* §§ 115.071, 115.073 (setting forth process for billing election costs)).

An unnecessary election creates a financial burden for a City. “We would not impose upon Kansas City the burden and expense of submitting to a vote an ordinance which would be of no effect if adopted....The proposition that a writ of mandate will not issue to compel respondents to submit to the electors of the city a proposed ordinance that

would be void if approved by a majority of the electors, is too clear for discussion or the citation of authorities.” *Cranfill*, 48 S.W.2d at 893 (Mo. 1932).

If the City were seeking a declaration, post-election, to prevent it from being required to build the system contemplated in the ordinance, repealing the ordinance would be an adequate remedy. In fact, as noted by Appellants, the City did exercise that remedy in a previous case involving a different light rail ordinance that was adopted through the initiative process. *State ex rel. Chastain*, 289 S.W.3d 759, 761 (Mo. App. W.D. 2009). After the City exercised that remedy, the Appellants sought a writ of mandamus to force the City to build the system contemplated in the ordinance. *Id.* at 762. The City prevailed in that case. *Id.* at 767.

Appellants’ characterization of Section 704 of the City Charter as an “administrative remedy” that must be exercised before the City can seek judicial relief regarding a proposed ordinance that does meet the threshold requirements of the Missouri Constitution is misplaced. (App. Sub. Br., p. 30). The City Council may always repeal or amend its laws, regardless of whether they are passed through the initiative or by the elected representatives. The initiative is just another mechanism for adopting legislation, but a law is not forbidden to be changed or repealed simply because it was adopted through direct legislation rather than by the legislative body.

Section 704 of the City Charter simply sets forth the process by which an ordinance adopted through the initiative may be amended or repealed. It provides that a super-majority vote of nine is required to amend or repeal an initiated ordinance during the first year after it is passed. After the first year, the ordinance may be amended or

repealed by a simple majority of the City Council. Appellants are arguing that because the City Charter provides a process for amending or repealing initiated ordinances *after* passage, this somehow removes their obligation to meet the threshold requirements set out in the Missouri Constitution for placing an issue before the voters.

It is “clear and explicit” that the limitations on the initiative process set forth in Article III, section 51 of the Missouri Constitution are mandatory. *Committee for Healthy Future*, 201 S.W.3d at 507. Appellants may not avoid those constitutional requirements by relying on a City Charter provision, particularly one that does not even address the prerequisites to successfully placing an issue on the ballot. Appellants’ third point should be denied.

IV. City’s Response to Appellants’ Point IV.

The trial court did not err in dismissing Appellants’ counterclaim for an order in mandamus, because the City has no ministerial duty to place the proposed ordinance on the ballot, in that the ordinance is unconstitutional on its face.

Standard of Review

This Court reviews the trial court’s grant of a motion to dismiss *de novo*. *Foster v. State*, 352 S.W.3d 357, 360 (Mo. 2011). A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the pleadings. *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 101 (Mo. 2010). In the case of a counterclaim, the defendant’s allegations are taken as true, and no attempt is made to weigh any facts alleged as to whether they are credible or persuasive. *Id.* However, it is only properly pleaded factual allegations that are considered and taken as true, and it is only allegations

of this nature which may form the basis of any reasonable inference to be given the allegations. *Bohac v. Walsh*, 223 S.W.3d 858, 862 (Mo. App. 2007). “Conclusory allegations of fact and legal conclusions are not considered in determining whether a petition states a claim upon which relief may be granted.” *Williamette Industries, Inc. v. Clean Water Commission*, 34 S.W.3d 197, 200 (Mo. App. 2000). “The [claim] is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action or of a cause that might be adopted in that case.” *Keveney*, 304 S.W.3d at 101.

**Mandamus is Not Proper Because City has No Ministerial Duty to Place
Facially Unconstitutional Ordinance on the Ballot**

“The law of mandamus is well settled. Mandamus is a discretionary writ, and there is no right to have the writ issued. Mandamus will lie only when there is a clear, unequivocal, specific right to be enforced. The purpose of the writ is to execute, not adjudicate. Mandamus is only appropriate to require the performance of a ministerial act. Conversely, mandamus cannot be used to control the judgment or discretion of a public official . . .” *State ex rel. Missouri Growth Ass’n v. State Tax Comm’n*, 998 S.W.2d 786, 788 (Mo. 1999)(internal citations omitted).

The decision of whether to place an ordinance proposed through the initiative before the voters is not a ministerial act. Missouri law is clear that a municipality will not be forced to place legislation that is unconstitutional as a matter of form before the voters. *McGee*, 269 S.W.2d at 666; *State ex rel. Sessions*, 359 S.W.2d at 719; *State ex rel. Card*, 517 S.W.2d at 81.

Article III, Section 51, of the Missouri Constitution provides that “[t]he initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby....” Appellants’ proposed ordinance is an appropriation ordinance in that it mandates the construction of a new light rail line, commuter rail line, streetcar line, and shuttle bus and bikeway feeder network connecting all rail stations. The proposed ordinance expressly states that the sales taxes required by the ordinance would be used “to help fund” the mandated improvements and to “finance bonds and secure federal matching funds.” The failure of the proposed ordinance to appropriate and provide for all of the funds to construct the mandated improvements is a facial defect making the ordinance unconstitutional as a matter of form, which justifies the City’s refusal to place the ordinance before the voters. *McGee*, 269 S.W.2d at 666; *State ex rel. Sessions*, 359 S.W.2d at 719.

This Court has held that dismissal of a mandamus action is proper when the action is brought to attempt to force a City to place an ordinance before the voters that violates Article III, Section 51, of the Missouri Constitution. *State ex rel. Sessions*, 359 S.W.2d at 719. In *Sessions*, a committee of petitioners proposed an ordinance through the initiative that established certain job classifications and salaries for fire department employees. *Id.* at 717. The City Council passed a resolution declaring its intent not to pass the ordinance, which stated in part that passage of the ordinance “would require large appropriations of money in excess of that now appropriated for the payment of salaries.” *Id.* at 718. The City estimated the additional appropriation would be about \$500,000. *Id.* at 719. The court determined that the ordinance was an appropriation ordinance within

the meaning of Article III, Section 51, and was “fatally defective in failing to provide new revenues out of which to pay the increased salaries.” *Id.* Accordingly, the court affirmed the trial court’s dismissal of the mandamus action filed by the committee of petitioners. *Id.*

The *Sessions* case is directly on point. The ordinance proposed in the initiative petition in this case is an appropriation ordinance in that it mandates the construction of a new light rail line, commuter rail line, streetcar line, and shuttle bus and bikeway feeder network connecting all rail stations. The proposed ordinance also acknowledges that it does not provide all of the revenues needed to construct the mandated system. The ordinance expressly states that the sales taxes required by the ordinance would be used “to help fund” the mandated improvements and to “finance bonds and secure federal matching funds.” Appellants’ own estimates show that the sales taxes would only raise \$1 billion of the projected \$2.5 billion that it would cost to fund and operate the system. (L.F. 123, ¶ B.3; Plaintiff’s Exhibit 110). The failure of the ordinance in this case to provide new revenues to pay for the mandated transportation system is “fatally defective,” and dismissal of Appellants’ counterclaim for mandamus is proper under *Sessions*. *Id.* at 719.

Appellants make much of the fact that Section 703 of the City Charter provides that if the procedural requirements to place an ordinance before the voters have been met, that provision provides that the City “shall” place the issue on the ballot. (Sub. App. Br. 34). The City Charter is required to be consistent with, and is subject to, the Missouri Constitution and state law. *Chastain*, 289 S.W.3d at 764. Article III, Section 51 of the

Missouri Constitution prohibits the use of the initiative for passage of appropriation measures, unless the measure provides all of the new revenue to fund the appropriation. The reason for this is clear – the constitution also requires the City to maintain a balanced budget. MO. CONST. art. VI, § 26(a). When read in harmony with the constitution, it is clear that the use of the word “shall” in section 703 of the City Charter does not override the prohibition against using the initiative to pass appropriation measures, nor does it excuse the City from the budget law set forth in the constitution. Rather, the City is required to place an ordinance before the voters when the procedural requirements of the City Charter are met, assuming the threshold requirements of the Missouri Constitution are also met. Appellants’ fourth point should be denied.

V. City’s Response to Appellants’ Point V

The trial court’s judgment was based on a determination that the proposed ordinance was unconstitutional on its face, the trial court did not consider the City’s exhibits 102, 103 and 110 in reaching its decision, so admitting those exhibits over Appellants’ objection is not reversible error.

Standard of Review

“In reviewing the admissibility of evidence in a court-tried case, we are mindful that the trial court is allowed wide latitude in the admission of evidence because it is presumed that it will not give weight to evidence that is incompetent.” *Markely v. Edmiston*, 922 S.W.2d 87, 91 (Mo. App. W.D. 1996). Because of this, it is difficult to base reversible error on the erroneous admission of evidence in a court-tried case.” *Id.*

“Except when a trial court relies on inadmissible evidence in arriving at its findings, such

evidence is ordinarily held to be nonprejudicial.” *Id.* “We review for prejudice, not mere error, and will reverse only if the error was so prejudicial that the defendant was deprived of a fair trial.” *Secrist v. Treadstone, LLC*, 356 S.W.3d 276, 280 (Mo. App. W.D. 2011).

The Trial Court Did Not Rely on City’s Exhibits 102, 103 or 110

Exhibits 102 and 103 are sections of the City Charter which address the fact that the Board of Parks and Recreation Commissioners ultimately govern the use of City park property. The City had argued in Count II of its petition that the proposed ordinance contemplated the use of City park property, but that the Appellants had not followed the necessary steps set out in the Charter in order to remove the property from the City park system. (L.F. 16). The trial court’s judgment acknowledges that the City raised this argument, but bases its judgment solely on the City’s argument that the proposed ordinance is facially unconstitutional. (L.F. 138-139). “The City asserts other grounds on which the proposed ordinance is constitutionally flawed. It is unnecessary for the court to reach those claims, since the ordinance is found to be facially unconstitutional under Article III Section 51 of the Missouri Constitution.” (L.F. 139).

It is difficult to understand how the mere admission into evidence of City Charter sections in a court-tried case could ever constitute reversible error, as the court has authority to take judicial notice of City Charter provisions. In any case, it is clear that the trial court did not rely on these provisions in reaching its judgment.

It is equally clear from both the judgment and the transcript that the trial court did not take into account City’s Exhibit 110, which was an “Information Sheet” circulated by the Appellants while they were gathering petition signatures. First, in admitting City’s

Exhibit 110, the trial court stated, “I feel like that information sheet goes farther off the page of the ordinance. And so I – you know, it’s noted, and it will be included in the record but....Admitted over objection, and I doubt that it will be reached in anything that the Court rules here....or finds here.” (Tr. p. 7, lines 23-25; p. 8, lines 1-13).

Additionally, the judgment shows the trial court did not rely on the information sheet in reaching its decision. The trial court’s decision is based solely on the plain language of the proposed ordinance, and the fact that it only stated that it would “help fund” the transportation system and that the sales taxes would need to be used to “finance bonds and secure matching federal funds.”

That being said, as noted by the Court of Appeals, Appellants’ admitted in the trial court that the Information Sheet was presented to citizens who signed the petitions, and it completely contradicts Appellants’ arguments regarding the plain meaning of the phrase “help fund.” (L.F. 123); *Chastain*, 2013 Mo. App. Lexis at *13. “This exhibit was relevant to [Appellants’] argument to the trial court that ‘help fund’ means something contrary to the way [Appellants’] explained ‘help fund’ to citizens when attempting to induce such citizens to sign the initiative petition in the first place.” *Id.* at *14. As the court stated, it is difficult to see how the information sheet is not an admission against interest regarding the plain meaning “help fund,” as it admits that the proposed sales tax revenue will not even provide half of the funds needed for the project. *Bradley v. Hill Haven Corp. (In re Estate of Daly)*, 907 S.W.2d 200, 205 (Mo. App. W.D. 1995).

Finally, the City notes that while the information sheet does go beyond the text of the ordinance, the court in both *Card* and *Sessions*, when considering legislation that was

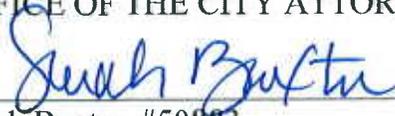
facially unconstitutional for violating Article III, Section 51, received evidence regarding the amount of the shortfall. In *Card*, the court noted that evidence was presented that the proposed legislation increasing salaries for firefighters would result in an increase of \$55,000 that was not previously budgeted or appropriated. *Card*, 517 S.W.2d at 79. In *Sessions*, where the court was again considering legislation regarding salaries for firefighters, the court received evidence that the salary increases would require an additional appropriation of about \$500,000. *State ex rel. Sessions*, 359 S.W.2d at 719. While it may be inappropriate for the court to consider the information sheet for the purpose of determining whether the proposed ordinance is facially unconstitutional, once that determination is made, under *Card* and *Sessions*, it is not inappropriate for evidence to be admitted regarding the amount of the shortfall. Appellants' fifth point should be denied.

CONCLUSION

The trial court did not err in granting its declaratory judgment in favor of the City and in dismissing Appellants' counterclaim for mandamus because the ordinance proposed by the Appellants is an appropriation ordinance that requires the construction of a comprehensive transportation system but fails to provide the revenue needed to build the system. It is clear from the text of the proposed ordinance that the sales tax revenue would only assist with the funding, but would not provide all of the funding. The ordinance is unconstitutional on its face and the City was justified in refusing to place the ordinance before the voters.

Respectfully Submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF COMPLIANCE AND OF SERVICE

Sarah Baxter, attorney for Respondent, hereby certifies that she is in compliance with Rule 55.03, that this brief is in compliance with the limitations contained in Rule 84.06(b), that Respondent's brief contains 8,955 words, that the brief was prepared using Microsoft Word 13 point Times New Roman font. I hereby certify that I electronically filed Respondent's Brief through the Missouri eFiling System this 8th day of July 2013, and that notification of such filing will be sent to Appellants' attorney, Jeffrey J. Carey, carey@carey-lawfirm.com.



Sarah Baxter, #50883
Assistant City Attorney

APPENDIX

Trial Court’s Judgment..... A1

Order Overruling Appellants’ Motion to Dismiss..... A5

Order Dismissing Appellants’ Counterclaim A10

Proposed Ordinance A13

MO. CONST. art. III, § 51 A16

Mo. Const. art VI, § 26(a) A17

§ 115.071 RSMo..... A18

§ 115.073 RSMo..... A19

City Charter § 805 A20

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CITY OF KANSAS CITY,

Plaintiff

Case No. 1116-CV29139

vs.

Division One

KAREN CHASTAIN, ET AL.,

Defendants.

FINAL JUDGMENT FOR PLAINTIFFS

This case came on for final hearing on February 17, 2012. Plaintiffs appeared by counsel Sarah Baxter. Defendants appeared by counsel Jeffrey Carey. Evidence was presented and arguments of counsel were heard. After full consideration of same, the court makes the following findings and judgment.

This is a declaratory judgment action wherein plaintiffs seek judgment pertaining to a proposed ordinance presented to the City by Initiative petition. The Initiative petition proposes construction of a 22-mile new light rail line, a 19 mile commuter rail line, an 8.5 mile streetcar line from the Kansas City Zoo to Union Station, a shuttle bus and bikeway feeder network connecting all rail stations. The proposed ordinance further establishes a one-fourth percent capital improvements sales tax for 25 years and a one-eighth percent transportation sales tax for 25 years. The proposed ordinance expressly states that the tax proceeds will be used "to help fund" the improvements for the mandated light rail system, and that the tax proceeds will be used to "finance bonds and secure federal matching funds."

The city seeks a declaration from this court that the proposed ordinance is unconstitutional on three grounds: (1) the ordinance is an unconstitutional appropriation in violation of Article III, Section 51 of the Missouri Constitution by failing to provide full funding for the construction mandated by the ordinance; (2) the proposed ordinance violates the U.S. Department of Transportation Act of 1966, 49 U.S.C. 303(c) in requiring construction of a transportation system with federal funds where requirements of the DOT Act have not been met; and (3) the ordinance circumvents the requirements of the City Charter, requiring approval of the Board of Parks and Recreation as required by the City Charter.

The proposed ordinance violates Section 51, Article III of the Missouri Constitution.

An ordinance submitted by initiative petition need not be submitted to the voters when it is facially unconstitutional. Article III, Section 51 of the Missouri Constitution provides:

The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution. Except as provided in this constitution, any measure proposed shall take effect when approved by a majority of the votes cast thereon. When conflicting measures are approved at the same election the one receiving the largest affirmative vote shall prevail.

An initiative petition which only partially funds the mandated appropriation of the city's funds is constitutionally impermissible under this provision.

In *Kansas City v. McGee*, 269 S.W.2d 662 (Mo.1954) the Missouri Supreme Court found that a proposed ordinance was in fact an appropriation ordinance which was not a lawful subject for the exercise of the power of initiative. The proposed

ordinance was found to violate Section 51, Article III of the Missouri Constitution. In such a case, pre-election review was held to be appropriate.

Defendants' proposed ordinance in this case fails to provide new revenues sufficient to cover the mandated appropriation of city funds. The ordinance provides only for a sales tax "to help fund" the mandated transportation network that is prescribed by the ordinance. On its face the ordinance in question fails to provide full funding for the transportation system mandated. By its very terms the proposed sales tax proceeds are to be used to "finance bonds and secure matching federal funds." The language of the ordinance makes it clear that municipal bonds and federal "matching funds" are necessary for funding of the 22-mile project. The proposed sales tax only helps fund the proposed project. It is therefore unconstitutional.

The City asserts other grounds on which the proposed ordinance is constitutionally flawed. It is unnecessary for this court to reach those claims, since the ordinance is found to be facially unconstitutional under Article III Section 51 of the Missouri Constitution.

IT IS NOW THEREFORE ORDERED AND ADJUDGED that the proposed ordinance, introduced as Ordinance No. 110607 is an unconstitutional appropriation ordinance under Article III, Section 51 of the Missouri Constitution. The City is therefore not obligated to place the facially unconstitutional ordinance before the voters, and is legally justified in refusing to place said ordinance before the voters.

March 9, 2012
Date


Sandra C. Midkiff, Circuit Judge

I certify that on 3/9/12 copies were mailed/faxed to:

Sarah Baxter & Galen Beaufort, Fax: 816-513-3127
Jeffrey Carey, Fax: 816-246-8006



Judicial Administrative Assistant

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CITY OF KANSAS CITY, et al.,

Plaintiff,

vs.

Case No. 1116-CV297

Division One

KAREN CHASTAIN, ET AL.,

Defendants.



**ORDER OVERRULING DEFENDANTS' MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION**

The court takes up Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, filed herein on December 2, 2011.

Plaintiff filed this case seeking declaratory judgment on the proposed ordinance presented by initiative petition, relating to the mandated proposed construction of a new light rail line, commuter rail line, streetcar line, and shuttle bus and bikeway feeder network connecting all rail stations. Plaintiff City of Kansas City, Missouri asserts that the proposed ordinance is impermissible for three reasons: (1) the system will cost more than the proposed funding contained in the ordinance, making it an unconstitutional appropriation ordinance as a matter of form, in violation of Article III, Section 51 of the Missouri Constitution; and (2) the proposed ordinance violates Department of Transportation Act of 1966, 49 U.S.C. 303(c) because it requires the construction of a transportation system with federal funds where the requirements of the DOT Act have not been met. (3) The proposed ordinance circumvents the requirements of the City Charter which requires the approval of the Board of Parks and Recreation is obtained for the establishment of this transportation system with federal funding. The

City seeks a judgment from this court declaring that the proposed ordinance is unconstitutional and the City is therefore justified in refusing to place the facially unconstitutional ordinance before the voters.

Standard for Review on Subject Matter Jurisdiction:

Defendants argue that this court lacks subject matter jurisdiction. The standard for subject matter jurisdiction was recently addressed by the Court of Appeals in *Ground Freight Expeditors, LLC v. Binder*, No. WD73678 (Mo.App.W.D. 12/27/2011). In that case the court held:

Dismissal for lack of **subject-matter jurisdiction** is proper whenever it appears, by suggestion of the parties or otherwise, that the court is without jurisdiction....

Though of no practical import to our standard of review, we do note that in light of *Webb ex rel. J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), the circuit court's reliance on a lack of **subject-matter jurisdiction** as a basis for its dismissal of the Binders' application for trial de novo is no longer technically accurate. In *Webb*, "the Supreme Court clarified that Missouri courts recognize only two kinds of jurisdiction: **subject matter jurisdiction** and personal jurisdiction." *State v. Molesbee*, 316 S.W.3d 549, 552 (Mo. App. W.D. 2010) (citing *Webb*, 275 S.W.3d at 252). "**Subject matter jurisdiction** is simply a matter of 'the court's authority to render a judgment in a particular category of case.'" *Id.* (quoting *Webb*, 275 S.W.3d at 253). "**Subject-matter jurisdiction** in Missouri's circuit courts is governed by state constitution." *Id.* (citing *Webb*, 275 S.W.3d at 253). "Article V, section 14 sets forth the **subject matter jurisdiction** of Missouri's circuit courts in plenary terms, providing that 'the circuit court shall have original jurisdiction over all cases and matters, civil and criminal.'" *Id.* (quoting *Webb*, 275 S.W.3d at 253).

Here, the Binders' application for trial de novo was a civil matter and, thus, technically a matter over which the circuit judge had **subject-matter jurisdiction**. Accordingly, we construe the Judgment pursuant to its import--a determination by the circuit judge that he lacked the statutory authority to consider the Binders' application for trial de novo pursuant to section 512.180. *Id.*

Applying that reasoning to the instant case, this court finds that circuit courts have original jurisdiction over all cases and matters civil in nature, including declaratory

judgment actions such as this one, brought pursuant to Section 527.010 et seq., R.S.MO. This court concludes therefore, that this circuit court has subject matter jurisdiction over the case.

Having determined that the circuit court had subject matter jurisdiction, the court in *Ground Freight Expeditors, LLC, id.*, went on to examine the court's statutory authority. As Judge Martin wrote for the court,

"we construe the Judgment pursuant to its import—a determination by the circuit judge that he lacked the statutory authority to consider the Binders' application for trial de novo pursuant to section 512.180.... *When a statute speaks in jurisdictional terms or can be read in such terms, it is proper to read it as merely setting statutory limits on remedies or elements of claims for relief that courts may grant... Thus, while a statute or a rule cannot strip the court of subject matter jurisdiction, it may still limit the court's ability to grant a remedy.*" *Id.* (Emphasis added.)

This court will, following the analysis in *Ground Freight Expeditors, LLC*, consider the defendants' motion as a claim that the court has no legal authority to grant the relief requested by the City in this case. Specifically defendants assert that declaratory judgment in advance of an election is "rarely appropriate." Here, however, there is a basis for pre-election review.

In *Kansas City vs. McGee*, 269 S.W.2d 662 (Mo. 1954) the court found that a proposed ordinance was in fact an appropriation ordinance which was not a lawful subject for the exercise of the power of initiative. The proposed ordinance was found to violate Section 51, Article III of the Missouri Constitution. In such a case, pre-election review was appropriate.

Defendants' proposed ordinance expressly states that the sales taxes required by the ordinance would be used to "help fund" the mandated improvements. The ordinance also provides that the tax proceeds would be used to "finance bonds and

secure federal matching funds." The City asserts that this ordinance, on its face, fails to provide for all of the funds to construct the mandated improvements. Therefore, pre-election review of the proposed ordinance for procedural defect is appropriate.

The City also alleges in its Petition that the proposed ordinance violates the federal DOT Act by attempting to circumvent the DOT Act requirements for obtaining federal assistance for a transportation project. Specifically, the act requires that the Secretary of Transportation must receive concurrence from the officials with jurisdiction over the property. The City alleges that pertinent provisions of the City Charter require that concurrence would need to come from the Board of Parks and Recreation. (Petition, Count II, paragraph 47-52). This court concludes that pre-election review of the proposed ordinance for facial compliance with existing federal law is appropriate under the Supremacy Clause of the United States Constitution. Article VI, Clause 2 provides:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

This court concludes that review of the proposed ordinance for compliance with state and federal constitutional restrictions is appropriate.

IT IS NOW THEREFORE ORDERED that defendants' Motion to Dismiss is OVERRULED.

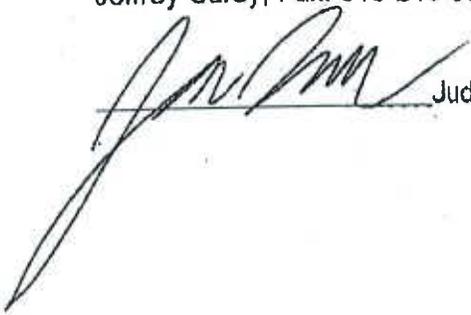
IT IS SO ORDERED.

2-7-12
Date


Sandra C. Midkiff, Circuit Judge

I certify that on 2/17/12 copies were mailed/faxed to:

Sarah Baxter & Galen Beaufort, Fax: 816-513-3127
Jeffrey Carey, Fax: 816-246-8006



Judicial Administrative Assistant

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CITY OF KANSAS CITY, et al.,

Plaintiff,

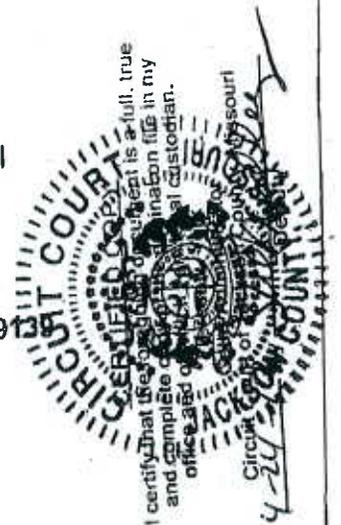
vs.

Case No. 1116-CV2912

Division One

KAREN CHASTAIN, ET AL.,

Defendants.



**ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM
ACTION FOR MANDAMUS**

The court takes up Plaintiff's Motion to Dismiss Defendants' Counterclaim, filed herein on December 5, 2011. Having considered Suggestions filed by both sides on this issue, the court concludes that the Counterclaim should be dismissed.

Plaintiff filed this case seeking declaratory judgment on the proposed ordinance presented by initiative petition, relating to the mandated proposed construction of a new light rail line, commuter rail line, streetcar line, and shuttle bus and bikeway feeder network connecting all rail stations. Plaintiff City of Kansas City, Missouri asserts that the proposed ordinance is impermissible for three reasons: (1) the system will cost more than the proposed funding contained in the ordinance, making it an unconstitutional appropriation ordinance as a matter of form, in violation of Article III, Section 51 of the Missouri Constitution; and (2) the proposed ordinance violates Department of Transportation Act of 1966, 49 U.S.C. 303(c) because it requires the construction of a transportation system with federal funds where the requirements of the DOT Act have not been met. (3) The proposed ordinance circumvents the requirements

of the City Charter which requires the approval of the Board of Parks and Recreation is obtained for the establishment of this transportation system with federal funding. The City seeks a judgment from this court declaring that the proposed ordinance is unconstitutional and the City is therefore justified in refusing to place the facially unconstitutional ordinance before the voters.

Defendants filed their counterclaim seeking a Writ of Mandamus, seeking an Order of Mandamus compelling the City to submit the proposed ordinance to a ballot as required by Section 703 of the City Charter.

Mandamus is a discretionary writ, and there is no right to have the writ issued. Mandamus is appropriate only to require the performance of a ministerial act. Mandamus cannot be used to control the judgment or discretion of a public official. *State ex rel. Missouri Grown Ass'n. v. State Tax Comm'n.*, 998 S.W.2d 786, 788 (Mo. 1999). The decision of whether to place an ordinance proposed through the initiative process before the voters is not a ministerial act. The City cannot be forced to place legislation which is unconstitutional as a matter of form before the voters. *Kansas City v. McGee*, 269 S.W.2d 662 (Mo. 1954).

Mandamus will not lie where the proposed ordinance is an impermissible appropriation. An ordinance that only partially provides funding and provides only for a sales tax "to help fund" the mandated transportation network cannot be the subject of a court's order of mandamus.

On its face, the ordinance in question fails to provide full funding for the transportation system mandated by the ordinance. By its very terms, the proposed sales

tax is only to "help fund" the transportation system. By its terms the ordinance requires or mandates bonds and seeking federal funding for the transportation system.

IT IS NOW THEREFORE ORDERED that Plaintiff's Motion to Dismiss Defendant's Counterclaim is GRANTED.

IT IS SO ORDERED.

2/7/12
Date

Sandra C. Mickiff
Sandra C. Mickiff, Circuit Judge

I certify that on 2/7/12 copies were mailed/faxed to:

Sarah Baxter & Galen Beaufort, Fax: 816-513-3127
Jeffrey Carey, Fax: 816-246-8006

[Signature]
Judicial Administrative Assistant



Office of the City Clerk

25th Floor, City Hall
414 East 12th Street
Kansas City, Missouri 64106

(816) 513-3360
Fax: (816) 513-3353

CERTIFICATE OF THE CITY CLERK

I, Vickie Thompson - Carr, City Clerk of Kansas City, Missouri, certify the attached is a true and correct copy of:

Chapter:

Charter Section:

Section:

Ordinance (s):

Resolution:

Other: Communication No. 110537 (Certificate of Receipt).

The above appears in records and is on file in the Office of the City Clerk, 25th Floor, City Hall, Kansas City, Missouri.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the City on this date, February 15, 2012.

Vickie Thompson - Carr
City Clerk

By Patricia D. Terry
Deputy City Clerk





Office of the City Clerk

R-2011-00587
Comm # 110537

25th Floor, City Hall
414 East 12th Street
Kansas City, Missouri 64106

(816) 513-3360
Fax: (816) 513-3353

CERTIFICATE OF RECEIPT

I certify that on this 7th day of July 2011 a Committee of petitioners filed in the City Clerk's office 194 pages of Initiative petition entitled Light Rail Based Transit Initiative.

Vickie Thompson Carr
City Clerk

INITIATIVE FOR A MORE GREEN, PROSPEROUS & TRANSIT-ORIENTED CITY

We the undersigned voters and citizens of Kansas City, Missouri hereby petition the City Council of Kansas City, Missouri to adopt the ordinance printed in full on the reverse side hereof and provide for submission of the following proposal to the voters of Kansas City, Mo. on the next available election date as may be provided by law.

In order to provide the people a more green, prosperous, and transit-oriented city shall the City of Kansas City, Missouri impose a capital improvement sales tax of ¼% and a transportation sales tax of 1/8%, both not to exceed 25 years, beginning in 2011, to help fund these improvements to the city's transit system:

- *Construct a 22-mile light rail spine from Waldo to a Park & Ride (P&R) lot south of Kansas City International Airport... with electric shuttle service to the terminals...including stops at or near Brookside, UMKC, the Plaza, Westport, Pean Valley Park & Liberty Memorial, Union Station, the Downtown Power & Light District on Main Street, City Market, NKC, Vivion Rd., Line Creek Park, and Zona Rosa generally following the Country Club right-of-way, Broadway, Main St., Burlington, North Oak Trafficway, and the Interurban right-of-way;
- *Construct a 19-mile commuter rail line from south Kansas City to Union Station including stops at or near a P&R lot at Blue Ridge and Hwy. 71, a P&R lot at Blue Ridge and I-476, the Bannister redevelopment site, Swope Park, and the Truman Sports Complex generally following existing rail corridors and Truman Rd.,
- *Construct an 8.5-mile streetcar line from the Kansas City Zoo to Union Station including stops at or near Research Medical Center, Citadel redevelopment site, Cleaver Blvd., 39th St, Troast Ave., Hospital Hill, and Crown Center generally following the Prospect Ave., Linwood Blvd., and Gilliam Rd. corridor;
- *Construct an electric shuttle bus and bikeway feeder network that will connect to all rail stations with the bikeways separated from traffic and using where possible the grassy medians of city boulevards; and also use the tax proceeds to finance bonds and secure federal matching funds?

The five following electors of the City of Kansas City, Missouri as a committee of petitioners shall be regarded as filing the petition: Karen D. Chastain 3552 Genesee St. KCMO 64111, Lamar Mickens 3943 Paseo Blvd. KCMO 64110, Cynthia L. Mickens 3943 Paseo Blvd. KCMO 64110, Richard C. Tolben 6229 East 15th Terrace KCMO 64126, and Kim Williamson 3558 Genesee St. KCMO 64111--It is unlawful for anyone to sign any petition with any name other than his or her own, or to knowingly sign his or her name more than once for the same measure for the same election, or to sign a petition when he or she knows he or she is not a registered voter.

STATE OF MISSOURI, COUNTY OF Jackson

CLAY CHASTAIN, after being first duly sworn, under oath state the following named persons,

SIGNATURE	ADDRESS	PRINTED NAME	DATE
<i>Bridgette Marchfield</i>	2041 Aska KCMO 64110	Bridgette Marchfield	10/23/10
<i>Daisy E. Perry</i>	5137 Forest Av. KCMO 64110	Daisy E. Perry	10/23/10
<i>Jennifer Leight</i>	4540 Pennsylvania Ave. KCMO 64110	Jennifer Leight	10/23/10
<i>Jennifer Leight</i>	5643 Forest KCMO 64110	Jennifer Leight	10/23/10
<i>Jennifer Clain</i>	705 E. 26 th Ave #2 KCMO 64110	Jennifer Clain	10/23/10
<i>Brenda Diber</i>	3814 Wyoming KCMO 64110	Brenda Diber	1-7-11
<i>Spruill Gibson</i>	3550 Winbar KCMO 64110	Spruill Gibson	1-7-11
<i>Patricia O'Connell</i>	14900 Peterson Rd KCMO 64110	Patricia O'Connell	1-7-11
<i>Paul Coester</i>	101 E. Dartmouth KCMO 64110	Paul Coester	1-7-11
<i>Dana Campbell Price</i>	8407 E 95th St KCMO 64110	Dana Campbell Price	1-7-11
<i>Ashley Edmundson</i>	3501 Jefferson St. EN KCMO 64110	Ashley Edmundson	1-7-11
<i>Brad Parr</i>	4118 Mercier KCMO 64111	Brad Parr	1-7-11
<i>Richard Lynn</i>	KC. Mo. 4514 Wyoming	Richard Lynn	1-7-11
<i>William Schuler</i>	6434 Vornell Rd. KCMO 64110	William Schuler	01/07/11
<i>John P. Pearson</i>	4233 Wyoming KCMO 64110	John P. Pearson	04/07/2011
<i>Diana Webb</i>	10820 Washington Ct	Diana Webb	11/7/2010
<i>Diane Kendall</i>	411 E. 16 th St KCMO 64110	Diane Kendall	11/7/2011
<i>Carolyn Williams</i>	4110 S. Denon	Carolyn Williams	11/1/11
<i>Mary Roberson</i>	2 W 58 th St KCMO 64110	Mary Roberson	1-7-11
<i>REX REED</i>	5725 110 th St. SS KCMO 64110	REX REED	1-7-11

Signed the foregoing initiative petition, and each of them signed his or her name thereto in my presence. I believe that each has stated his or her name and address correctly, and that each signer is an elector of the City of Kansas City, Missouri. Subscribed and sworn to before me, a Notary Public, on this 12th day of July, 2011, at Kansas City, MO. Notary Public

STATE OF MISSOURI
Jackson County
My Commission Expires: Jan. 31, 2012
Commission #08477507

Missouri Constitution

Article III LEGISLATIVE DEPARTMENT Section 51

August 28, 2012

Appropriations by initiative--effective date of initiated laws --conflicting laws concurrently adopted.

Section 51. The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution. Except as provided in this constitution, any measure proposed shall take effect when approved by a majority of the votes cast thereon. When conflicting measures are approved at the same election the one receiving the largest affirmative vote shall prevail.

(1974) A city charter amendment which would require salaries of city firemen to equal those of another city's firemen violates this section in that it in effect constitutes an appropriation measure which failed to provide new revenues. State ex rel. Card v. Kaufman (Mo.), 517 S.W.2d 78.



[Missouri General Assembly](#) →

Missouri Constitution

Article VI LOCAL GOVERNMENT Section 26(a)

August 28, 2012

Limitation on indebtedness of local governments without popular vote.

Section 26(a). No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution.

Source: Const. of 1875, Art. X, § 12 (adopted Nov. 2, 1920).

(1958) Contract of employment with defendant city whereby plaintiff was to make preliminary investigations, plans and supervise construction of proposed sewer improvements was held contrary to public policy and ultra vires where both parties realized necessity of approval by voters of city of bond issues to secure funds for the improvements and voters subsequently failed to approve bond issues. *Shikles v. City of Clinton (A.)*, 319 S.W.2d 9.

(1958) Indebtedness incurred by school district was valid so long as it was within the anticipated revenue for the year. *First National Bank of Stoutland v. Stoutland School District (Mo.)*, 319 S.W.2d 570.

(1967) Cities' cooperative sewer agreement which conditioned obligation of a fourth class city to build facilities on its passage of a bond issue did not, until the passage of the bond issue, create an indebtedness of the city, within constitutional debt limitation, and was not ultra vires or void ab initio. The passage of the bond issue obligated the city to perform the construction and established corresponding obligation of the other contracting city to perform its duties conditioned on the passage of the bond issue. *Kansas City v. City of Raytown (Mo.)*, 421 S.W.2d 504.

(1973) Lease agreement held to be an indebtedness of city and subject to this section. *Scruggs v. Kansas City (Mo.)*, 499 S.W.2d 500.

(1976) In action by state highway commission to recover on contract whereby city agreed to pay one-half of cost of acquisition of right-of-way for highway through the city, record was insufficient to sustain city's defense that contract was ultra vires, as being in violation of Art. VI, § 26(a), since there was no showing that the city, by reason of the contract, became indebted in an amount exceeding the revenues for the year in which the contract became binding plus any encumbered balances from previous years. *State ex rel. Highway Commission v. City of Washington (Mo.)*, 533 S.W.2d 555.

(2007) Requirement in sections 86.344 and 86.355, RSMo, that City of St. Louis pay entire contribution amounts certified by trustees for police retirement system and firemen's retirement system does not violate section. *Neske v. City of St. Louis*, 218 S.W.3d 417 (Mo.banc).



Missouri General Assembly →

Missouri Revised Statutes

Chapter 115 Election Authorities and Conduct of Elections Section 115.071

August 28, 2012

Election costs, how paid (Kansas City).

115.071. 1. In any city which has over three hundred thousand inhabitants and is located in more than one county, all general expenses related to the conduct of elections and the registration of voters in the part of the city situated in the county containing the major portion of the city shall be paid one-half from the general revenue of the city and one-half from the general revenue of the county in which the major portion of the city is located.

2. Except as provided in section 115.067, in any city which has over three hundred thousand inhabitants and is located in more than one county, the salaries of election judges at all city primary, general and special elections shall be paid from the general revenue of the city, even if a candidate or question other than a city candidate or question is submitted at the same election.

(L. 1977 H.B. 101 § 2.530)

Effective 1-1-78

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[Missouri General Assembly](#)

Missouri Revised Statutes

Chapter 115 Election Authorities and Conduct of Elections Section 115.073

August 28, 2012

Election costs, how paid (Clay, Platte and Jackson counties).

115.073. 1. In any county containing a portion but not the major portion of a city which has over three hundred thousand inhabitants, all general expenses related to the conduct of elections and the registration of voters shall be paid proportionally from the general revenue of the city and the general revenue of the county. The city shall pay such proportion as its population within the county is to the total population of the county as determined by the last preceding federal decennial census. The annual general operating expenditures from the general revenue funds of the city and any county of the first classification with more than seventy-three thousand seven hundred but less than seventy-three thousand eight hundred inhabitants or any city located within such county shall be subject to the budgeting approval of the governing body of the county.

2. In any county containing a portion but not the major portion of a city which has over three hundred thousand inhabitants, the salaries of election judges at all county and state primary, general and special elections shall be paid from the general revenue of the county, unless the city submits a question or candidate at the election, in which case the salaries of election judges shall be paid proportionally from the general revenue of the city and the general revenue of the county as provided in subsection 1 of this section.

(L. 1977 H.B. 101 § 2.535, A.L. 2003 H.B. 511)

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[Missouri General Assembly](#)

Sec. 805. Adoption of budget.

- (a) *Council review of the proposed budget.* Upon receipt of the annual budget, the Council shall review the budget to determine the need for the expenditures requested and the adequacy, reliability and propriety of estimated revenues. The review will include hearings with the City Manager and department officers. At the completion of this review, the Council shall hold at least one public hearing on the budget.
- (b) *Council modifications.* Following public hearings, the Council may increase or decrease the amount of, or eliminate any appropriation requested by the City Manager, and may add appropriations other than those included in the budget submitted by the City Manager.
- (c) *Report.* Upon completion of its review of the budget, and in any case not later than the first regular meeting in March, the Council shall place on file in the office of the City Clerk a copy of the document to be considered and shall set a date for a public hearing thereon, but in no case later than the second regular meeting in March.
- (d) *Adoption of the budget.* At the fourth regular meeting in March the Council shall by ordinance adopt the annual budget in detail specified below, with or without alteration or amendment.
- (e) *Budget requirements and appropriations.* The budget as adopted shall itemize purposes of expenditure by departments, activities, functions, and character classes in not less detail than personal services, contractual services, commodities and capital outlays, and as adopted shall constitute an appropriation for the purposes stated of the sums therein set forth as appropriation and authorization of the amount to be raised by taxation for the purposes of the City, provided that the total amount appropriated shall not in any event exceed the total revenues estimated to be realized in cash during such year, plus any unencumbered balance from previous years.
- (f) *Limitations on expenditures.* No officer, board, department or commission shall, during any fiscal year, spend any money, incur any liability, or enter into any contract which by its terms incurs the expenditure of money for any purpose for which no appropriation is provided, or is in excess of the amount appropriated for any purpose. Any officer, head of any department, or the members of any board or commission violating this provision shall be immediately removed from office by the appointing authority.
- (g) *Appropriation ordinances and establishment of tax levies.* The appropriation ordinance shall contain a statement of the estimated revenues for the ensuing fiscal year. Whenever practicable, ordinances fixing the tax levies shall be passed at the time the annual appropriation ordinance is passed, but no later than the fourth Monday in March. The Council may pass ordinances making additional appropriations after the passage of the annual appropriation ordinance, provided that such ordinances bear the certificate of the Director of Finance that a sufficient unappropriated balance remains in the fund from which the appropriation is to be made in accordance with the provisions of this Charter.
- (h) *Bond funds.* Monies of bond funds shall be appropriated only for the purposes for which the bonds were authorized and issued, and at such times as the funds may be needed for those purposes.
- (i) *Alteration of dates and deadlines.* The Council may change the dates for the elements of the budget adoption process and for the passage of the annual appropriation and tax levy ordinances. The annual budget shall be adopted and the annual appropriation and tax levy ordinances shall be passed not later than thirty days before the beginning of the fiscal year.
- (j)

General fund. All general revenue receipts, not including receipts from special assessments or other levies for particular purposes as in this Charter specified, shall be credited to the general fund.