

IN THE SUPREME COURT OF MISSOURI

No. SC94339

STATE OF MISSOURI EX REL.
RUTH CAMPBELL, ET AL.

Plaintiffs/Appellants

v.

COUNTY COMMISSION OF FRANKLIN COUNTY
and
UNION ELECTRIC COMPANY, D/B/A AMEREN MISSOURI

Defendants/Respondents

On Appeal from the Circuit Court of Franklin County
Honorable Robert D. Schollmeyer

BRIEF OF *AMICUS CURIAE*
THE MISSOURI MUNICIPAL LEAGUE

B. Allen Garner, # 26532
3808 S. Coachman Court
Independence, MO 64055
Telephone 816.478.3848
Facsimile 816.326.0898
allen@allengarnerlaw.com

ATTORNEY FOR *AMICUS CURIAE*
THE MISSOURI MUNICIPAL LEAGUE

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CONSENT OF ALL PARTIES

Pursuant to Rule 84.05(f), the Missouri Municipal League hereby notifies this Court that it has obtained the consent of all parties to file this brief.

JURISDICTIONAL STATEMENT

Amicus Curiae, the Missouri Municipal League, adopts and incorporates the Statement of Jurisdiction contained in the Respondent's Brief.

INTEREST OF THE *AMICUS CURIAE* MISSOURI MUNICIPAL LEAGUE

The Missouri Municipal League ("MML") is an independent not for profit association of 672 municipalities in the State of Missouri. MML members are political subdivisions. The MML provides for cooperation in formulating and promoting municipal policy and administration of local government at all levels to enhance the welfare and common interests of its members and their citizens. The MML advocates on behalf of its members in favor of the proper exercise of governmental authority, against the inappropriate or unlawful usurpation of local authority, and in defense of attacks on local governmental action.

Like Franklin County in this case, many MML members have adopted ordinances that establish zoning standards and requirements within the members' respective jurisdictions. Those ordinances provide for the holding of public hearings to be conducted by numerous volunteer citizens and elected officials. Appellants' position requiring the insertion of court oversight of the conduct within the public hearings, including review of comments made by those conducting the hearing, if adopted, would

place municipalities and those relying on the procedures in a state of uncertainty with the prospect of litigation from all hearings in which any comments are made by members of the body conducting the hearing. This prospect would create delays and increase the costs of conducting hearings whose purpose is to provide a forum for the public to address the body holding the hearing.

STATEMENT OF FACTS

The MML adopts Respondents' Ameren and Franklin County Statement of Facts.

SUGGESTIONS BY AMICUS CURIAE

The MML fully supports the affirmance of the judgment of the circuit court and the denial of the Appellants' points relied on. The MML writes separately to address a major issue of separation of powers implicated by the arguments of the appellants and raised by the erroneous opinion issued by the divided panel of the Court of Appeals. This Court should reject the appellants' invitation to impose judicially created rules on parliamentary procedure of legislative bodies.

The settled law is that the courts' relationship to legislative bodies is one of deference, not one of prescription. The Court should not venture into second guessing procedural decisions or comments of elected officials or setting rules for governmental entities in their conduct and management of public meetings in the legislative zoning process. These aspects of the appellants' argument are addressed below.

The Legislature Has Not Placed Procedural Requirements on Local Government Public Hearings, and the Court Should Not Do So.

Zoning ordinances constitute an exercise of a state's police power. *Moore v. City of Parkville*, 156 S.W.3d 384, 387 (Mo. App. 2005). As to cities, for example, a city has no inherent police power, so it must look to the Constitution and statutes to determine the extent of the power delegated to it by the state. *Id.* The exercise of such delegated powers must conform to the terms of the statutory grant. *Id.* Missouri's Municipal Zoning Enabling Act (§§ 89.010 et seq., RSMo) is the sole source of power and measure of authority for a city, town, or village in zoning matters. *Id.* Section 89.030 delegates the power to zone to municipalities and provides that the local legislative bodies of such municipalities may divide their cities into zoning districts. *Id.* Section 89.050 grants municipal legislative bodies the power to determine the manner in which zoning regulations shall be established and amended. *Id.* It also provides that notice and a hearing are necessary prerequisites to the valid enactment of a zoning ordinance. *Id.* Similarly, as this Court has noted, county zoning power is enabled and prescribed by Chapter 64 of the Revised Statutes.

Appellants admit that there is no legal authority supporting their First Point Relied on. There is a reason for this. Judicial review of statements by legislators would violate the separation of powers between the judiciary and local legislative bodies, Mo. Const. Art. II. The cases in which Missouri Courts have invalidated local zoning procedures are cases in which there was both (1) untimely or defective (in content) notice in objective

violation of a statute or ordinance, and (2) lack of actual notice to the appealing party. In addition, defective notice may be waived by participation in a hearing.

The purpose of the statutory notice and public hearing requirements is to afford interested persons an opportunity to be heard regarding a proposed zoning ordinance. *Bonds v. City of Webster Groves*, 432 S.W.2d 777 (Mo. App. 1968); see §§ 64.875, 89.050, 89.060, RSMo. In *Bonds*, the Court held:

In this case, Mrs. Bonds not only had actual knowledge that the hearing would be held, but was actually at the meeting representing her interest and that of her husband. Furthermore she actually was heard. She voiced no objection to the failure to give notice at said meeting or at the meetings thereafter of the City Council which she and plaintiffs' attorney attended. Under these circumstances, plaintiffs are in no position now to complain of the failure of defendant to give said notice.

Bonds at 783-4. As in *Bonds*, Appellants, having appeared and vigorously opposed the Landfill Ordinance without limit, cannot complain of unfairness.

We note that Missouri courts also apply the harmless error analysis to conduct of hearings. See, e.g., *School District of Clayton v. Kelsey*, 196 S.W.2d 860 (Mo. 1946) and *Pelligreen v. Century Furniture & Appliance Co., et al.*, 524 S.W.2d 168 (Mo. App. 1975).

Appellants' argument would require the Court to divine rules dictating what might be said by legislative presiding officers, or even other voting legislators, at legislative

hearings. There are states which, by statute, impose limited rules for conduct of local legislative hearings, including subpoena power, testimony under oath, cross-examination at the discretion of the presiding officer, and authorizing the presiding officer to impose “reasonable” limitations on speaking time and number of speakers. *See, e.g.*, N.J. Stat. Ann. § 40:55D-10 (West 1997). California requires agencies to adopt rules for conduct of public hearings. Cal. Gov’t Code §§ 65804 and 65854 (West 1996). The Missouri legislature (and certainly the courts) have declined to do so, however.

Other states have expressly held that public hearings need not be formal, but must simply allow interested persons an opportunity to be heard and express their views. *See, e.g. Dram Associates v. Planning and Zoning Commission of Town of Cromwell*, 574 A.2d 1317, 1319 (Conn. App. 1990). A hearing on a proposed zoning amendment is not of the same character as a trial, or even of administrative hearing or other legal proceeding, and is not limited by formal rules of procedure or evidence. *Gayland v. Salt Lake County*, 358 P.2d 633 (Utah. 1961).

Despite the comprehensive zoning enabling provisions of Chapters 64 (counties) and 89 (cities, towns and villages), the Missouri legislature has not directed local elected officials to conduct public hearings in any particular way, or for any particular length.

The Missouri legislature has imposed rules for recusal of legislators, for such reason as a pecuniary interest in the pending matter. *See* Missouri’s Conflict of Interest Statute, § 105.452 RSMo. (prohibiting acts in conflict of interest, including voting where there is a special benefit to or financial gain by a spouse or dependent children).

By exclusion, however, and certainly because of the constitutional requirement of separation of powers, neither the legislature nor the courts of Missouri have seen fit to do what Appellants advocate—that is, to micromanage the political process.

The Appellants’ arguments in this appeal ignore the nature of the decision that they seek to overturn. Zoning and rezoning are legislative acts. *JGJ Properties, LLC v. City of Ellisville*, 303 S.W.3d 642, 647-648 (Mo. App. 2010). Zoning ordinances are presumed to be valid, and the challenger bears the burden of proving otherwise. *Id.* Any uncertainty about the reasonableness of a zoning regulation must be resolved in the government’s favor. *Id.* If the issue is at least fairly debatable, the reviewing court may not substitute its opinion for that of the zoning authority that enacted the challenged ordinance. *Id.* The evidence is viewed in the light most favorable to the legislative body’s decision. *Id.* The challenged act in the instant case is the adoption of an ordinance by the legislative body.

Judicial deference to legislative decisions such as zoning amendments is based upon the doctrine of separation of powers, a constitutional doctrine, which may not be overturned by the judiciary (or by statute of the legislature). Mo. Const. Art. II. For the same reasons supporting judicial deference to substantive decisions of legislative bodies, this Court should defer to procedural decisions.

Contrary to the deference that Missouri courts have always shown in reviewing legislative matters, the appellants’ argument would require the Court to set rules for legislative hearings. The Court should decline to do so.

While the Missouri Constitution provides this Court with authority to “establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law,” Mo. Const. Art. V, § 5, the Franklin County Commission is not a court or an administrative tribunal when it is exercising its legislative powers.

These appellants do not claim any lack of notice of any public hearings. These appellants do not claim any defects in the content of the notices of public hearings. These appellants do not claim untimely notice of any public hearings.

These appellants do not set forth any facts or evidence showing that they were denied the opportunity to be heard at any public hearings. Rather, the allegations of their pleading and the vast legislative record show that these appellants were heard, at length. They provided the County with abundant public comments, expert testimony, and evidentiary exhibits. These appellants do not and cannot point to any fact, or evidence, or opinion that they wished to provide to the County but were prevented from providing.

In these circumstances, the conduct of the legislative hearings is and should remain a matter on which the Court defers to the legislative body. The members of the MML, in exercising their legislative functions, have discretion that they must continue to be able to exercise in the democratic proceeding that they regularly conduct. To hold otherwise would be inefficient and inject the Court into matters that are not committed to the Court’s discretion.

CONCLUSION

The trial court properly refused to substitute its judgment for that of the Franklin County Commission as to the conduct of the extensive hearings that led to the passage of the ordinance at issue. The Missouri Municipal League respectfully submits that this Court should do the same. The judgment of the trial court should be affirmed.

Respectfully submitted,

Allen Garner Law, LLC
Of Counsel with Kapke & Willerth

/s/ B. Allen Garner 

B. Allen Garner, # 26532
3808 S. Coachman Court
Independence, MO 64055
Telephone 816.478.3848
Facsimile 816.326.0898
allen@allengarnerlaw.com

Attorney for Amicus Curiae
The Missouri Municipal League

CERTIFICATE OF SERVICE

A copy of this brief was served via the court's electronic filing system on all parties of record on October 10, 2014.

/s/ B. Allen Garner



CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 1,813, excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix.

/s/ B. Allen Garner 
B. Allen Garner, # 26532
3808 S. Coachman Court
Independence, MO 64055
Telephone 816.478.3848
Facsimile 816.326.0898
allen@allengarnerlaw.com

Attorney for Amicus Curiae
The Missouri Municipal League