

IN THE SUPREME COURT OF MISSOURI
No. SC83503

STATE OF MISSOURI, ex rel.
SUNSHINE ENTERPRISES OF MISSOURI,
INC., doing business as, SUNSHINE
TITLE AND CHECK ADVANCE,
Appellant,

v.

BOARD OF ADJUSTMENT OF THE
CITY OF ST. ANN, MISSOURI, et al.,
Respondents.

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS, EASTERN
DISTRICT

ED 77979

SUBSTITUTE REPLY BRIEF OF APPELLANT STATE OF MISSOURI, ex
rel.,
SUNSHINE ENTERPRISES OF MISSOURI, INC., doing business as,
SUNSHINE TITLE AND CHECK ADVANCE,

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ARGUMENT

II. THE TRIAL COURT ERRED IN AFFIRMING THE DECISION OF THE BOARD OF ADJUSTMENT OF THE CITY OF ST. ANN BECAUSE SUNSHINE=S PROPOSED SECTION 500 LOAN BUSINESS IS NOT EXCLUDED BY THE GENERALLY LISTED PERMITTED USES IN THE C-2 GENERAL COMMERCIAL DISTRICT IN THAT PURSUANT TO PRINCIPLES OF STATUTORY CONSTRUCTION SERVICES PERFORMED BY A SECTION 500 LOAN BUSINESS ARE NOT ARELATED® TO CHECK CASHING SERVICES AND SUCH SECTION 500 LOAN SERVICES ARE SIMILAR TO THE OTHER USES SPECIFICALLY LISTED IN ST. ANN CODE SECTION 400.370

In their Brief, Respondents concede that the primary, narrow issue presented for decision is whether Sunshine=s business is a permitted use under the St. Ann Zoning Code.

A. Sunshine=s Proposed Business is not Excluded by the Generally Listed Permitted Uses in the C-2 General Commercial District.

Again, Section 400.370, Permitted Uses, of the St. Ann Zoning Code provides, in part:

B. Personal services, including barbershop, beauty parlor, cleaning and laundry pick-up establishments, photographers, shoe repair, tailoring and dressmaking, but excluding pawn shops and establishments whose

primary business is check cashing and related services....

D. Banks, savings and loan associations, credit unions, stock brokers and title companies....

H. Uses having the same or similar characteristics as the foregoing uses.

In their Brief, Respondents first attempt, ineffectively, to defend their position that their Zoning Code is permissive in nature. Respondents, however, completely ignore Sunshine's first, and dispositive, argument that Respondent St. Ann's Code, by its terms, does not exclude Sunshine from conducting its business in St. Ann, as the Respondent Board of Adjustment incorrectly decided. Respondents have no response to this argument. (See, unanswered argument set forth in Appellant's opening Brief at pages 16-20).

Instead, Respondents' opening argument is that under the precepts of permissive zoning, that which is not listed as a permitted use is excluded or prohibited; therefore, Respondents contend that if a business like Sunshine's is not specifically listed, it is excluded as a permitted use. Rather than restating it here, Appellant refers the Court to its opening Brief which adequately addresses and distinguishes Respondents' simplistic argument. (Appellant's opening Brief, pages 20-23).

Furthermore, the Ordinance which has been attacked by Sunshine itself illustrates that presumably, the clarity of the St. Ann Zoning Code as to what was not a permitted use was in question to prompt the Board of Aldermen to pass Ordinance No. 2074 prohibiting all such uses and further contradicts and undermines Respondents' argument that their Zoning Code is permissive in nature.

Moreover, Frison v. City of Pagedale, relied on by Respondents, is distinguishable. 897 S.W.2d 129 (Mo.App. 1995). Frison does not hold that every single, identifiable permitted use which may be proposed for licensure, presently or in the future, must be specifically listed in the list of permitted uses. Indeed, there, the use in question was an outdoor flea market. The court looked at two possible types of businesses listed under which a "flea market" could fall. Id. at 133. The permitted uses included a "store or shop for the conduct of a retail business" and a "sales or show room." The court found that those general categories of businesses did not concern the conduct of sales outdoors. The court did not say that "outdoor flea market" had to be explicitly listed as a permitted use in order to gain a valid license. Id. Accordingly, Respondents' similar contention is incorrect.

Matthews v. Jennings is also instructive because there, although a specific use was not explicitly listed in the

allowable uses, the court found that such use would be allowed as a permitted use so long as it fell within the context of the listed permitted uses. 978 S.W.2d 12, 15-16 (Mo.App. 1998). In construing the ordinances of a city, the court applies the same general rules of construction as are applicable to state statutes. Id. at 15. The court looked at the list of permitted uses in the subject zoning district and found a definition of a use which could include the applicant's proposed use. Id. The court also looked at the definitions of uses within the context of the entire zoning code. Thus, the court found that the proposed use may be included in the list of permitted uses if the definition is satisfied even though the proposed use is not specifically named. Id. at 16.

Thus, as before, Respondents' positions appear to have shifted like smoke and mirrors. Previously, their position, as stated in Respondent Board of Adjustment's decision and at the hearing, was that they believed Sunshine was a check cashing business and, therefore, should be excluded from operating its business in St. Ann.¹ Respondents now put a

¹ At the hearing, a Respondent Board of Adjustment

different spin on their denial by shifting their defensive posture to the contention that Sunshine's business is not specifically named in the list of permitted uses and,

member stated: AI believe at this point the City suspects that the manner in which you operate, by requiring a post-dated check, has the appearance that it is a check cashing operation.@ L.F. 70. Further, in their written decision, Respondents relied on their belief that Sunshine is a check cashing business; to wit, AMr. Creech stated the term XCash Advance= is on the application and printed in very large letters on the sign at Sunshine's place of business. He also stated that according to testimony given at the hearing a post dated check is always required before a loan is given.

Everything is based on the post dated check. Section 400.370-B very clearly states that CHECK CASHING AND RELATED SERVICES are excluded from the list of permitted businesses in St. Ann.

Mr. Creech expressed his opinion that Sunshine Title and Check Advance is in fact seeking to conduct Check Cashing and related services in St. Ann Mr. Strobl said that he felt the term Xrelated services= in paragraph B of Section 400.370 was the key. If the Board of Aldermen wanted to exclude only pawn shops and check cashing businesses, they would not have added the term Xrelated services.@ L.F. 175.

therefore, is excluded (i.e., permissive zoning). Sunshine has responded here and in its opening Brief by factually and legally showing the Court why it is not a check cashing business and why the language of St. Ann's Zoning Code does not exclude businesses which naturally fall under the descriptive list of permitted uses/businesses included in Section 400.370, including Apersonal services,@ banks, savings and loan associations and Auses having the same or similar characteristics as the foregoing uses.² Sunshine's business

² Only a brief response needs to be made to address the Circuit Court of the City of St. Louis case cited by Appellant in its opening Brief. (Page 23, fn 6). Respondents conveniently dismiss this case as inapplicable; however, it is applicable because there the trial court initially reversed the Board of Adjustment while relying on Asimilar@ catchall language as in the instant case. It is being used here only as a case from a local jurisdiction which addressed an analogous factual and legal situation. Although the trial court's opinion was recently reversed by the Missouri Court of Appeals, that appellate opinion stands for the proposition that cities continue to retain their zoning powers to regulate a state authorized business. Missouri Title Loans, Inc. v. City of St. Louis Board of Adjustment, 2001 WL 435450

of providing short-term loans to consumers under the direction and supervision of the Director of the Missouri Division of Finance, and the rules promulgated thereunder, logically falls into this zoning district as a permitted use. Indeed, it must be assumed that if Respondents have chosen to abandon their Board of Adjustment decision that Sunshine was a check cashing operation and therefore excluded, then Respondents must now agree that Sunshine is not a check cashing operation.

Instead, Respondents now incorrectly contend that Sunshine is excluded because its type of business is not explicitly listed in the list of permitted uses.

Finally, Respondents' interpretation of their Zoning Code patently ignores the fact that Sunshine has been granted a business license to conduct an automobile title loan business at this same location. (L.F. 23, 24, 35, 52, 247). Such business involves making consumer loans secured by liens on automobiles and, like Sunshine's businesses, is also not explicitly listed as a permitted use in St. Ann's Zoning Code, but has been allowed to operate. Such a factual point has also been conveniently ignored by Respondents in their Brief and therefore, must be conceded as further evidence that

(Mo.App.E.D. May 1, 2001)(unpublished opinion); see also, *infra*, p. 28.

Respondents= argument as to permissive zoning is baseless here.

**B. Appellant Was Challenging the Board of Adjustment
Decision Not Technically Seeking a Use Variance.**

Respondents= additional argument in Part B of their Point I that Sunshine failed to provide evidence which would warrant issuance of a use variance is a red herring. Respondents are well aware that Sunshine was not technically seeking a variance in this case (although a variance was mentioned in the pleadings), but rather was appealing the incorrect decision of the Respondent Board of Adjustment, which appeal was required to be first directed to the Board of Adjustment based upon Respondents= Code so as to exhaust all administrative remedies. Indeed, Respondent Board of Adjustment=s letter notifying Sunshine of its denial specifically mentions the fact that Sunshine was appealing.

L.F. 176.

III. THE TRIAL COURT ERRED IN DECLARING, ADJUDGING AND DECREERING THAT ORDINANCE NO. 2074, AN AMENDMENT TO THE ST. ANN ZONING CODE, IS VALID BECAUSE ORDINANCE NO. 2074 IS INVALID AND HAS BEEN PREEMPTED IN THAT SAID ORDINANCE PROHIBITS THAT WHICH THE STATE OF MISSOURI AUTHORIZES AND PERMITS.

A. Appellant Established the Unreasonable and Arbitrary Nature of Ordinance 2074 and Overcame the Presumption of Validity.

The second narrow issue before this Court is whether Ordinance No. 2074 is inconsistent with the governing Missouri statute as set forth in Section 408.500 R.S.Mo. (the Under \$500 Lender Act). It is fair to state that in this case, Sunshine has sought to overturn the incorrect decision of the Respondent Board of Adjustment and to question the partial basis of that decision, i.e., the overly broad and illegal Ordinance No. 2074 passed by the Respondent City. Despite Respondents' contention that Sunshine has not presented evidence showing the arbitrariness and unreasonableness of Ordinance No. 2074, Sunshine submits that it has done so by arguing that the very act of completely prohibiting businesses like Sunshine's from an entire municipality is arbitrary and unreasonable.³ The fact that Respondents simply do not like

³ For example, at the hearing before the Respondent Board of Adjustment, counsel for Sunshine argued, in part, as follows:

A. . . [A]n ordinance passed by a city . . . may not prohibit that which . . . the State of Missouri allows . . . @ L.F. 49.

A. . . [A] city . . . cannot prohibit that which a statute allows. It can regulate it and you can regulate it, . . . more strenuously than the State

businesses like Sunshine's and would prefer to keep such businesses out of their City is clear from Respondents' Brief.

See page 16 wherein Respondents state: "The regulatory feature of the [Under \$500 Lender Act] is, at best, minimal."

See also, page 17, wherein Respondents state, "The regulations add nothing to protect customers. . . ." and "They clearly do not embody a comprehensive set of regulations." Essentially, because Respondents do not like the idea of having businesses like Sunshine's in their City, what they seek to do is supplant the State's standards for such businesses, as outlined in Under \$500 Lender Act, with their City standards.⁴

does. But you can't just prohibit it if the State specifically allows it." L.F. 82.

⁴ In the Joint Brief of Amici Curiae, those municipalities have improperly also jumped on the bandwagon of suggesting that payday loan companies are "bad" businesses, not in the public interest and should not be allowed, by attaching to their Brief an Appendix filled with articles and cases about payday loan companies in other jurisdictions. (Joint Amici Curiae Brief, p. 19). Appellant submits that such Appendix is entirely improper and should be ignored by this Court. Supreme Court Rule 83.08(a) provides that "The record on appeal filed in the court of appeals is the record in this

As the court of appeals remarked in State ex rel. Burnau v. Valley Park Fire Protection District of St. Louis County,
Ahowever laudable may be such efforts of the [City] the stark reality of the situation is that there is a general law on the subject of [Section 500 loan businesses]. And the general law specifically and expressly approves and authorizes the [businesses] throughout the state. In effect, the [City] by its ordinance has attempted to prohibit precisely what the legislature has explicitly said may be done.@ 477 S.W.2d 734, 736 (Mo.App. 1972).

Accordingly, instead of the State standard whereby such businesses are entirely proper and authorized to conduct business, the City's Aregulation@ is intended to completely outlaw such businesses in St. Ann; thus, the Aregulation@ is actually a total prohibition. Supplanting the State statute with Respondents= Ordinance No. 2074 is impermissible.

2. Ordinance 2074 Is Inconsistent with State Law.

Respondents and Amici Curiae must be reminded that our State's general statutes provide that ordinances must conform to the state law. See Sections 79.450.7 R.S.Mo. and 71.010 R.S.Mo. (1994). It has long been the law, as stated in City of Meadville v. Caselman, quoting earlier cases, that:

Court.@"

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and none others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation **C** simply convenient, but indispensable.

227 S.W.2d 77, 79-80 (Mo.App. 1950).

Thus, as the instant case involves the issuance of a business license, the power of fourth class cities to regulate businesses is critical. Section 94.270 R.S.Mo. confers power on such cities to **A**regulate and to license . . . loan companies.[@] Such provision does not include the power to prohibit. The difference between regulation and prohibition is clear.

City of Meadville is a case directly on point. There the court held that although Section 94.270 R.S.Mo. (formerly section 7196 Mo.R.S.A.) gave the city the power to license, tax, regulate or suppress billiard tables, the general policy of the state was to license them, thus the use of the word **A**suppress[@] conferred on the city the power, as a police regulation, to suppress unlicensed billiard tables doing business without a license, but not the power to prohibit

them. 227 S.W.2d at 80. The court recognized the rule of previous decisions that the power to license and regulate does not include the power to prohibit. @ Id. Here too, the Respondent City is conferred with the power to regulate, license and tax loan companies like Sunshine's, yet it is not given the power to prohibit such businesses. Accordingly, Ordinance No. 2074 is a municipal usurpation and void.

Furthermore, on the issue of preemption, Respondents and Amici Curiae have been understandably unable to satisfactorily distinguish the cases cited by Sunshine as to what constitutes preemption under these circumstances. Respondents= and Amici Curiae attempted distinctions of the cases cited by Sunshine miss the mark. As here, the cases cited by Sunshine involved a direct conflict between a statute and Respondents= Ordinance.

For instance, in State ex rel. Burnau v. Valley Park Fire Protection Dist. of St. Louis County, 477 S.W.2d 734 (Mo.App. 1972), the court held that a fire protection district under its authority to adopt fire protection ordinances could not prohibit the selling of all fireworks within the district when a state law permitted the sale of certain types of fireworks.

Here, State law authorizes and encourages Section 500 loan businesses, but Respondents prohibit all such businesses in St. Ann.

Moreover, Respondents claim that none of Sunshine's cases involved the exercise of municipal zoning powers. (Respondents' Brief, p. 19). Yet, Respondents' cases also do not exclusively involve the exercise of municipal zoning powers. For example, one case relied on by Respondents provides Sunshine with further support. Borron v. Farrenkopf, 5 S.W.3d 618 (Mo.App. 1999)⁵ involved the ability of a third class county to enact an ordinance establishing health regulations governing the operation of large concentrated animal feeding operations (CAFOs) in the county. The issues were whether the county's health ordinance, which included rules and regulations regarding permits needed to operate a CAFO in the county, was an ordinance the county could pass and whether the ordinance was prohibited by state law or preempted by other state statutes. Id. at 619-620. The crux of the matter for the court was that it found that the county was given the specific right to make health ordinances. Moreover,

⁵ Borron also cites State ex rel. Hewlett v. Womach, 196 S.W.2d 809 (Mo. 1946) as controlling authority and decides that Hewlett governs its decision. Sunshine also relies on Hewlett in the case at bar. (Opening Brief at 27-28). Thus, again, Respondents' contentions that Sunshine's authorities are misplaced should be dispelled.

while noting that Alocal ordinances regulating matters upon which there is a state law must in harmony with the state on that subject,@ it found that because the ordinance in question only provided for additional regulations by the county, it was not in conflict with state law. Id. at 622. Significantly, the court noted that Ain order for an ordinance to be in conflict with state law it must be prohibitory, not simply regulatory.@ Id. Clearly, the instant Respondents= Ordinance is prohibitory, by its very terms and intent and, therefore, is in conflict with State law.

Moreover, preemption and zoning cases do exist which provide Sunshine further support. First, a recent zoning case involving implied preemption is St. Charles County Ambulance District v. Town of Dardenne Prairie, 39 S.W.3d 67 (Mo.App.E.D. 2001). St. Charles County Ambulance District appealed from the decision of the Town of Dardenne Prairie, which, although granting the District a conditional use permit to build an ambulance base in the town, the Town also prohibited the use of a siren in specific areas at certain time. The District contended that such an exercise of the Towns zoning powers through restrictions within the conditional use permit was impermissible because the Town did not have the authority to regulate hours when an ambulance may

sound its siren and such restriction is preempted by Section 304.022 R.S.Mo. Supp. (2001). Id. at 68. The court noted that although a town may enact regulations that supplement or enlarge upon provisions of a state by requiring more than what is required in the statute, when the expressed or implied provisions of a local regulation and the state statute are inconsistent and in irreconcilable conflict, then the local regulation is void. Id. at 69. After reviewing the statutory language, the court noted that because the statute does not specifically prohibit municipalities from regulating ambulances, no express preemption exists. The conditional use permit restriction, however, directly conflicts with the statute by prohibiting an activity (i.e., the use of an ambulance siren) that the statute expressly permits. Id. The statute allows an ambulance driver to use discretion to sound the siren and the conditional use permit restriction would negate this grant of power. Hence, although additional restrictions are allowed when the state has not preempted the area of regulation, restrictions that conflict with state law are not allowed. **A**The state law is paramount.**@** Id. at 70. Similarly, here, the statute does not expressly prohibit cities from regulating Sunshine's business. However, although St. Ann may additionally restrict and/or regulate, through its zoning and other powers, the activities of Sunshine's business,

it may not entirely prohibit Sunshine from conducting its business in the City of St. Ann.

Second, a zoning case involving express preemption is also illustrative of the principles before the Court. In Union Electric Co. v. City of Crestwood, 562 S.W.2d 344 (Mo.banc 1978), the question presented was whether the City of Crestwood may, through zoning ordinance restrictions, regulate intercity electric transmission lines. 562 S.W.2d at 345. The Court, while noting that inclusion of such a regulation within the confines of the zoning ordinance does not ipso facto clothe it with validity,@ thereby allowing the municipality to do that which is foreclosed by state statute, held that the Public Service Commission had invaded the area of regulation of intercity transmission lines and, therefore, the zoning ordinances were preempted. Id. at 346, quoting, In re Public Service Electric and Gas Company, 35 N.J. 358, 374, 173 A.2d 233, 241 (1969).⁶ The instant case is dissimilar in that it does not involve express preemption, but it is similar

⁶ As the New Jersey Supreme Court also cautioned, calling something >zoning= cannot cloak a municipality with power to act in a field and in a way which is otherwise foreclosed to it by supervening state legislation or policy.@ Id.

because both are zoning cases and illustrate that if an area has not been entirely preempted by a state statute, a local body may regulate, but shall not prohibit, a state authorized activity.⁷

⁷ The wholesale power to prohibit is not necessarily a power given to a municipality under all circumstances. A municipal corporation is a creature of the legislature, possessing only those powers expressly granted or those necessarily or fairly implied in or incidental to express grants, or those essential to the declared objects of the municipality and any reasonable doubt as to whether a power has been delegated to a municipality is resolved in favor of non-delegation. Anderson v. City of Olivette, 518 S.W.2d 34, 39 (Mo. 1975).

Respondents further disingenuously contend that Sunshine is arguing that St. Ann is precluded from imposing any restrictions on it. (Respondents= Brief at pages 15, 16, 17, 20).⁸ Such an argument is nonsense. Sunshine has clearly stated that St. Ann may regulate Sunshine=s business or restrict similar businesses to certain zoning districts. (Opening Brief, p. 31). Respondents attempt to pigeonhole this case into a simple case about express preemption. However, Sunshine is not arguing that the Under \$500 Lender Act and the regulations preempt the City from regulating such businesses from conducting its business in the City, but rather that due to this State statute and the regulations, the City must be consistent with State law and cannot totally

⁸ Significantly, at page 20 of Respondents= Brief, Respondents take their argument too far, stating that Sunshine is advocating that **A**ny entity subject to any form of registration or licensing by the state [should be able] to assert that it was free of any restrictions, zoning or otherwise, imposed by the city in which it was located, . . .@ Plainly and simply, that is not Sunshine=s argument. What Sunshine objects to is the wholesale prohibition of its business in any zoning district in the City, not to any zoning regulations in place.

prohibit such businesses from existing in the City. Here, a clear and direct conflict exists between the State statute and the City Ordinance.

Respondents= attempted argument that pursuant to the law of preemption, the Under \$500 Lender Act does not occupy the field is also flawed. Sunshine has not argued that the Under \$500 Lender Act occupies the field. It would possibly be a different situation if the City's Ordinance did not prohibit all short-term loan businesses in the City. Respondents= argument is flawed because it fails to recognize that even if the Under \$500 Lender Act and the regulations do not represent a clear declaration of a legislative purpose to all small loan businesses to locate anywhere in Missouri, then such businesses still cannot be entirely zoned-out of a City, just because the governing statute does not disallow that. Indeed, in the only reported case relating to the Under \$500 Lender Act, Barry Service Agency Co. v. Manning, 891 S.W.2d 882, 891 (Mo.App. 1995), the court of appeals interpreted the legislative purpose of the Act, in part, as follows:

In enacting ' 408.500, the General Assembly clearly desired to make unsecured loans under \$500 more available to those Missouri citizens needing them. On the other hand, it also desired to afford some

regulatory protection to borrowers and to discourage so-called loan-sharking activities.

Moreover, Respondents' argument that the Under \$500 Lender Act should be compared and contrasted to the Missouri Billboards Act found to be in conflict with a city ordinance in National Advertising Company v. Missouri State Highway and Transportation Commission, 862 S.W.2d 953 (Mo.App. 1993), is more flawed argument. That case is not on point here and represents a rare instance in which a Missouri statute contained a clear legislative purpose outlined in the statute.

Such a clear declaration of purpose is not the norm in legislation and the Under \$500 Lender Act cannot be disregarded as the law of the State merely because it does not contain such a declaration. The Under \$500 Lender Act evidences this State's public policy authorizing Sunshine's business and permission to conduct such business within the boundaries of the State.

Furthermore, Respondents' reliance on two cases for the proposition that a city may validly exclude all commercial uses and limit a municipality to single family residences, is yet another baseless argument in the context of this case. (Respondents' Brief, page 19). The Court should be mindful that the question presented in the instant case is whether a fourth class municipality, with several different zoning

districts, including a commercial district, can completely prohibit a state authorized use. In McDermott v. Calverton Park, 454 S.W.2d 577 (Mo.banc 1970) and State ex rel. Chiavola v. Village of Oakwood, 886 S.W.2d 74 (Mo.App. 1994), the issue presented was whether a village may only provide for single family residential usage of property in light of the nature of the villages as small bedroom communities located a short distance from numerous commercial facilities. The Court's rationale in Calverton Park included consideration of the municipalities' reasoning in enacting such a zoning ordinance and all pertinent circumstances. The Court concluded that a municipality may be restricted to single use zoning. 454 S.W.2d at 584. In reaching its conclusion, the Court noted that in reading the applicable zoning statutes, it has found nothing to indicate a legislative intent that, *under all circumstances*, a municipality must provide for more than one use in its zoning ordinance. Id. at 581 (emphasis supplied).

This premise is especially true for small bedroom communities situated in a large metropolitan area like St. Louis. Id. Hence, the Court must consider all the pertinent circumstances of the instant case and limit Calverton Park to the facts existing in that case. Chiavola v. Village of Oakwood, 886 S.W.2d 74, 78 (noting that the nature of the community involved is a primary factual consideration when determining

if single use zoning is appropriate). The City of St. Ann is not a bedroom community. Rather, it has seven (7) zoning districts, including commercial districts. (L.F. 108-109). Sunshine is not seeking to change the nature of the existing districts or rezone any such district.

By virtue of the Under \$500 Lender Act, the State of Missouri has authorized and regulates Section 500 loan businesses. To the extent that Sections 89.010-89.144 R.S.Mo. confer powers on cities to regulate by zoning the location of businesses, such cities remain subject to the requirements of Sections 79.450.7 R.S.Mo. and 71.010 R.S.Mo. to be consistent with state law. City of Meadville v. Caselman, 227 S.W.2d 77 (Mo.App. 1950). The State zoning statutes do not allow, as Respondents and Amici Curiae suggest, a city to entirely prohibit a lawful business from doing business anywhere in a city. Hence, St. Ann's wholesale prohibition of Sunshine's business in the entire City blatantly and unlawfully conflicts with State law.

Finally, both Respondents and Amici Curiae have overstated their position by making the argument that if St. Ann's Ordinance were held invalid, then a municipality could not bar even a slaughterhouse because it is regulated by statute. (See, e.g., Amici Curiae Joint Brief, p. 12). A decision holding that Ordinance No. 2074, because it entirely

prohibits statutorily licensed and authorized businesses, is void does not mandate that the zoning powers of every city and county are destroyed. Rather, a city may continue to regulate such business within reasonable limits if the regulation does not impair the statutorily-authorized rights of the business.

The City of St. Ann, for example, has specific, statutorily created criteria for determining if a particular use can be granted a special use permit to conduct its activity within a particular zoning district. (L.F. 164, et seq.).⁹ Therefore, due to the direct and irreconcilable conflict between Ordinance No. 2074, which places a wholesale ban on Section 500 loan businesses, and Section 408.500, which provides

⁹ Indeed, in a recent case, the City of St. Louis Board of Adjustment's decision to prohibit a title loan company from obtaining a conditional [special] use permit because the City provided competent and substantial evidence that such use did not meet the City of St. Louis' conditional use permit criteria, was upheld. Missouri Title Loans, Inc. v. City of St. Louis Board of Adjustment, 2001 WL 435450, 7 (Mo.App.E.D. May 1, 2001) (unpublished opinion). Such case reinforces a city's constant ability to regulate state authorized businesses, like Sunshine's, by virtue of adhering to the statutorily provided special use permit criteria.

statutory requirements and promulgates regulations for this type of business, Ordinance No. 2074 is void.

IV. THE TRIAL COURT ERRED IN DECLARING, ADJUDGING AND DECREEING THAT ORDINANCE NO. 2074, AN AMENDMENT TO THE ST. ANN ZONING CODE, IS VALID BECAUSE ST. ANN-S CITY-WIDE BAN ON SECTION 500 LOAN BUSINESSES IS UNCONSTITUTIONAL IN THAT ST. ANN HAS FAILED TO ESTABLISH THE VALIDITY OF THE REGULATION AND HAS, CONSEQUENTLY, FAILED TO SHOW THAT THE REGULATION BEARS A RELATIONSHIP TO THE PUBLIC HEALTH, SAFETY, MORALS AND GENERAL WELFARE.

V. THE TRIAL COURT ERRED IN DECLARING, ADJUDGING AND DECREEING THAT ORDINANCE NO. 2074, AN AMENDMENT TO THE ST. ANN ZONING CODE, IS VALID BECAUSE ST. ANN-S ORDINANCE IS UNCONSTITUTIONAL IN THAT IT IS VAGUE AND OVERLY BROAD.

A. Constitutional Challenges are Properly before the Court.

Respondents contend that Sunshine waived any constitutional issues in this case. However, as to vagueness and overbreadth, Sunshine raised these issues at the earliest opportunity, the hearing before the Respondent Board of Adjustment. There, Sunshine's attorney clearly stated, as follows:

[T]he ordinance marked Exhibit E, maybe a little too broadly or vaguely drafted and were not waiving any

issues we have regarding that, but I would just point out to the Board that the law is . . . that an ordinance passed by a city . . . may not prohibit that which . . . the State of Missouri allows

L.F. 49. Constitutional issues may be timely even if they are not first raised by the pleadings. Longview of St. Joseph, Inc. v. City of St. Joseph, 918 S.W.2d 364, 367 (Mo.App. 1996). Constitutional issues not objected to as exceeding the scope of the pleadings, automatically amend the pleadings to conform to the evidence and the issues are deemed to be tried by consent. Id. Thus, at the earliest opportunity, the hearing before the Board of Adjustment, Sunshine raised the issue of the vagueness and overbreadth of Ordinance No. 2074 and Respondents did not object.

Such issues implicate the due process clauses of the Missouri and United States constitutions which require that zoning regulations be reasonable and bear a reasonable relationship to a community's health, safety, morals or welfare. @ Longview, 918 S.W.2d at 368. A zoning ordinance may be proper on its face, (which Sunshine does not concede is the case here) but still be a due process violation because of the unreasonable or arbitrary manner in which a city applies it to a particular tract. @ Id.

Moreover, Respondents concede that Sunshine has clearly continued to raise the issue of an equal protection violation as set forth in Count II of its Second Amended Petition. (Respondents= Brief at page 22). Respondents suggest, however, that this issue has been abandoned because it was only mentioned in a footnote in Sunshine=s Brief.¹⁰ Sunshine=s mention of this constitutional violation in a footnote, however, does not diminish its importance as further evidence of Respondents= unreasonable and arbitrary conduct with respect to Sunshine=s business. The fact that Respondents have used Ordinance No. 2074 to unfairly discriminate against businesses like Sunshine=s illustrates a legitimate equal protection claim.

¹⁰ The Court should avoid reaching constitutional issues if they are not essential to the disposition of the case and there are other grounds upon which a case can be decided. Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 53 (Mo.banc 1999). This principle clearly applies here. See Points II and III above.

B. Respondents= Violations of the U.S. Constitution and the Missouri Constitution Are Set Forth in Sunshine=s Opening Brief at Points IV and V.

Sunshine=s opening Brief elaborates on these points. (Pages 33-39). Respondents contend that Sunshine improperly refers to cases in other jurisdictions as having no value. Yet, Respondents provide this Court with no cases on point and, therefore, cases from other jurisdictions which are applicable are entirely proper. Sunshine has shown how the Ordinance in question is unreasonable and arbitrary and therefore has met its burden in State ex rel. Helujon v. Jefferson County, 964 S.W.2d 531, 536 (Mo.App. 1999). However, such burden does not displace Respondents= obligation to show that their zoning regulations Abear a reasonable relationship to a community=s health, safety, morals or welfare.@ Longview of St. Joseph, Inc. v. City of St. Joseph, 918 S.W.2d 364, 368 (Mo.App. 1996). It bears repeating that

The municipal power for zoning purposes to absolutely forbid a use in a particular district ordinarily presupposes the allowance or permission of that use in another district, and the complete exclusion or prohibition of any use that is not inherently obnoxious must be regarded as of doubtful validity.

McQuillen, The Law of Municipal Corporations, ' 25.119.10,
p.467 (3rd Ed. 1991).

Finally, it is undisputed that Sunshine has been granted a business license to conduct its automobile title loan business at said location in St. Ann, lending further credence to the unreasonable, arbitrary and discriminatory nature of Respondents= denial. (L.F. 23, 24, 35, 52, 247).

CONCLUSION

For the foregoing reasons, Sunshine respectfully submits that pursuant to principles of statutory construction, Sunshine's business was not excluded by St. Ann's generally listed permitted uses for the commercial district in issue. Sunshine further submits that Ordinance No. 2074 was preempted and rendered void by Section 408.500 R.S.Mo. and that Ordinance No. 2074 is unconstitutional. Sunshine requests this Court to remand this case to the Court of Appeals to reinstate its opinion.

Respectfully submitted,

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CERTIFICATE REQUIRED BY SPECIAL RULE 1(c)

The undersigned certifies that this Substitute Reply Brief complies with the limitations contained in Special Rule 1(c) and the Missouri Supreme Court Rules, that this Brief contains 6,439 words and that the floppy disk filed herewith has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 12th day of June, 2001, two (2) hard copies and a disk copy of Appellant's Substitute Reply Brief were mailed first class, postage prepaid to:

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