

IN THE MISSOURI SUPREME COURT

APPEAL NO. SC88075

ST. LOUIS UNIVERSITY,

RESPONDENT,

v.

THE MASONIC TEMPLE ASSOCIATION OF ST. LOUIS, et al.,

APPELLANTS.

**APPEAL FROM THE TWENTY-SECOND CIRCUIT, DIVISION 2
HON. STEVEN R. OHMER**

**TRANSFER FROM THE MISSOURI COURT OF APPEALS,
EASTERN DISTRICT**

SUBSTITUTE BRIEF OF RESPONDENT CITY OF ST. LOUIS

OFFICE OF THE CITY COUNSELOR

Mark Lawson #33337

Associate City Counselor

Room 314, City Hall

St. Louis, MO 63103

Phone: (314) 622-3361

Fax: (314) 622-4956

ATTORNEY FOR RESPONDENT

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STATEMENT OF FACTS

The City of St. Louis (“City”) generally accepts the Statement of Facts submitted by Appellants the Masonic Temple Association of St. Louis, Urban Design, Inc., Arras, Henry, Keeney and Medler (hereafter, “Masonic Temple Parties” or “Temple Parties”). However, City wishes to supplement the record with additional facts.

St. Louis University (“SLU”) filed this suit for declaratory judgment that certain City Ordinances, numbered 65703, 65857, and 65858 (collectively referred to as the “Grand Center TIF Ordinances” or “TIF Ordinances”)¹, were valid and enforceable (L.F., Vol. I, 21-32). These ordinances pertained to the establishment of a Grand Center Redevelopment Area as a tax-increment financing (TIF) district, and the creation of TIF-related instruments to finance redevelopment projects in the district. These ordinances were passed by the St. Louis Board of Aldermen in 2002 and 2003. The suit named all of

¹Copies of these Ordinances are actually found in two different places in the Exhibit Volumes (“Ex. Vol.”): In Exhibit Volume I, which contains some of St. Louis University’s exhibits, because they were attached to the original Petition; and in Exhibit Volume IA, which contains the City’s exhibits, because they were appended to the City’s Statement of Uncontroverted Material Facts as part of its Motion for Summary Judgment (L.F., Vol. I, 84-88). The verbiage in both exhibits is the same, however, the pagination is different, because the ordinances were obtained from two different sources. In order to avoid further confusion, references to specific language and provisions of the Ordinances will be done by section designations, rather than by page numbers.

the Masonic Temple Parties² as defendants; it also named the City as a defendant, pursuant to § 527.110, RSMo.³ Masonic Temple Parties subsequently filed an “Answer and Counterclaim,” against SLU, the City, and adding as third-party defendants Grand Center, Inc.; its President and CEO, Vincent Schoemehl; and City Center Redevelopment Corporation (L.F., Vol. I, 38-74). The Masonic Temple Parties’ claim as to the City was that the ordinances were facially invalid, ¶ 95 (L.F., Vol. I, 62), under a number of constitutional provisions, including the federal Establishment Clause and Missouri constitutional provisions concerning aid to institutions under control of a religious creed.

The Grand Center TIF Ordinances were all approved within the space of six months by the Board of Aldermen. Ordinance 65703 (2002) (Ex. Vol. IA, City Ex. A) designated an area known as the Grand Center Redevelopment Area for purposes of the

²Approximately three weeks prior to SLU’s suit being filed, the Masonic Temple Parties had filed suit in U.S. District Court for the Eastern District of Missouri against the City and Grand Center, Inc., alleging, *inter alia*, that the same City ordinances were unconstitutional. *Masonic Temple Association of St. Louis, et al. v. Grand Center, Inc., et al.*, Cause No. 4:04-CV-1387 (CEJ) (E.D. Mo). Originally, SLU was not a party to the suit, but was added as a defendant sometime after the filing of SLU’s suit. The Masonic Temple Parties’ suit was dismissed, on federal abstention principles where there was ongoing state litigation pertaining to the same issue.

³All statutory references are to RSMo. (2000) unless otherwise specified.

TIF (sections 1 and 2); approved a redevelopment plan (section 3); adopted tax increment financing within the redevelopment area (section 4); and established the Grand Center Special Allocation Fund (section 6). It also attached as an exhibit the Redevelopment Plan, which included additional exhibits: Ex. I — Parcels in the Redevelopment Area; Ex. II — Map of the Area; Ex. III — Chapter 99, 100 and 353 Plan Areas; Ex. IV: Description of Redevelopment Projects/Phasing/Project Costs⁴; Ex. V — Projections; Ex. VI — Financing; Ex. VII — Developers' Affidavits.

Ordinance 65857 (2003) (Ex. Vol. IA, City Ex. B) approved a TIF redevelopment agreement for the Grand Center Redevelopment Area, with Grand Center, Inc. identified as the Developer. Attached to the Ordinance was the Redevelopment Agreement between the City and Grand Center, Inc.

Ordinance 65858 (2003) (Ex. Vol. IA, City Ex. C) authorized and directed the issuance and delivery of not to exceed \$80 million principal amount of tax increment revenue notes for the Grand Center Redevelopment Area.

The financing machinery of Grand Center TIF District, as with most TIF districts, is the establishment of a special allocation fund, into which monies, called payments in lieu of taxes (PILOTS), and sometimes additional monies (penalties, interest and other taxes) generated by property within the district are deposited. See Ordinance 65858, Section 401. For the Grand Center Special Allocation Fund, in addition to these

⁴The SLU Arena Project was listed among the Redevelopment Projects; see Ex. IV, Section A.6.

PILOTS, there was to be deposited fifty percent (50%) of “the total additional revenues from taxes which are imposed by the City or other taxing districts ... and which are generated by economic activities within the Redevelopment Area ...” See Ordinance 65858, Art. I Definitions, “TIF Revenues.” This revenue derived from economic activity taxes (EATS) was included in the Grand Center Special Allocation Fund.

It was known that SLU desired to build a new arena for athletic and other secular events somewhere near its midtown campus. Because at the time of passage of Ordinance 65703, the SLU Arena Project was still undergoing a feasibility study, the projected costs were unknown, as was the amount of TIF financing which might be available. See Ordinance 65703, Ex. IV, Section A.6.

Ordinance 65858 was passed to authorize the issuance of \$80 million in TIF notes for various projects in the Grand Center Redevelopment Area. The SLU Arena Project was one of those projects; however, because financing of the Project was still not finalized, there was no certainty that the Project would become a reality⁵. For that reason, Ordinance 65858, in establishing the Special Allocation Fund, also set up as part of the Fund, a discrete fund, within the EATS Account, called the University Sub-Account. Ordinance 65858, Art. IV, Section 401(a). The Ordinance provided that the account was to be kept until the submission of a Certificate of Commencement of Construction

⁵It was subsequently determined that approximately \$8 million of TIF funding was planned for the SLU Arena Project, out of a total projected cost of \$80 million for the Project. Deposition of Lawrence Biondi, S.J. (Ex. Vol. V), p. 74.

Related to a Redevelopment Project involving total development costs of greater than \$50 million. Ordinance 65858, Art. IV, Section 401(a). If no Certificate of Commencement was issued, then the City Comptroller had the right to generate a written notice of termination of a Parcel Development Agreement, and the monies deposited into the Account were to be distributed into the larger Special Allocation Fund as surplus. Ordinance 65858, Art. IV, Section 402(b) Clause *Fourth*. The amounts in the University Sub-Account were to be paid only if the SLU Arena Project was actually begun.

After discovery, the City (L.F., Vol. I, 84-89) and SLU (L.F., Vol. I, 105-120) filed Motions for Summary Judgment. The Masonic Temple Parties filed responses to those motions, (L.F., Vol. I, 129-138; L.F., Vol. II, 198-210), and filed their own Motion for Judgment on the Pleadings (L.F., Vol. I, 188-197). In their motion, the Masonic Temple Parties claimed that “the language of the TIF Ordinances are unconstitutional on their face individually and collectively.” (L.F., 189). On July 14, 2005, the trial court issued its Order and Judgment (L.F., Vol. II, 240-258), granting City’s and SLU’s Motions, and denying the Temple Parties’ Motion. Among the trial court’s findings was that the ordinances did not violate the Establishment Clauses of the Missouri Constitution and the United States Constitution. Order and Judgment, slip op., at 12 (L.F., Vol. II, 251). Masonic Temple Parties filed their Notice of Appeal on August 22, 2005 (L.F., Vol. II, 259-268).

On October 3, 2006, the Missouri Court of Appeals, Eastern District issued its opinion, 2006 Mo. App. LEXIS 1472, *Slip op.*, stating that it “would affirm the trial court’s judgment,” but that, in light of the general interest and importance of the issues

involved, it was transferring the case to this Court, pursuant to Rule 83.02. *Slip op.*, at 1. The opinion of the Court of Appeals indicated that, based on the record in the trial court, two judges would uphold the constitutionality of the City ordinances providing for TIF funds being used to help build the SLU Arena, while one would not.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE CITY AND AGAINST THE MASONIC TEMPLE PARTIES BECAUSE JUDGMENT WAS PREMISED ON THE VALIDITY OF CITY ORDINANCES 65703, 65857 AND 65858, WHICH TEMPLE PARTIES CHALLENGED AS FACIALLY INVALID, AND THE RECORD IN THE TRIAL COURT ESTABLISHED THERE WAS NO GENUINE DISPUTE AS TO THE VERBIAGE OF THE ORDINANCES AND TEMPLE PARTIES DID NOT MEET THE BURDEN OF FACIAL INVALIDITY TO SHOW THAT THERE WAS “NO CONCEIVABLE SET OF CIRCUMSTANCES” UNDER WHICH THE ORDINANCES MIGHT OPERATE CONSTITUTIONALLY UNDER THE MISSOURI CONSTITUTION, AND EVEN IF MASONIC TEMPLE PARTIES’ CLAIMS WERE CONSTRUED TO CHALLENGE THE CITY ORDINANCES “AS APPLIED,” THE RECORD ESTABLISHED ST. LOUIS UNIVERSITY WAS OPERATED BY AN INDEPENDENT BOARD OF TRUSTEES, AND AS A MATTER OF LAW, THERE WAS NO AID TO A UNIVERSITY “UNDER CONTROL OF A RELIGIOUS CREED, CHURCH OR SECTARIAN DENOMINATION.”

Menorah Medical Center v. Health & Ed. Fac. A., 584 S.W.2d 73 (Mo. banc 1979)

Americans United v. Rogers, 538 S.W.2d 711 (Mo. banc 1976)

College of New Rochelle v. Nyquist, 326 N.Y.S.2d 765 (N.Y. App. Div. 3rd Dept. 1971)

II. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY

JUDGMENT IN FAVOR OF THE CITY AND AGAINST THE MASONIC TEMPLE PARTIES BECAUSE JUDGMENT WAS PREMISED ON THE VALIDITY OF ORDINANCES 65703, 65857 AND 65858, AND THESE ORDINANCES DID NOT VIOLATE THE FEDERAL ESTABLISHMENT CLAUSE BECAUSE THE RECORD IN THE TRIAL COURT ESTABLISHED FACTS SHOWING THAT THE ORDINANCES HAD NO TENDENCY TO ENTANGLE THE STATE EXCESSIVELY IN CHURCH AFFAIRS AND THERE WAS NO SHOWING THAT RELIGION IS SO PERVASIVE AT ST. LOUIS UNIVERSITY THAT A SUBSTANTIAL PORTION OF ITS FUNCTIONS ARE SUBSUMED IN THE RELIGIOUS MISSION.

Lemon v. Kurtzman, 403 U.S. 602 (1971)

Hunt v. McNair, 413 U.S. 734 (1973)

Roemer v. Bd. of Public Works, 426 U.S. 736 (1976)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE CITY AND AGAINST THE MASONIC TEMPLE PARTIES BECAUSE JUDGMENT WAS PREMISED ON THE VALIDITY OF CITY ORDINANCES 65703, 65857 AND 65858, WHICH TEMPLE PARTIES CHALLENGED AS FACIALLY INVALID, AND THE RECORD IN THE TRIAL COURT ESTABLISHED THERE WAS NO GENUINE DISPUTE AS TO THE VERBIAGE OF THE ORDINANCES AND TEMPLE PARTIES DID NOT MEET THE BURDEN OF FACIAL INVALIDITY TO SHOW THAT THERE WAS “NO CONCEIVABLE SET OF CIRCUMSTANCES” UNDER WHICH THE ORDINANCES MIGHT OPERATE CONSTITUTIONALLY UNDER THE MISSOURI CONSTITUTION, AND EVEN IF MASONIC TEMPLE PARTIES’ CLAIMS WERE CONSTRUED TO CHALLENGE THE CITY ORDINANCES “AS APPLIED,” THE RECORD ESTABLISHED ST. LOUIS UNIVERSITY WAS OPERATED BY AN INDEPENDENT BOARD OF TRUSTEES, AND AS A MATTER OF LAW, THERE WAS NO AID TO A UNIVERSITY “UNDER CONTROL OF A RELIGIOUS CREED, CHURCH OR SECTARIAN DENOMINATION.”

Standard of Review

An order granting summary judgment is reviewed *de novo*. *Blair by Snider v. Perry County Mut.*, 118 S.W.3d 605, 607 (Mo. banc 2003). The propriety of summary judgment is purely an issue of law. *ITT Commercial Finance Corp. v. Mid-America*

Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The reviewing court need not defer to the trial court's order, as its judgment is founded on the record submitted and the law. *Id.* The criteria on appeal for testing the propriety of summary judgment are no different from those which should be used by the trial court to determine the propriety of sustaining the motion initially. *Id.* Summary judgment is proper only in those situations in which the movant can establish that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Id.* at 377. The movant has the burden to show a right to judgment flowing from the facts about which there is no genuine dispute. *Id.* at 378. The reviewing court considers the same information the trial court considered in rendering its decision. *Northwest Plaza, L.L.C. v. Michael-Glen, Inc.*, 102 S.W.3d 552, 553 (Mo. App. E.D. 2003).

Introduction

This point responds to Points I, II, III and IV of Appellants' Brief. A further enumeration of the responses to those particular points will be made in the course of the argument.

Summary Judgment in the Context of a Constitutional Challenge to Legislation

Summary judgment is often an appropriate means to resolve constitutional challenges to statutes and ordinances, particularly where, as here, the challengers assert facial invalidity. Legislation is presumed to be constitutional. *Reproductive Health Services v. Nixon* 185 S.W.3d 685, 688 (Mo. banc 2006), citing *Suffian v. Usher*, 19 S.W.3d 130, 134 (Mo. banc 2000). Accordingly, the burden to prove legislation unconstitutional rests upon the party bringing the challenge. *Id.* This Court will not

invalidate legislation unless it “clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution.” *Id.*

SLU filed this action, praying for a declaratory judgment that the TIF Ordinances were constitutional. Temple Parties responded by asserting in their Counterclaim that the TIF Ordinances were facially invalid. Their Motion for Judgment on the Pleadings was based solely on a theory of facial invalidity. See Motion for Judgment on the Pleadings, ¶ 3, L.F., 189. The City’s Motion for Summary Judgment on Temple Parties’ Counterclaim was therefore addressed to Temple Parties’ contention of facial invalidity. The City attached the ordinances themselves as exhibits to its summary judgment motion. The Temple Parties’ challenges to the ordinances should fail, because nothing on the face of the ordinances violated the Missouri Constitution.

To mount a successful facial challenge to legislation, “the challenger must establish ‘that no set of circumstances exists under which the Act would be valid.’” *Artman v. State Bd. of Registration*, 918 S.W.2d 247, 251 (Mo. banc 1996), citing *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). Under Rule 74.04(c), a party moving for summary judgment must make a *prima facie* showing it is entitled to judgment as a matter of law. *ITT*, 854 S.W.2d at 381. However, a “defending party” may make this *prima facie* showing in several ways, including by showing “facts that negate *any one* of the claimant’s elements facts.” *Id.* Thus, based on the theory of facial invalidity alleged in Temple Parties’ counterclaim, City made its *prima facie* showing by showing on the face of the ordinances were not constitutionally invalid, and that legislation is presumed constitutional. When a summary judgment movant has made a *prima facie* showing that

there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law, “an adverse party may not rest upon the mere allegations or denials of his pleading, but his *response*, by affidavits or as otherwise provided in this Rule 74.04, *shall set forth specific facts* showing that there is a genuine issue for trial. (Emphasis in original). *Id.* Temple Parties never presented facts to overcome the presumptive constitutionality of the City ordinances, and to show that there was no conceivable set of circumstances under which the ordinances might operate constitutionally.

At least one set of circumstances exists where the Temple Parties could not claim that the ordinances were unconstitutional: if SLU never received any TIF funding. As set out in City’s Statement of Facts, *supra*, the ordinances did not guarantee that SLU would receive TIF funding. Ordinance 65858 established a discrete fund within the Economic Activity Taxes (EATS) Account, the University Sub-Account. Ordinance 65858, Art. IV, § 401(a). However, no monies were to be paid from that account until the submission of a Certificate of Commencement of Construction Related to a Development Project involving total development costs of greater than \$50 million. If no such document were issued, the City Comptroller, under terms of Ordinance 65858, had the right to generate a written notice of termination of the Parcel Development Agreement (PDA), and no funding would be provided to SLU. Temple Parties could hardly claim that the ordinance violated the constitutional provisions prohibiting an appropriation or “public fund,” if no monies were ever paid.

However, even if this Court construed the claims of Temple Parties to somehow challenge these City ordinances “as applied,” the ordinances were valid, based on the

nature of tax increment financing, the authority of City ordinances, and the fact that SLU is not “controlled by any religious creed, church, or sectarian denomination” in violation of Article IX, Section 8 of the Constitution of Missouri. Art. IX, § 8, Mo. Const. (1945).

The Nature of Tax Increment Financing

For many years the state of Missouri has authorized tax increment financing. The current statutory authority, the Missouri Real Property Tax Increment Allocation Redevelopment Act, is located at §§ 99.800 - .865, RSMo. The Act authorizes a municipality to create a tax increment financing commission, which may adopt a redevelopment plan, subject to final approval by the municipality’s governing body. In tax increment financing, redevelopment of an area is undertaken with the intention that the redevelopment plan will increase the assessed valuation of the real property within the area, thereby increasing property tax revenue. Each year that the post-plan assessed value of the taxable real property within the redevelopment project area exceeds the pre-plan assessed value, taxes on the increase in assessed value are abated. In place of taxes, the taxpayer makes payments in lieu of taxes (PILOTS). The PILOT is equal to the amount of tax that would have been collected on the increased assessed valuation of the property after improvements. *Tax Increment Fin. Com’n v. Dunn Const.*, 781 S.W.2d 70, 73 (Mo. banc 1989). The PILOTS are paid into the special allocation fund which is pledged as security for the bonds issued by the municipality. *Id.* The City of St. Louis has long had a TIF Commission, which has adopted many redevelopment plans, subject to final approval by the Board of Aldermen, by way of City ordinance. *Id.* This Court has previously held that PILOTS are not taxes. *Id.*

The Authority of City Ordinances

The City of St. Louis is a constitutional charter city. The United States Supreme Court once commented as follows:

The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter under express authority from the people of the state, given in the constitution ... The city is in a very just sense an “*imperium in imperio*.” Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter.

City of St. Louis v. Western Union Tel. Co., 149 U.S. 465, 467-468 (1893). The Charter of the City of St. Louis has, with respect to municipal matters, all the force and effect of an act of the legislature. *Meier v. City of St. Louis*, 180 Mo. 391, 79 S.W. 955, 957 (1904). The Board of Aldermen of the City of St. Louis is the City’s duly recognized legislative body under the Charter. Revised Charter of the City of St. Louis, Art. IV, § 1.

The Missouri Constitutional Provisions

Masonic Temple Parties allege that the TIF Ordinances, insofar as they pertain to SLU, violate certain provisions of the Missouri Constitution¹, specifically:

¹These constitutional provisions have sometimes been referred to as “Blaine amendments,” in reference to James G. Blaine, a nineteenth-century United States Congressman, Senator, and candidate for President, who in 1875 sought to amend the U.S. Constitution, specifically the First Amendment, to have the Establishment and Free

Art. I, § 7:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Art. IX, § 8:

Neither the general assembly, nor any county, city, town, township,

Exercise clauses read:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

H.R.J. Res. 1, 44th Cong., 1st Sess., 44 Cong. Rec. 205 (1875). The proposed amendment did not pass, 44 Cong. Rec. 5595 (1876), but subsequently, many states, including Missouri, adopted provisions in their state constitutions of similar verbiage and effect. See Mo. Const. (1875), Art II, § 7, Art. XI, § 11. The term “Blaine amendments” has generally been used to describe all state provisions of this sort. See *Oliver v. State Tax Com’n of Missouri*, 37 S.W.3d 243, 251, n. 20 (Mo. banc 2001).

school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

A. Facial Validity of the Ordinances²

Temple Parties claim that the Ordinances were facially invalid because “the face of the ordinances, as well as SLU’s admissions, established that public funds would be going for the benefit of said University, contrary to the Missouri constitutional provisions.” Appellants’ Brief, at 26. Any discussion of constitutional challenges to legislation must start with the premise that legislation is presumed constitutional. *Tax Increment Fin. Com’n v. Dunn Const.*, 781 S.W.2d at 74. To mount a successful facial challenge to legislation, “the challenger must establish ‘that no set of circumstances exists under which the Act would be valid.’ [Citation omitted.] It is not enough to show that under some conceivable set of circumstances the [act] might operate unconstitutionally.” *Artman*, 918 S.W.2d at 251. Thus, Temple Parties’ burden was to

²This responds to Appellants’ Point I.

show that the City ordinances, on their face, violated the Constitution.

It is evident from the face of the ordinances that their purpose was not to advance religion, but to provide for redevelopment of an area whose economic, cultural and social well-being is of great importance to the City. As stated in the Redevelopment Plan, an attachment to Ordinance 65703:

Historically, the Redevelopment Area was the cultural theater and artistic center for the St. Louis region. The Area is distinguished by several palatial movie and vaudeville theater houses which evidence the Area's rich and diverse past. The theatres, galleries, ornate buildings and open public spaces served as the cultural center for artists, performers, patrons and citizens of the St. Louis area. Also included within the Redevelopment Area is Saint Louis University (the "University"). Since its founding in 1818, the University continues to serve as an invaluable educational and cultural entities within the Area. Despite its rich past, however, the Redevelopment Area has struggled to maintain its economic viability and has undergone several changes over the last decades.

Ordinance 65703, Redevelopment Plan, Introduction, p. 5.

The Board of Aldermen found the Redevelopment Area to be blighted. The Redevelopment Plan laid out the circumstances of that blight: a defective or inadequate street layout, improper subdivision or obsolete platting, unsanitary or unsafe conditions, deteriorating site improvements, excessive vacancies, obsolescence of buildings and other structures, endangerment by fire or other causes, and other economic, public health

and safety problems. Ordinance 65703, Redevelopment Plan, Part I.B., Determination of Blight. pp 25-28. The Board’s finding of blight, as a legislative finding by the governing body of the City, is presumptively correct, *Crestwood Commons. v. 66 Drive-In, Inc.*, 812 S.W.2d 903, 911 (Mo. App. E.D. 1991), and has not been challenged in this action.

To address this problem, the City adopted a Redevelopment Plan that identified a number of anticipated projects, including museums, performance spaces, arts centers, and theaters, Ordinance 65703, Redevelopment Plan, Ex. IV, as well as the infrastructure improvements (parking garages, green spaces, street rerouting) necessary to support them. Among the many contemplated projects was the one SLU facility that is the subject of this appeal: an arena that would host “a variety of functions, including plays, concerts, cultural events, community events, speakers, trade shows, academic conferences, commencements and sporting events.” (Id.).

Nothing on the face of the TIF Ordinances reflects that they had as a purpose the promotion of any religious creed or religion, or that they would have the effect of doing so. Rather, the Ordinances had a single entirely public and secular purpose: redeveloping this historically important, but now blighted, area. The TIF funds are not, in the language of Art. IX, § 8, to be used in support of “any religious creed, church or sectarian purpose,” but for the proper public purpose of urban redevelopment.

Temple Parties quote the language of Mo. Const., Art. IX, § 8 and Art. I, § 7. They then state, without citing any particular authority, that Art. IX, § 8 requires two findings to show that a government activity contravenes this provision: 1. A city’s appropriation of a public fund 2. that is in aid of a religious creed or sectarian purpose, or

to help support or sustain any public or private school, academy, seminary, college, university or other institution of learning controlled by any religious creed, church or sectarian denomination whatever. Appellants' Brief, at 26. Temple Parties claim that allowing SLU to participate in the TIF funding of the Grand Center Redevelopment Area is the appropriation of a public fund³ and that SLU is a university controlled by a religious creed.

It would violate the Missouri Constitution if the Board of Aldermen were to appropriate public funds in direct support of the advancement of a religion or denomination. It might be that there are some institutions that are in fact controlled by a church or denomination, so that advancing public funds to them even for the clearest of

³No Missouri case has yet decided whether TIF funding constitutes an "appropriation" or "payment from a public fund," for purposes of these constitutional provisions, or in any other context, for that matter. An "appropriation" has been described as "the legal authorization to expend funds from the treasury." *State ex rel. Sikeston R-VI School Dist. v. Ashcroft*, 828 S.W.2d 372, 375 (Mo. banc 1992). If this indeed is the essence of an appropriation, then it is questionable that TIF funding comes within this description. A TIF ordinance is not a legal authorization to expend funds from the City treasury. Rather, a TIF ordinance merely authorizes real property owners within a given area to re-direct increases in property value to a fund which is pledged as security for bonds issued by the municipality. No monies are ever taken from the City treasury and transferred to a third party.

public purposes, might violate the constitutional provisions at issue here. Nothing in this case -- nothing on the face of the ordinances, and nothing in the record presented to the trial court -- establishes that Saint Louis University is such an institution. Rather, the record establishes the contrary.

Temple Parties claim that proof that SLU is controlled by a religious creed comes from the University Bylaws, as well as the admissions of SLU's President, Lawrence Biondi, S.J. Fr. Biondi stated in an affidavit in support of summary judgment that SLU is controlled and operated by an independent, lay board of trustees. Affidavit of Lawrence Biondi, S.J. (Ex. Vol. II), ¶ 3. SLU's Bylaws provide that the SLU Board of Trustees consists of no fewer than twenty-five (25) members and no more than fifty-five (55) members, and that no fewer than six (6), nor more than twelve (12), members of the Board shall be members of the Society of Jesus, *i.e.*, Jesuits. SLU Bylaws, attached to Deposition of Lawrence Biondi (Ex. Vol. III), Art. II, ¶ 1. This means that at no time can Jesuits comprise a majority of the membership of the Board of Trustees.

Temple parties characterize these facts as “conclusionary,” “argumentative,” and “irrelevant.” Appellants’ Brief, at 28-29. For them, apparently, it is enough that SLU is identified as a Catholic university to categorize it as being “under control” of a religious creed. They cite *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (en banc 1942) for the proposition that the presence of a lay board does not mean that the institution is not under control of a religious creed. However, they fail to acknowledge that in *Americans United v. Rogers*, 538 S.W.2d 711, 721 (Mo. banc 1976), a significant factor for upholding the statute authorizing tuition grants to college students against a challenge based on Art. IX,

§ 8 was that the college of choice had to be run by an “independent board.” As the court noted, for schools that had an independent board, “those schools ... would not be subjected to that ‘control’ prohibited by Article IX, § 8, of the Missouri Constitution.” *Id.*

Temple Parties also claim that Fr. Biondi’s status as President of SLU shows that the school is under control of a religious creed. They claim that because SLU’s Bylaws require SLU’s President to be a Jesuit, with “broad powers” in the running of the University, this sufficiently establishes such control. Appellants’ Brief, at 27-28. However, while the President undoubtedly has a significant, high-profile role in the University’s affairs, he has virtually no authority, under the SLU Bylaws, without the authorization of the Board of Trustees. All officers of the University, including the President, serve at the pleasure of the Board of Trustees. Bylaws, Art. II, § 2. Only the Board of Trustees has express authority to amend and/or revoke the Bylaws. Bylaws, Art. VII. Under the Bylaws, the Board of Trustees, not the President, controls the operations of SLU.

No Missouri case has expressly analyzed how to determine whether a college or university was “controlled by a religious creed.” However, in *College of New Rochelle v. Nyquist*, 326 N.Y.S.2d 765 (N.Y. App. Div. 3rd Dept. 1971), a court engaged in such an analysis of a similarly-worded constitutional provision. In that case, a New York state law granting tuition assistance to college students required that the college of attendance be eligible for state aid under both the United States and New York Constitutions. New York’s Blaine Amendment, section 3 of Article XI of its Constitution, provided that the

State shall not use or permit to be used public moneys in aid “of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.” *College of New Rochelle* was founded by Ursuline Nuns, an order devoted to the education of girls. The responsibility for administering the college was shared by the Community of Ursuline Nuns, who comprised a substantial minority of the board of trustees, occupied the presidency and comprised approximately one-third of the faculty. It was acknowledged that the Ursuline Nuns were not controlled by religious affiliation insofar as their professional and academic activities were concerned, but only in matters of faith. The court held that this was insufficient to characterize the institution as “under the control” of a religious denomination:

To make sense of and to give purpose to this clause of the Blaine Amendment it must be construed to proscribe State aid where the affiliated religious denomination controls or directs the institution towards a religious end; where the institution is controlled or directed to a degree so as to enable the religious authorities to propagate and advance -- or at least attempt to do so -- their religion. Mere affiliation or a sharing of administrative control by a denomination will not, in and of itself, bring the institution within the proscription of the statute; such a situation cannot be said to have caused religion to so “pervade” the atmosphere of the college as to effectuate religious control or direction by a religious denomination.

Id. at 771. If the logic of *College of New Rochelle* is accepted, then SLU should not be

characterized as controlled by a religious creed.

The No Discrimination Command of Article I, Section 7

Temple Parties ignore the command of Art. I, § 7 that “no preference shall be given to *nor any discrimination made against* any church, sect or creed of religion, or any form of religious faith or worship.” (Emphasis added). They would require the City to deny TIF funding to SLU because of its Catholic identification and stated adherence to Jesuit traditions, at the same time that the City makes TIF funding available to a host of other projects in the same blighted area.

SLU is an acceptable participant generally in plans for public financing of non-profit activities that achieve public purposes. This was established by *Americans United, supra*, and *Menorah Medical Center v. Health & Ed. Fac. A.*, 584 S.W.2d 73 (Mo. banc 1979). The former decision established that universities having religious affiliations could receive public funds for student education so long as the institutions were truly under the control of independent boards and the funds were not used to advance any religious purpose. The latter decision enabled SLU to participate in a bond program to facilitate the financing of medical facilities.

If the City were to deny SLU TIF funds that are being used for secular purposes and being made available to other institutions in the redevelopment area for similar purposes because it identifies itself as Catholic and a small minority of its board members are Jesuits, the City would run the risk of violating the non-discrimination provision of Art. I, § 7 by discriminating against an institution on the basis of the religious faith of certain of its constituent members. It might well be running afoul of the free exercise

clause of the First Amendment to the Constitution as well. By choosing to make the funds available to this institution for this secular purpose, the City has not established a religion, or paid out public funds in support of any sectarian purpose. It has fully complied with the Missouri Constitution.

B. Proper Criteria to be Applied Under Missouri Constitutional Provisions⁴

Temple Parties claim the trial court improperly utilized portions of the federal Establishment Clause test when analyzing the validity of the Ordinances under the Missouri constitutional provisions. Specifically, they claim that the trial court, in deciding that the ordinances did not violate the Missouri Constitution, cited as precedent two Missouri cases, *Americans United, supra*, and *Menorah Medical Center, supra*, which were actually analyzing under the federal constitutional provision, rather than the state provisions.

Initially, the Temple Parties presented claims under both the Missouri constitutional provisions and the federal Establishment Clause. See Masonic Temple Parties' Counterclaim, Count I (L.F., Vol. I, 49-51) and Count II (L.F., Vol. I, 51-54). Both *Americans United* and *Menorah* analyze claims under both the Missouri and federal constitutions. This results in a somewhat confusing roadmap for analyzing claims under the Missouri constitutional provisions.

Americans United was an analysis of whether a state financial assistance program for college students which was used to attend both public and private universities, was

⁴This responds to Appellants' Point II.

constitutional. To the extent Temple Parties assert or imply that the Missouri Supreme Court’s analysis of the state constitutional provisions in *Americans United* made no use of the federal test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971)⁵, they are incorrect. In discussing the federal analysis, the opinion stated:

2. Is the primary effect of the statutory program other than the advancement of religion? We think the answer is “Yes.” Hopefully, however, to avoid some repetition the reasons for our conclusion in this connection will await consideration of our state constitution, which not only proscribes “advancement of religion” generally but other related activities specifically.

538 S.W.2d at 717-718. Moving to the discussion of the state constitutional provisions, the opinion found that the statute might not be “in aid” of religion because the tuition grant was essentially an element of bargained-for consideration as part of an arrangement in the nature of a contractual relationship involving the student, the school, and the state, wherein the school undertook to educate the student, the student undertook to pay a portion of the tuition, and the state undertook the obligation to finance a portion of the

⁵*Lemon* applied a three-prong test, all three having to be satisfied before a state legislative enactment or administrative determination is constitutional; the state provision must have: (1) a secular legislative purpose; (2) a primary effect other than the advancement of religion; and (3) no tendency to entangle the state excessively in church affairs. 403 U.S. at 612-613.

cost of educating the student not covered by tuition. In expressly finding that the statute did have a secular purpose, *id.*, at 721, the Court seemed to say that because the statute had a secular purpose, it was distinct from those programs that were an outright giveaway to a religious institution, *e.g.*, the statute providing for free textbooks to parochial school students which was invalidated in *Paster v. Tussey*, 512 S.W.2d 97 (Mo. banc 1974).

In *Menorah*, the issue was whether a state statute which provided funding to “educational institutions” and “health institutions,” including St. Louis University, to finance capital improvements (excluding property to be used for sectarian instruction or study, or as a place for religious worship) was constitutional. In analyzing the federal constitutional claim, the Court cited the three-prong *Lemon* test, then stated, “This test also has been recognized by Missouri courts.” 584 S.W.2d at 87, citing *Americans United*. The Court in *Menorah* then went on to analyze the federal and state constitutional claims under the identical criteria as set forth in *Lemon*, concluding that the only issue in controversy was whether the statute violated the third prong, excessive entanglement with religion. The court concluded it did not:

Four overall observations lead us to conclude that no excessive entanglement exists in the present case: (1) the state is not directly involved in expending or in supervising expenditure of funds, (2) funds are being used to promote a public purpose, not a sectarian one, (3) the funds involved are being used in a neutral fashion, for the construction of physical facilities, and (4) facilities for the higher education level, as opposed to elementary or secondary level, are in issue.

Id.

The conclusion one reaches is that the trial court did, in fact, analyze these ordinances under the proper standard. *Americans United* did invoke the second element of the *Lemon* test in analyzing the state constitutional provisions. *Menorah* cited *Americans United* for the proposition that the entire *Lemon* test was applicable for considering the state constitutional provisions. The trial court expounded on why the ordinances had a secular purpose and had a primary effect other than an advancement of religion:

These ordinances were enacted for the secular purpose of redeveloping the blighted redevelopment area created thereunder. These ordinances also specifically limit SLU's authority to use funds received thereunder for secular purposes, including the development of theaters, museums, parking, green space, educational and housing projects, retail and mixed-use establishments, historic rehabilitation, and arena projects. See Ordinance 65703. The development is not to primarily benefit St. Louis University.

Order and Judgment, slip op., at 11-12 (L.F., Vol. II, 250-251). The trial court then found the same four factors of *Menorah, supra*, to show that there was no excessive entanglement with religion. *Id.*

Temple Parties' attempts to distinguish or otherwise discredit *Americans United* and *Menorah* are without merit. Their attempt to distinguish *Americans United* from the present case on grounds that the statute at issue there only applied to universities not controlled by a religious creed or doctrine only reinforces the applicability of *Americans*

United, because the facts adduced in the trial court showed SLU was controlled by an independent board of directors which was composed of a majority of lay people and therefore was not controlled by a religious creed or doctrine. Furthermore, there is no support for the Temple Parties' contention that "[a]t no place in the *Menorah* opinion did the court state or even indicate that the federal *Lemon* test should be applied in deciding the 'plain language' of the Missouri state constitutional provisions." Appellants' Brief, at 47. If *Menorah* did not use the *Lemon* test to analyze the state constitutional provisions, then it is hard to see what criteria were used, because the *Lemon* factors were the only ones discussed. Moreover, the attempt to discount *Menorah* because it was a plurality opinion ignores the fact that it has been cited by the Missouri Supreme Court in multiple cases⁶ as support for various legal propositions. Temple Parties' reference to the 1997 *Gibson* case⁷, Appellants' Brief, at 48, and its citation to *Paster*, should not detract from

⁶See, e.g., *State ex rel. Wagner v. St. Louis Cty.*, 604 S.W.2d 592, 597 (Mo. banc 1980); *State ex rel. Leet v. Leet*, 624 S.W.2d 21, 22 (Mo. 1981); *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 912 (Mo. banc 1982); *State ex rel. Pub. Def. Com'n v. County Court of Greene Cty.*, 667 S.W.2d 409, 412 (Mo. banc 1984); *Evangelical Ret. Homes v. State Tax Com'n*, 669 S.W.2d 548, 554 (Mo. banc 1984); *Century 21 v. City of Jennings*, 700 S.W.2d 809, 810 (Mo. banc 1985); *Curchin v. Mo. Indus. Dev. Bd.*, 722 S.W.2d 930, 933 (Mo. banc 1987); *Fust v. Attorney General*, 947 S.W.2d 424, 429 (Mo. banc 1997).

⁷*Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997).

Menorah's precedential value. The reference to *Paster* in the *Gibson* case can hardly be characterized as anything other than *dictum*, since it was only mentioned in clarifying that state constitutional provisions were *not* part of the analysis.

C. The Relevance of Secular Purpose Under Missouri Law⁸

In Point III of their Brief, the Temple Parties contend that the trial court erred in failing to apply the correct rule of financial benefit to the religiously controlled institution, as applied in *Harfst, supra, Berghorn v. Reorganized School Dist. No. 8*⁹, and *Paster, supra*. Appellants' Brief, at 49. Apparently, Temple Parties do not dispute the actual finding that the TIF funding would be used for a secular purpose, *viz.*, the building of SLU's on-campus arena, nor could they dispute it, since the ordinances themselves specify the SLU Arena. See Ordinance 65703, Ex. A Redevelopment Plan, Exhibit IV, Section A, subparagraph 6. Rather, Temple Parties dispute that a secular purpose has any relevance to the Missouri constitutional provisions, citing *Harfst, Berghorn* and *Paster*.

Temple Parties provide no explanation for why *Americans United* discusses the secular purpose of the proposed monies in the context of the Missouri constitutional provisions, or why *Menorah* cites *Americans United* for the proposition that the *Lemon* three-prong test has been accepted by Missouri courts. Their contention that "Missouri courts construe Missouri constitutional provisions by applying 'the plain language' of the particular Missouri constitutional provision," Appellants' Brief, at 49, begs the question,

⁸This responds to Appellants' Point III.

⁹364 Mo. 121, 260 S.W.2d 573 (1953).

because the terms “appropriation,” “to help support or sustain,” and “controlled by any religious creed” in Art. IX, § 8 are themselves vague and subject to interpretation, and no Missouri case has expressly interpreted these terms or articulated a test to determine whether a particular scenario implicates the constitutional provisions at issue here.

No case from the Missouri Supreme Court since prior to *Menorah* has cited *Harfst*, *Berghorn* or *Paster* as precedent for determining whether monies authorized to an institution with a religious affiliation violates the Missouri Constitution. See *Waites v. Waites*, 567 S.W.2d 326, 331 (Mo. banc 1978). However, it may not be necessary for purposes of this appeal to determine whether these cases still have precedential value, in whole or in part, because the situation in the case *sub judice* is distinguishable from those cases. First, those cases all involved elementary schools, as opposed to colleges or universities. Both *Americans United* and *Menorah* have emphasized that there may be a difference in analysis depending on the level of the institution. See *Americans United*, at 722 (“Institutions of higher education are able to boast of academic freedom, institutional independence, objective instruction, lack of indoctrination, faculty autonomy, mature students and a diversity of religious background in faculty and students.”); *Menorah*, at 87 (noting that one factor for why there was not excessive entanglement was “facilities for the higher education level, as opposed to elementary or secondary level, are in issue.”). Second, those earlier cases all concerned a direct transfer of funds for a purpose that was either clearly sectarian — teachers (*Harfst*) and textbooks (*Berghorn* and *Paster*) in a parochial school — or was open-ended (federal Title I funds in *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. banc 1976)). Cf. *Menorah*, at 87 (noting one factor for why there

was not excessive entanglement was “funds are being used to promote a public purpose, not a sectarian one.”). It should be enough to say that the instant case has a fact pattern remarkably similar to *Menorah*, and therefore should be analyzed under the same criteria as utilized there, focusing on whether there was excessive entanglement. The City submits that based on *Menorah*, the TIF Ordinances do not violate the Missouri Constitution.

The Temple Parties argue that the TIF Ordinances create excessive entanglement with religion because they would somehow involve the City officials in the religious affairs of the University. This is not the case. The City administers TIF funds on a regular basis, to the benefit of a wide number and variety of entities. The accounting required to insure that the TIF funds are properly handled and accounted for does not in any way entangle the City in the internal affairs of TIF recipients. There is no entanglement of the City with religion here, much less the “excessive entanglement” addressed in *Menorah* and in the federal Establishment Clause decisions.

D. Whether Temple Parties Created a Genuine Issue as to Any Material Fact¹⁰

The propriety of summary judgment is purely an issue of law. *ITT, supra*, 854 S.W.2d at 377. A “defending party” may establish a right to summary judgment by showing (1) facts that negate *any one* of the claimant’s elements facts, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of

¹⁰This responds to Appellants’ Point IV.

any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense. *Id.* at 381 (Emphasis in original). A "genuine issue" is a dispute that is real, not merely argumentative, imaginary or frivolous. *Andes v. Albano*, 853 S.W.2d 936, 940 (Mo. banc 1993).

Temple Parties claim that there is a genuine issue of material fact as to whether or not SLU is controlled by a religious creed, citing various portions of the record pertaining to the Motions for Summary Judgment of the City and SLU. Appellants' Brief, at 52-55. Temple Parties confuse the fundamental nature of a "material fact" with conclusory allegations. Their references in the trial court record never connected "facts" with "materiality." Merely alleging, as the Temple Parties did in the trial court, that SLU is "controlled by a religious creed" does not present a *fact*. See *Rycraw v. White Castle Systems, Inc.*, 28 S.W.3d 495, 498 (Mo. App. E.D. 2000) (noting the difference between a material fact and a conclusion of law). Merely presenting a number of isolated references in the record that somehow pertain to religious aspects of SLU does not present a *material fact* bearing on the issue of whether SLU is "controlled by a religious creed."

Short of an admission by SLU or its agents that it is controlled by a religious creed, which SLU has denied, the question of whether SLU is "controlled by a religious creed," for purposes of the constitutional analysis, is necessarily a conclusion. The Temple Parties aver, *inter alia*, that SLU's mission statement is "the pursuit of truth for the greater glory of God ..."; that Barbara Arras, in her deposition, stated that she sees "fifty banners up and down the street that say 'In the Lord's service' ..."; that the motto of

the Jesuits is “For the Greater Glory of God”; that Fr. Biondi, in his deposition, testified that “the general purpose of the Jesuits is basically to help anybody who would like to gain salvation of their souls ...”; that Fr. Biondi, in his deposition, testified that “our philosophy is to teach young men and women to be good citizens, to follow their Judeo-Christian conscience ...” Appellants’ Brief, at 52-55. While all of these are facts, they are not *material* facts because they say nothing from which the determination of “control” by a religious creed could be deduced.

The material facts which appeared in the trial court record were: that SLU is operated and controlled by an independent lay Board of Trustees, Affidavit of Lawrence Biondi, S.J. (Ex. Vol. II), ¶ 3; that the Board of Trustees consists of no fewer than twenty-five (25) members and no more than fifty-five (55) members and no fewer than six (6) but no more than twelve (12) of the members of the Board may be members of the Society of Jesus, Biondi Affidavit, ¶ 3, and SLU Bylaws (Ex. Vol. III), (attached to Deposition of Lawrence Biondi, S.J.), Art. II, § 1; that a majority of all trustees must be present at any meeting called for such purposes and a majority of all trustees present at such meeting is required to authorize any corporate action by SLU, Biondi Affidavit, ¶ 3, and SLU Bylaws, Art. II, § 2; that SLU does not require its employees and/or students to be Catholic or otherwise have any specific religious affiliation, Biondi Affidavit, ¶ 2. From these facts, as to which there is no genuine dispute, a conclusion could be reached, that SLU was not controlled by a religious creed.

On the basis of the foregoing, the Grand Center TIF Ordinances did not violate any Missouri constitutional provisions based on their inclusion of the SLU Arena Project.

II. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE CITY AND AGAINST THE MASONIC TEMPLE PARTIES BECAUSE JUDGMENT WAS PREMISED ON THE VALIDITY OF ORDINANCES 65703, 65857 AND 65858, AND THESE ORDINANCES DID NOT VIOLATE THE FEDERAL ESTABLISHMENT CLAUSE BECAUSE THE RECORD IN THE TRIAL COURT ESTABLISHED FACTS SHOWING THAT THE ORDINANCES HAD NO TENDENCY TO ENTANGLE THE STATE EXCESSIVELY IN CHURCH AFFAIRS AND THERE WAS NO SHOWING THAT RELIGION IS SO PERVASIVE AT ST. LOUIS UNIVERSITY THAT A SUBSTANTIAL PORTION OF ITS FUNCTIONS ARE SUBSUMED IN THE RELIGIOUS MISSION.

Standard of Review

An order granting summary judgment is reviewed *de novo*. *Blair by Snider v. Perry County Mut., supra*, at 607. The propriety of summary judgment is purely an issue of law. *ITT, supra*, at 376. The reviewing court need not defer to the trial court's order, as its judgment is founded on the record submitted and the law. *Id.* The criteria on appeal for testing the propriety of summary judgment are no different from those which should be used by the trial court to determine the propriety of sustaining the motion initially. *Id.* Summary judgment is proper only in those situations in which the movant can establish that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Id.* at 377. The movant has the burden to show a right to judgment flowing from the facts about which there is no genuine dispute. *Id.* at

378. The reviewing court does consider the same information the trial court considered in rendering its decision. *Northwest Plaza, L.L.C. v. Michael-Glen, Inc.*, *supra*, at 553.

Introduction

This point responds to Points V and VI of Appellants' Brief. A further itemization of the responses to those particular points will be made in the course of the argument.

A. "Excessive Entanglement" Under the *Lemon* Test¹¹

The Masonic Temple Parties contend that, separate and apart from their claims based on state constitutional provisions, the TIF Ordinances violate the Federal Establishment Clause. The test for whether government action violates the Establishment Clause encompasses the three-prong criteria from *Lemon*:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ... finally, the statute must not foster "an excessive government entanglement with religion."

403 U.S. at 612-613 (citation omitted). Temple Parties' sole contention of invalidity of the TIF Ordinances under the *Lemon* criteria rests in the third element, excessive government entanglement with religion.¹²

¹¹This responds to Point V of Appellants' Brief.

¹²The City acknowledges the "corollary" to *Lemon* from the decision in *Hunt v. McNair*, 413 U.S. 734 (1973), which will be discussed *infra*.

Temple Parties alleged that they pled facts of excessive government entanglement with a religious institution, then state: “Neither Father Biondi’s affidavit nor any other proper evidence submitted by movants controverted the above statement. It stands admitted for the purposes of this Summary Judgment.” Appellants’ Brief, at 56. Temple Parties’ sole reference to these “facts” is Paragraph 43 of their Answer to SLU’s Petition, which actually is an affirmative defense that states:

Thus, the TIF ordinances were enacted in such a way as to provide financial aid to a religious institution from city and state taxpayers’ money. The ordinances were enacted and implemented in such a way as to permit participation and control of the taxing powers by said religious institution, in particular with reference to the University Sub-Account as defined in the ordinance, leading to excessive government entanglement with a religious institution.

L.F., 46.

However, Temple Parties cannot stand on this allegation to avoid summary judgment. First, Temple Parties fail to acknowledge that this allegation was denied by the City. This Paragraph was incorporated into the Temple Parties’ “Counterclaim,” which was directed against the City¹³ and SLU, by way of Paragraph 54 of the

¹³Since the City was a co-defendant with the Temple Parties in SLU’s original action, the Temple Parties’ claim as to the City would probably have been more accurately characterized as a “crossclaim.”

Counterclaim (L.F., 50). The City, in Paragraph 54 of its Answer to the Counterclaim (L.F., 76), specifically denied the allegations of Paragraph 43. Second, Temple Parties' reliance on *Rodgers v. Threlkeld*, 22 S.W.3d 706 (Mo. App. W.D. 1999) is misplaced. *Rodgers* concerned a situation where a plaintiff was attempting to obtain summary judgment on his petition to quiet title. The court held that because the defendant pled an affirmative defense, in order to obtain summary judgment, the plaintiff not only had to make a *prima facie* case for summary judgment as to his claim, he also had to negate all affirmative defenses of the defendant. *Id.* at 710. In the instant case, as to the City, the above allegation was a part of the Temple Parties' claim, not an affirmative defense. Therefore, the Motion for Summary Judgment only had the requirement of establishing facts that negated any one of the Temple Parties' facts. *ITT*, at 377.

Furthermore, "excessive entanglement" cannot reasonably be construed to be a "fact," for purposes of summary judgment; rather, it is a conclusion of law, adduced from facts. Legal conclusions, without specification of factual contentions, can be disregarded when considering motions for summary judgment. *Estate of Cates v. Brown*, 973 S.W.2d 909, 916 (Mo. App. W.D. 1998). Therefore, even if the City's Answer to the Temple Parties' claim had not denied the allegations hereinabove quoted, they would not be able to stand on those allegations in the face of a motion for summary judgment:

A denial may not rest upon the mere allegations or denials of the party's pleading. Rather, the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.

Rule 74.04(c)(2).

The only “fact” which the Temple Parties appear to rely on for their claim of excessive entanglement is the establishment of a University Sub-Account in one of the ordinances. See Ordinance 65858, Section 401(a). This account, which is to exist until such time as SLU provides the City a Certificate of Commencement of Construction with total development costs of greater than \$50 million, was designed to prevent SLU from using the TIF funds for anything other than the purpose of constructing its arena. As shown by the provisions of City Ordinance 65858, Section 402(b), “no moneys on deposit in the University Sub-Account of the EATS Account shall be applied to payments ... unless the Comptroller of the City directs the Fiscal Agent in writing to do so.” In the event SLU does not provide the Certificate of Commencement of Construction prior to the expiration of the TIF District, then the money in the University Sub-Account reverts to the City’s Special Allocation Fund for the TIF District, and is never available to SLU for any purpose. Ordinance 65858, Section 402(b), Clause *Fourth*.

Contrary to Temple Parties’ contentions, the ordinances do not involve excessive entanglement between the City and religion. City Ordinance 65703 states that there will be a “SLU-EATS Sub-Account,” and

All amounts deposited to the EATS Account and generated from parcels owned and operated by the University shall be segregated and accumulated in a SLU-EATS Sub-Account. Upon commencement of the construction of the SLU Arena, all amounts then on deposit in the SLU-EATS Sub-Account shall be transferred to the EATS Account and thereafter all

amounts attributable to the parcels owned and operated by the University shall be immediately deposited in the EATS Account.

City Ordinance 65703, Ex. A Redevelopment Plan, Section II, Subsection E. As the Temple Parties themselves point out, the calculation of the PILOTS and EATS rests with the Comptroller of the City of St. Louis. Appellants' Brief, at 62. The Temple Parties claim that because it will be up to the individual developers and business owners in the TIF District to report their taxes, that this somehow leads to excessive entanglement. However, self-reporting of taxes and other financial obligations takes place at every level of government, federal, state and local. There will be no more entanglement as a result of this ordinance than there would be in the case of the SLU Athletic Department complying with federal Title IX requirements.

The analysis of whether this arrangement constitutes "excessive entanglement" seems remarkably similar to that found in *Menorah*. In *Menorah*, a state statute authorized educational and health institutions to obtain funds for financing or refinancing, in order to build new or to upgrade existing facilities. The program was open, *inter alia*, to private not-for-profit institutions. The program excluded facilities used for sectarian instruction or as a place for religious worship. Several institutions, including SLU, filed suit against the administrator of the program, which declined to authorize agreements to finance certain projects. One basis for the refusal to provide SLU the financing was concern that it would violate the federal Establishment Clause, specifically, the third prong of the *Lemon* test, that it would foster an excessive entanglement with religion. In this regard, the Court stated:

At the outset, we note that entanglement itself is not prohibited. Only excessive entanglement is forbidden. Four overall observations lead us to conclude that no excessive entanglement exists in the present case: (1) the state is not directly involved in expending or in supervising expenditure of funds, (2) funds are being used to promote a public purpose, not a sectarian one, (3) the funds involved are being used in a neutral fashion, for the construction of physical facilities, and (4) facilities for the higher education level, as opposed to elementary or secondary level, are in issue.

584 S.W.2d at 87.

Using the same criteria as *Menorah*, it must be concluded that the TIF Ordinances do not foster excessive entanglement with religion: (1) the City is not directly involved in expending or supervising expenditure of the funds — rather it is the TIF Commission, which appears similarly situated to the Health and Educational Facilities Authority in *Menorah*; (2) the funds are being used to promote a public purpose, namely, the construction of an arena for athletic events and exhibitions; (3) the funds involved are being used in a neutral fashion, for the constructions of physical facilities; and (4) the facilities at issue are be used in connection with a higher education level, a university. Therefore, the TIF Ordinances pass muster under the most recent Missouri precedent for determining whether there is an excessive entanglement with religion.

B. Application of the *Hunt* Refinement to *Lemon*¹⁴

In *Hunt v. McNair*, 413 U.S. 734, 743 (1973) the Supreme Court, in discussing the excessive entanglement aspect of the *Lemon* test, noted:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

From this, subsequent cases have found *Hunt* to be a “refinement” of *Lemon*. *Americans United*, after enunciating the *Lemon* test, noted that the excessive entanglement prong is “conditioned by the ultimate refinement thereof found in *Hunt* ... that a constitutional violation may nevertheless be present ‘... when it [aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.’” 538 S.W.2d at 716. Temple Parties contend SLU is such an institution. Appellants’ Brief, at 66.

While SLU in its Brief undoubtedly will address the issue of whether religion is so pervasive that a substantial portion of its functions are subsumed in its religious mission, it should be noted that in *Hunt*, the Supreme Court found that the institution involved there, the Baptist College at Charleston, was *not* one where religion was so pervasive that

¹⁴This responds to Appellants’ Point VI.

a substantial portion of its functions were subsumed in the religious mission. *Id.* at 743. This was so despite the fact that the members of the college's board of trustees were all elected by a religious organization, *viz.*, the state Baptist Convention, that the Convention's approval was also required for certain financial transactions involving the college, and that the college's charter could only be amended by the Convention. *Id.* This appears on the surface to have been an arrangement where religion was much more pervasive than at SLU, where the school's affairs, including financial transactions, are governed by an independent board of trustees that by its charter always must have a majority of lay members. In *Hunt*, the majority appeared to find that this college did not have "the 'substantial religious character of these church-related' elementary schools," *id.* at 746, which was a factor in *Lemon*'s finding of a violation of the Establishment Clause.

Moreover, in *Tilton v. Richardson*, 403 U.S. 672 (1971), decided the same day as *Lemon*, the Supreme Court upheld a federal statute's grant of financial aid to four Catholic universities, including Fairfield University, a Jesuit institution, for the purpose of building on-campus facilities. In *Tilton*, it was also argued that at the institutions in question, "religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." *Id.* at 680. The Court found this was not the case, and that as to the intended uses of the financial aid, "[t]here is no evidence that religion seeps into the use of any of these facilities." *Id.* at 681. In *Hunt*, the Court noted, "there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton*." 413 U.S. at 746.

Finally, in *Roemer v. Bd. of Public Works of Maryland*, 426 U.S. 736 (1976) the Supreme Court upheld a state statute by which financial aid went to four Catholic colleges. As to the issue of whether they were pervasively sectarian, the Court found that

(a) Despite their formal affiliation with the Roman Catholic Church, the colleges are characterized by a high degree of institutional autonomy ...

(b) The colleges employ Roman Catholic chaplains and hold Roman Catholic religious exercises on campus [but] [a]ttendance at such is not required ... (c) Mandatory religion or theology courses are taught at each of

the colleges, primarily by Roman Catholic clerics, but these only supplement a curriculum covering “the spectrum of a liberal arts program.”

... (d) Some classes are begun with prayer [but] [t]here is no actual college policy of encouraging the practice ... (e) ... [A]part from the theology

departments ... faculty hiring decisions are not made on a religious basis.

(f) The great majority of students at each of the colleges are Roman Catholic, but ... the student bodies are chosen without regard to religion.

Id. at 755-758. Again, these characteristics appear to be even more pervasively sectarian than at SLU. Thus, in comparing SLU to a number of other institutions already found not to be pervasively sectarian, SLU appears even less sectarian than any of them. Based on the overwhelming weight of authority analyzing this issue, SLU is not a pervasively sectarian institution under the *Hunt* refinement.

Under either permutation of the excessive entanglement factors, the allowance of SLU to participate in the Grand Center TIF Redevelopment Area does not violate the

federal Establishment Clause.

CONCLUSION

As adverted to at the beginning of the Argument, *supra*, the City of St. Louis, within the power of its Board of Aldermen, may enact legislation that has statute-like authority. The Board has for years sought ways to revitalize the midtown area. The creation of the Grand Center Redevelopment Area is the boldest plan yet devised by the City to eradicate the urban blight in midtown and replace it with an arts and entertainment district. St. Louis University occupies the preeminent position in terms of restoring the Grand Center Redevelopment Area. The SLU Arena Project is the centerpiece of SLU's contribution to the redevelopment effort. The Board of Aldermen has made a conscious determination that assisting SLU in making the Arena Project a reality is an effective measure in helping to restore midtown. If the aldermen have made a mistake in that determination, their voting constituents will undoubtedly express the ultimate check on their decision-making. But this should be a policy question, not a legal one. Legislation is presumed constitutional, and courts should overturn it only if it clearly contravenes the Constitution. This legislation does not. The judgment of the trial court should be affirmed.

Respectfully submitted,

OFFICE OF THE CITY COUNSELOR

Mark Lawson #33337
Associate City Counselor
Room 314, City Hall
St. Louis, MO 63103
Phone: (314) 622-3361
Fax: (314) 622-4956
Attorney for Respondent City of St. Louis

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this Substitute Brief of Respondent was prepared in the format of Microsoft Word, using Times New Roman typeface in font size 13. This Brief contains approximately 11,179 words of text. The accompanying diskette, containing a complete copy of Brief of Respondent, has been scanned and found to be virus-free. The name, address, bar and telephone number of counsel for Respondent City of St. Louis are stated herein and the Brief has been signed by the attorney of record.

Mark Lawson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Substitute Brief of Respondent City of St. Louis, along with a copy of the same Substitute Brief on a diskette, scanned and determined to be virus-free, were served by U.S. Mail, postage prepaid, on January 11, 2007, upon:

James A. Stemmler
Attorney at Law
1602 S. Big Bend Blvd.
St. Louis, MO 63117
Attorney for Appellants

Richard B. Walsh, Jr.
Winthrop B. Reed, III
Stephen M. Durbin
Lewis, Rice & Fingersh, L.C.
500 N. Broadway, Suite 2000
St. Louis, MO 63102
Attorneys for Respondent St. Louis University

Alana M. Barragan-Scott
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Attorney for State of Missouri

Anthony E. Rothert
American Civil Liberties Union
of Eastern Missouri
4557 Laclede Avenue
St. Louis, MO 63108
Attorney for *Amicus Curiae*
American Civil Liberties Union
of Eastern Missouri

Carl H. Esbeck
Hulston Hall
Room 209
Conley and Missouri Avenues
Columbia, MO 65211
Co-Counsel for *Amicus Curiae*
Center for Law & Religious Freedom

Timothy Belz
Ottsen, Mauzé, Leggat & Belz, L.C.
112 S. Hanley, Suite 200
St. Louis, MO 63105
Co-Counsel for *Amicus Curiae*
Center for Law & Religious Freedom

Lauren Rae Rexroat
Proskauer Rose LLP
1001 Pennsylvania Avenue, NW
Suite 400 South
Washington, DC 20004
Attorneys for *Amicus Curiae*
Americans United for Separation
of Church and State

Ayesha N. Khan
Alex J. Luchenister
Heather L. Weaver
Americans United for Separation
of Church and State
518 C Street, NE
Washington, DC 20002

Mark Lawson