IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

FILED
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SANDRA L. SKINNER, Clerk
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

Appeal No. SD 28304

THE ROBERT W. PLASTER, TRUST AND STEPHEN PLASTER, TRUSTEE OF THE ROBERT W. PLASTER, TRUST, AND THE VILLAGE OF EVERGREEN,

Defendants/Appellants,

90133

vs.

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Thomas F. Simon
CLERK, SUPREME COURT

ORLA HOLMAN CEMETERY, INC. AND SUSAN RECTOR

Plaintiffs/Respondents.

APPEAL FROM THE CIRCUIT COURT OF CAMDEN COUNTY, MISSOURI
The Honorable Carl DeWitt Gum, Jr., Judge

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This appeal was taken from an action in the Circuit Court of Camden County, Missouri where Respondents Orla Holman Cemetery, Inc. and Susan Rector asserted claims against Appellants seeking declaratory and injunctive relief establishing public easements, prescriptive easements and *mandamus*. Both Respondents and Appellants filed motions for summary judgment. The trial court sustained Respondent's Motion for Summary Judgment, denied Appellant's Motion for Summary Judgment, and entered a final judgment for Respondents.

Because this case does not involve one of the five areas subject to the exclusive jurisdiction of the Supreme Court of Missouri, the Court of Appeals has jurisdiction. Article V, Section 3, of the Missouri Constitution vests general appellate jurisdiction in the Southern District Court of Appeals for this matter. This Court also has jurisdiction pursuant to § 477.060 R.S.Mo. in that the underlying matter arose in Laclede County, Missouri and was heard in Camden County, Missouri.

STATEMENT OF FACTS

Row Crop Road is a rural gravel road in Laclede County, Missouri. (LF 666) The road was originally constructed in 1954 or 1955. (LF 555, 558, 559, 564, 687-688, 754) The road runs approximately one-quarter to one-half of a mile from Highway V. (LF 754) The Orla Holman Cemetery was created by virtue of deeds to Laclede County dated November 16, 1901 and July 29, 1910. (LF 683, 682) The Orla Holman Cemetery is located wholly within property formerly owned by a family named Massey. (LF 741) The Massey family owned the property surrounding the cemetery from the 1940s until 2002. (LF 61) Billy Massey gave an affidavit stating his family had given permission to cemetery patrons to access the cemetery. (LF 61-62) Stephen Plaster, Trustee of the Robert Plaster Trust, currently owns the property surrounding both the cemetery and Row Crop Road. (LF 667) Orla Holman Cemetery is near to, but does not abut, Row Crop Road. (LF 670) The tract of land situated between the cemetery and Row Crop Road is a grassy area and has been referred to as the "parking area" by the parties. (LF 670, 990)

The Village of Evergreen is an incorporated village located in Laclede County, Missouri. (LF 79) On January 29, 2003, the Village of Evergreen annexed the Massey property. (LF 79) No objections were filed to the annexation. (LF 79) As a result of the annexation, the Massey property, the Orla Holman Cemetery and Row Crop Road, a gravel road whose only destination is the cemetery, lie entirely within the corporate limits of the Village of Evergreen. (LF 40, 78-79, 95)

Prior to January 2005, the Village of Evergreen experienced frequent and continual problems with individuals driving up and down Row Crop Road for purposes

unrelated to Orla Holman Cemetery. Such problems included poaching, littering, theft, vandalism, loitering and other untoward activities. (LF 79) While the Masseys owned the property, they too experienced property theft, having three to five head of cattle stolen each year from 2000 to 2002. (LF 756- 757) On January 20, 2005, after public notice, the Village of Evergreen enacted an ordinance to address these problems. (LF 76-77) The ordinance specifically referenced the nuisance activities which were occurring on Row Crop Road. (LF 76) They included unauthorized dumping, poaching, and the use and sales of illicit drugs. (LF 76) The ordinance further provided that the Village of Evergreen determined it was necessary to exercise its police powers "to protect the safety and health of its residents" and to prevent crime within the Village. (LF 76) The ordinance authorized the Village of Evergreen, Missouri, to erect and maintain a barricade, in the form of an unlocked gate, across Row Crop Road. (LF 76)

Following passage of the ordinance, gates were installed on Row Crop Road to protect both property owners along Row Crop Road and the cemetery. (LF 743) Respondents themselves acknowledged that a two-panel gate system is currently in place on Row Crop Road. (LF 668) One panel, or side, of the gate is open and the second panel is locked. (LF 668) Photographs of the two-panel gate system were attached to Respondents' First Amended Petition. (LF 687-688) Joe Pickering, a Laclede County Commissioner, testified in his deposition that county road graders were able to access Row Crop Road through the open gate panel. (LF 199) Catherine Ivy, an Orla Holman Cemetery Association member, testified she had no problems getting and to and from the cemetery with one panel closed and the other open. (LF 1009) Nor was Ms. Ivy aware of

any other cemetery patrons who had problems accessing the cemetery. (LF 1009) Elizabeth Davis, another Association member, had no trouble accessing the cemetery since installation of the gate. (LF 1017) Gerald Davis and Mary Wilson also testified by deposition that they were able to access the cemetery since installation of the gate. (LF 774, 781)

This action was filed by Respondents on November 1, 2004. (LF 1) Respondents' Petition claimed Appellants improperly obstructed and denied access to Row Crop Road and Orla Holman Cemetery. Respondents sought mandatory injunctive relief and damages for nuisance. (LF 15-24) On April 20, 2005, Appellants filed their motion for summary judgment. (LF 3) Respondents' motion for partial summary judgment was filed on or about October 28, 2005. (LF 132-133) On December 14, 2006, the parties appeared before the trial court for hearing on the summary judgment motions. (LF 10) On January 19, 2007, the trial court entered judgment in this case, denying Appellants' motion for summary judgment and granting Respondents' motion for summary judgment on Counts I through IV and VI of Respondents' First Amended Petition. (LF 1036-1038) Appellants filed their notice of appeal in the Circuit Court of Camden County on February 16, 2007. (LF 11)

CHRONOLOGY

1901	Deed to Lawrence County creating Orla Holman Cemetery	LF 683
1910	2nd Deed to Lawrence County adding to Orla Holman Cemetery	LF 682
1940-2002	Massey Family owns property surrounding cemetery	LF 61
1954-1955	Row Crop Road built	LF 754
4/19/2002	Massey property sold to Plaster Trust	LF 686
1/29/2003	Land surrounding Row Crop Road and Orla Holman Cemetery annexed by Village of Evergreen	LF 926-934

POINTS RELIED ON

I. **The trial court erred in entering summary judgment on Counts I-IV and VI of Respondents' First Amended Petition because Respondents were not entitled to judgment as a matter of law in that: (a) the Village of Evergreen has the authority to control and regulate roads within its boundaries pursuant to § 80.090 and 304.120 R.S.Mo; (b) Row Crop Road lies entirely within the boundaries of the Village of Evergreen; (c) the Village of Evergreen enacted an ordinance imposing reasonable restrictions on the public's use of Row Crop Road; (d) the Village of Evergreen's actions were a reasonable exercise of its police powers; and (e) § 229.030 R.S.Mo. does not preempt the Village of Evergreen's police powers.**

Jones v. City of Jennings, 595 S.W.2d 1 (Mo. App. 1979)

Duckworth v. City of Springfield, 184 S.W. 476 (Mo. App. 1916)

Foster v. Kansas City, 90 S.W. 751 (Mo. App. 1905)

Normandy Fire Protection District v. Village of Pasadena Park, 927 S.W.2d 516 (Mo. App. 1996)

Other Authorities

§ 80.090 R.S.Mo.

§ 304.120 R.S.Mo.

II. The trial court erred in granting Respondents' summary judgment on Counts I-IV and VI of their First Amended Petition because there are disputed issues of material fact present in that: (a) the Village of Evergreen is not obstructing or prohibiting the public's access to either Row Crop Road or Holman Cemetery; (b) any purported easement rights of Respondents are subject to the Village of Evergreen's police powers; (c) Respondents believed the "parking area" adjacent to Holman Cemetery was public property; (d) Respondents presented no evidence of the scope or consistency of their alleged use of the parking area; (e) there was evidence present showing Respondents' use of the parking area was permissive; and (f) the trial court relied on numerous legal conclusions in granting Respondents' motion.

Universal Underwriters Ins. v. Johnson, 905 S.W.2d 529 (Mo. App. 1995)

Homan v. Hutchinson, 817 S.W.2d 944 (Mo. App. 1991)

North Central County Fire Alarm System, Inc. v. Maryland Heights Fire Protection District, 945 S.W.2d 17 (Mo. App. 1997)

Whittom v. Alexander-Richardson, 851 S.W.2d 504 (Mo. 1993)

III. The trial court erred in entering permanent injunctions against Appellant Village of Evergreen because said injunctions are overbroad in that: (a) Appellant Village of Evergreen is endowed with police powers pursuant to §§ 80.090 and 304.120 R.S.Mo. authorizing it to control roads and regulate traffic within its boundaries; (b) Appellant Village of Evergreen is prohibited under the injunction from limiting the public's use of the parking area in any way; (c) Appellant Village of Evergreen is prohibited from enacting any reasonable time restrictions on the public's use of Row Crop Road; and (d) the injunction effectively deprives Appellant Village of Evergreen of its lawful exercise of powers delegated to it by the legislature.

City of Bridgeton v. City of St. Louis, 18 S.W.3d 107 (Mo. App. 2000)

May Dept. Stores Co. v. County of St. Louis, 607 S.W.2d 857 (Mo. App. 1980)

State v. Metje, 298 S.W.2d 128 (Mo. App. 1954)

Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. banc 2003)

Other Authorities

Rule 92.02(e)

§ 214.132 R.S.Mo.

ARGUMENT

STANDARD OF REVIEW

The standard of review for the trial court's grant of summary judgment is governed by the Missouri Supreme Court's decision in *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993). This court gives no deference to the trial court's grant of summary judgment as the propriety of summary judgment is strictly an issue of law. *Id.* at 376. When considering an appeal from a summary judgment, this court uses the same principles employed by the trial court in determining whether to grant summary judgment. *Id.* This court views the record in the light most favorable to Appellant. *Id.* In determining the propriety of the trial court's grant of summary judgment, this court employs a *de novo* standard of review. *Stone v. Farm Bureau Town & Country Ins. Co. of Mo.,* 203 S.W.3d 736, 744 (Mo. App. S.D. 2006). No deference is given to the trial court's order granting summary judgment. *Id.* The key to a summary judgment is the undisputed right to judgment as a matter of law, not simply the absence of factual questions. *Pyle v. Layton*, 189 S.W.3d 679, 682 (Mo. App. S.D. 2006). Accordingly, summary judgment is appropriate only when the moving party makes 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. *Id.* The record is reviewed in the light most favorable to the party against whom judgment has been entered, and the non-movant is also given the benefit of all reasonable inferences from the record. *Wedgewood Square Center Ltd. Partnership v. Lincoln Land Title Co., Inc.*, 217 S.W.3d 308, 310 (Mo. App. S.D. 2007). To defeat a motion for summary judgment, a non-

moving party need only show the existence of a genuine dispute as to the facts underlying the movant's right to judgment. *New Prime, Inc. v. Professional Logistics Mgmt. Co. Inc.*, 28 S.W.3d 898, 903 (Mo. App. S.D. 2000). A trial court has no authority to weigh the credibility of conflicting affidavits in adjudicating a motion for summary judgment. *Id.* at 904.

POINT RELIED ON I

The trial court erred in entering summary judgment on Counts I-IV and VI of Respondents' First Amended Petition because Respondents were not entitled to judgment as a matter of law in that: (a) the Village of Evergreen has the authority to control and regulate roads within its boundaries pursuant to § 80.090 and 304.120 R.S.Mo; (b) Row Crop Road lies entirely within the boundaries of the Village of Evergreen; (c) the Village of Evergreen enacted an ordinance imposing reasonable restrictions on the public's use of Row Crop Road; (d) the Village of Evergreen's actions were a reasonable exercise of its police powers; and (e) § 229.030 R.S.Mo. does not preempt the Village of Evergreen's police powers.

In its judgment, the trial court found that Respondents Orla Holman Cemetery, Inc. and Susan Rector had demonstrated that they were entitled to judgment based upon facts about which there was no dispute. (LF 1036) The judgment contained no finding that Respondents were entitled to judgment as a matter of law. (LF 1036 through 1038) For the reasons developed below, Appellants respectfully suggest that Respondents were not entitled to judgment on Counts I through IV and VI of their First Amended Petition as a matter of law. Accordingly, the trial court's judgment in the case must be reversed.

A. The Village of Evergreen's powers under §§ 80.090 and 304.120 R.S.Mo.

The Village of Evergreen is an incorporated village located in Laclede County, Missouri. (LF 40, 79) As an incorporated village, Appellant Village of Evergreen has an absolute right to regulate roads within its boundaries. The legislature delegated the power to regulate roads and streets within the Village in § 80.090(34) R.S.Mo. The

Village of Evergreen has been empowered to locate and lay out new streets and alleys, to widen streets, and to "open, clear, *regulate*, grade, pave or improve" roadways within its boundaries. § 80.090(30),(33),(34). Moreover, § 304.120 R.S.Mo. gives the Village of Evergreen broad authority to enact ordinances making additional rules of the road and traffic regulations to meet its specific needs and traffic conditions. § 304.120.2(1) R.S.Mo. The delegation of authority present in § 304.120 R.S.Mo. applies to all classes and types of municipalities within the state. *Jones v. City of Jennings*, 595 S.W.2d 1, 3 (Mo. App. 1979).

Accordingly, it is beyond dispute that the legislature has made specific delegations of power to the Village of Evergreen concerning the regulation and control of roadways within its corporate boundaries. Both § 80.090 and § 304.120 authorize the Village of Evergreen to regulate and control roadways within its boundaries.

B. Row Crop Road lies within the Village of Evergreen.

Row Crop Road lies within the corporate limits of the Village of Evergreen. (LF 79) On January 29, 2003, the Village of Evergreen annexed certain real estate known as the "Massey property." (LF 67 through 77, 79) As a result of the annexation, Row Crop Road fell within the village limits of the Village of Evergreen. (LF 79) No objections were filed to the annexation. (LF 96)

Respondents have contended that because the annexation ordinances specifically excepted "roadways," Row Crop Road is not within the Village of Evergreen. (LF 95-96) Appellants respectfully submit that such arguments are spurious, calculated solely to divert the court's attention from the true issues in the case. In the case of *Duckworth v.*

City of Springfield, 184 S.W. 476 (Mo. App. 1916), the court held that once unincorporated areas of Greene County were annexed into the City of Springfield, control and responsibility for county roads passed by virtue of state law from the county to the city. Here, Row Crop Road has been annexed into the Village of Evergreen. As a result, responsibility for and control over Row Crop Road has passed from Laclede County to the Village of Evergreen.

The issue of county roads being annexed into municipalities was also dealt with by the court in *Foster v. Kansas City*, 90 S.W. 751 (Mo. App. 1905). In this regard, the court in *Foster* observed:

> Was the city, at the time of the injury, burdened with the duty of keeping the street in a reasonably safe condition for travel? An affirmative answer must be predicated upon these facts alone: First, the inclusion of the highway within the municipality by the extension of its limits; and second, the act of the city in permitting the street to remain open to travel and its continued use by the public.

Id. at 752. *Foster* involved a personal injury claim made by the occupant of a wagon which struck an obstruction in the roadway. Notwithstanding the fact that the county had maintained the roadway for many years, the court concluded that the city, and not the county, would be responsible for damages. Municipal expansion not only divests the county of control over the roadway, it also creates liability for defects on the part of the

city. Municipal expansion converts roadways from county roads to city streets, with authority over and liability for the roadway passing to the municipality. *Id.* at 752.

C. The Village of Evergreen imposed reasonable restrictions on Row Crop Road by ordinance.

Prior to January 2005, the Village of Evergreen had experienced frequent and continual problems with individuals driving up and down Row Crop Road for purposes unrelated to Orla Holman Cemetery. The problems experienced have included poaching, littering, theft, vandalism, loitering and other untoward activities. (LF 79) On January 20, 2005, following public notice, the Village of Evergreen duly enacted an ordinance to address these problems. (LF 76-77) The ordinance specifically referenced the nuisance activities which were occurring on Row Crop Road. They included unauthorized dumping, poaching, and the use and sales of illicit drugs. (LF 76) The ordinance further provided that the Village of Evergreen determined it was necessary to exercise its police powers "to protect the safety and health of its residents and in the prevention of crime within the Village." (LF 76) The ordinance provided in pertinent part that:

> The Village of Evergreen, Missouri, is hereby authorized and directed to erect and maintain a barricade across Row Crop Road at a point north of the intersection of Row Crop Road and Laclede County Road V, in the form of an unlocked gate which can be opened and shut by pedestrians and motorists seeking to utilize Row Crop Road, in order to eliminate the nuisance referred to above and thereby preserve the public peace, health

and safety of the people residing within the Village of Evergreen, Missouri in the vicinity of Row Crop Road.

(LF 76).

Through its ordinance, the Village of Evergreen did not attempt to close Row Crop Road or prohibit the public from accessing Orla Holman Cemetery. The ordinance did not authorize the placement of any permanent barricade which would block access to Row Crop Road. Rather, the ordinance simply authorized the erection and maintenance of an unlocked gate which could be opened and shut by citizens seeking to utilize Row Crop Road. At no time since the ordinance was enacted has the gate across Row Crop Road been locked. (LF 80) The ordinances enacted by the Village of Evergreen were reasonable, narrowly tailored to address a public health and safety issue within its boundaries.

D. The Village of Evergreen's actions were a reasonable exercise of its police powers.

It is equally clear that the Village of Evergreen's actions were a reasonable exercise of its police powers. As the following discussion makes clear, the Village of Evergreen possesses the power to erect permanent barricades across its streets which completely block access, requiring citizens to use alternate routes. If such permanent barricades are permissible, then without question the Village of Evergreen possessed the power to erect and maintain an *unlocked* gate across Row Crop Road.

In *Jones v. City of Jennings*, 595 S.W.2d 1 (Mo. App. 1979), the court dealt with erection of a barricade across a city street. The City of Jennings passed an ordinance to

permanently barricade a public street. The surrounding land owners brought suit to declare the ordinance invalid and requested an injunction preventing the City from erecting the barricade. The trial court found the ordinance valid, and on appeal, it was determined the City had statutory authority to barricade the street, the barricade was not statutorily prohibited, and the ordinance was neither arbitrary nor capricious. *Id.* at 3-4.

The *Jones* Court held "a community may in the exercise of its police powers restrict the flow of traffic into a residential area in order to reduce noise, traffic, hazards and litter." *Id.* at 4.

The Court noted that:

> The barricade proposed by Jennings does not prevent the plaintiffs from reaching the general system of public streets and highways, rather, it merely imposes some inconvenience on them in terms of a route to reach the highway system. A barricade erected as a traffic control device which merely imposes some circuity of route is not a prohibited obstruction within the meaning of §229.030. *Id.* at 3.

Therefore, the alleged conduct of maintaining an unlocked gate by the Village of Evergreen *over half the roadway*, one which has always remained open and which allows access to the Cemetery, cannot constitute a violation of the law and cannot serve as the basis for injunctive relief.

In *Normandy Fire Protection District v. Village of Pasadena Park,* 927 S.W.2d 516 (Mo. App. E.D. 1996), the Eastern District Court of Appeals affirmed the Circuit

Court's denial of requested injunctive relief where the fire district complained that the Village erected a permanent gate across four streets. The Court of Appeals explained:

> Under § 80.090(34) R.S.Mo. (1994), the village has the power to 'open, clear, [and] regulate ... the streets and alleys.' Further, the village has broad authority to enact ordinances making 'additional rules of the road or traffic regulations to meet its needs and traffic conditions.' § 304.120.2(1) R.S.Mo. (1994). A community may, in the exercise of its police powers, restrict the flow of traffic into a residential area in order to reduce noise, traffic hazards and litter. This includes using permanent barricades on certain streets to restrict traffic ... **A permanent barricade used to re-route traffic is not an obstruction under state law.**

Id. at p. 517 (citations omitted, emphasis added). If a permanent barricade used to re-route traffic is not an unlawful obstruction, the maintenance of an unlocked gate in the Village of Evergreen should not be enjoined.

In *Mahaffy v. City of Woodson Terrace,* 609 S.W.2d 233 (Mo. App. E.D. 1980), the Eastern District Court of Appeals found that temporary barricading is a reasonable use of police power and reversed a judgment against the city where the lower court had entered an injunction directing the removal of a barricade. In *State of Missouri ex rel. Schmitz v. City of St. Louis,* 551 S.W.2d 848 (Mo. App. 1977), barricades and "diverters," i.e., metal posts linked with chain, were found to be reasonable exercises of police power, and the Plaintiff's request for a mandatory injunction was denied. The *Schmitz* court

found that § 229.030 did not preempt the whole field relating to obstruction of public roads, nor has it eliminated any actions by municipal governments on this subject. *Id.* at 851. The Court noted that:

> The residents of Shaw District are entitled to reasonable access to the general system of streets, but plaintiffs have not shown that they have been deprived of this right, or that they have suffered inconvenience or damages different in kind (although perhaps different in degree) from that suffered by the general public. The barricades affect all of the traveling public in the same manner. It is generally recognized that under a proper delegation of authority, a city has the power to promulgate or enforce traffic regulations in the general public interest and to install regulatory devices which merely impose some circuity of route, even though they interfere to some extent with access or compel circuity of route.

The same must hold true in the case at bar. The Cemetery patrons have access. It may be inconvenient because one panel of the gate is in the roadway but there is access and it is the same access open to the general traveling public. The Village of Evergreen has acted consistent with its inherent statutory authority found in R.S.Mo. §§ 304.120 and 80.090. Respondents have argued that § 229.030 precludes the Village of Evergreen from acting, but the case law clearly indicates that the Village of Evergreen can and should act, so long as it acts reasonably within its statutory mandate. *See also Duetsch v. City of Ladue,* 728 S.W.2d 239, 241 (Mo. App. E.D. 1987).

As explained in *Deutsch v. City of Ladue,* 728 S.W.2d 239 (Mo. App. E.D. 1987), a decision upholding permanent barriers that allegedly interfered with ingress and egress rights, traffic ordinances are enacted pursuant to a city's police power, and in the exercise of this police power, the ordinance may regulate private property to protect the general welfare. The right of ingress and egress itself is subject to the valid exercise of police power, and the right of access may be limited to reasonable access under the existing facts and circumstances of each case. *Doorack v. Board of Adjustment of the City of Town and Country,* 709 S.W.2d 140 (Mo. App. E.D. 1986).

The erection and maintenance of an unlocked gate is a reasonable response to the problem of continuing trespass, vandalism, poaching, litter and other criminal activities taking place on Row Crop Road. The Road dead-ends on the Massey Property, and patrons of the Cemetery can freely access the Cemetery through the open panel of the Second Gate, which they have been doing since January 2005.

The "public" nature of the road only strengthens the analysis because Row Crop Road is clearly within the confines of the Village of Evergreen as annexed, without objection, on January 29, 2003. *See, St. Louis County v. Village of Peerless Park,* 726 S.W.2d 405 (Mo. App. E.D. 1987) (holding it was not necessary to expressly and specifically "convey" a public road to the Village within an annexation under the procedures set out in § 71.012 R.S.Mo.).

E. Section 229.030 R.S.Mo. does not preempt the Village of Evergreen's police powers.

Respondents argued in the trial court that § 229.030 R.S.Mo. prohibits the Village of Evergreen from erecting and maintaining a gate across Row Crop Road. For the reasons developed below, such contentions are without merit.

As previously noted, *Jones v. City of Jennings*, dealt with barricades placed on city streets. One of the arguments raised by the plaintiff in *City of Jennings* was that § 229.030 R.S.Mo. prevented placement of the barricade. The court in *City of Jennings* rejected any argument that ordinances are facially void if they conflict with § 229.030 R.S.Mo. The court noted that "A person does not have the right to travel in any particular direction from his property or upon any specific part of the public highway right-of-way. His right of ingress and egress is subject to reasonable restrictions under the police power of the state in protecting the public and facilitating traffic." 595 S.W.2d at 3. The court also determined that "A community may in the exercise of its police powers restrict the flow of traffic into a residential area in order to reduce noise, traffic, hazards and litter." *Id.* at 4. Finally, the court noted that obstructions which do not prevent the public from reaching the public streets and highways, but which rather merely impose some inconvenience on them, are not prohibited by § 229.030 R.S.Mo. *Id.* at 3. It is axiomatic that "a barricade erected as a traffic control device which merely imposes some circuity of route is not a prohibited obstruction within the meaning of § 229.030." *Id.*

Here, § 229.030 R.S.Mo. does not prohibit the Village of Evergreen from erecting and maintaining an unlocked gate across Row Crop Road. The unlocked gate does not

block Respondents' access, nor anyone's access, to Row Crow Road. At best, the gate imposes a minor inconvenience on members of the public, requiring them to drive on one-half of Row Crop Road. In light of *City of Jennings*, an unlocked gate does not violate 229.030 as a matter of law and, thus cannot serve as the basis for injunctive relief.

POINT RELIED ON II

The trial court erred in granting Respondents' summary judgment on Counts I-IV and VI of their First Amended Petition because there are disputed issues of material fact present in that: (a) the Village of Evergreen is not obstructing or prohibiting the public's access to either Row Crop Road or Holman Cemetery; (b) any purported easement rights of Respondents are subject to the Village of Evergreen's police powers; (c) Respondents believed the "parking area" adjacent to Holman Cemetery was public property; (d) Respondents presented no evidence of the scope or consistency of their alleged use of the parking area; (e) there was evidence present showing Respondents' use of the parking area was permissive; and (f) the trial court relied on numerous legal conclusions in granting Respondents' motion.

As discussed earlier, summary judgment is appropriate only when the moving party establishes there are no genuine issues of material fact present and that movant is entitled to judgment as a matter of law. *Pyle,* 189 S.W.3d at 682. This court reviews the record in the light most favorable to Appellants, and gives Appellants the benefit of all reasonable inferences from the record. *Wedgewood Square Center*, 217 S.W.3d at 310. If a genuine dispute exists as to facts underlying the movant's right to judgment, this court must reverse the grant of summary judgment. *New Prime, Inc.*, 28 S.W.3d at 903. For the reasons developed below, Appellants respectfully submit that there are numerous disputed issues of material fact present in the record which defeat Respondents' right to judgment as a matter of law. As such, the decision of the trial court must be reversed.

A. The Village of Evergreen is not obstructing or prohibiting the public's access to Row Crop Road or Holman Cemetery.

Respondents acknowledge in their First Amended Petition that a two-panel gate system is currently in place on Row Crop Road. (LF 668) One panel, or side, of the gate is open, while the second panel is locked. (LF 668) Photographs of the two-panel gate system were attached to the First Amended Petition. (LF 687-688) As the court can see, the general traveling public has access to Row Crop Road. During discovery, numerous individuals testified concerning the issue of "access" to Row Crop Road. Joe Pickering, Laclede Commissioner, testified that county road graders were able to access Row Crop Road notwithstanding the "obstruction" that forms the basis of Respondents' claims. (LF 199) Catherine Ivy, an Orla Holman Cemetery Association member, testified she had had no problems getting to and from the cemetery with one gate panel closed and the other open. (LF 1009) She also testified she was not aware of any other individuals who had been prevented from accessing the cemetery because of the sign posted on the gate. (LF 1009) Elizabeth Davis, another Cemetery Association member, testified she had not had any trouble getting to the cemetery since the second gate was installed. (LF 1017) Gerald Davis, the husband of Elizabeth Davis, offered the following testimony:

Question: And when you came to that gate configuration, it has the right panel pinned back and then the left panel is bolted down in the center of the road; is that correct?

Answer: Uh-huh.

Question: Has that – since that gate's been up, has it caused you to not be able to get down that road?

Answer: I'd give the same answer. It does not restrict the use of the road, but it's very annoying to just see it there. You know, it's just annoying.

(LF 781) Mary Wilson offered this testimony at her deposition:

Question: And this gate configuration is a little different from the other one because it has one panel swung closed –

Answer: Right.

Question: – and one pinned back.

Answer: Right.

Question: Have you seen that?

Answer: Yes.

Question: And have you been able to get to the cemetery with that gate configuration in place?

Answer: Yes.

(LF 774)

Respondents' First Amended Petition consistently alleges that Appellants have blocked and denied access to Row Crop Road and Orla Holman Cemetery. (LF 671, 674, 675, 677, and 679) The above discussion makes abundantly clear that no one's access to either Row Crop Road or Orla Holman Cemetery has been denied. Indeed, one of the Laclede County Commissioners testified it was possible for a *road grader* to freely pass

through the gate system and access Row Crop Road. Numerous cemetery patrons testified in their depositions that the current gate system did not prevent them from accessing Row Crop Road and the cemetery. The issue of access to Row Crop Road and the cemetery, specifically whether access had been blocked or denied, is central to each one of Respondents' counts upon which the court granted summary judgment. Appellants submit that the record before the trial court, at a minimum, established the presence of a disputed issue of material fact concerning access to Row Crop Road and the cemetery. As such, Respondents were not entitled to judgment as a matter of law and the trial court should not have entered summary judgment in their favor.

B. Any easement rights claimed by Respondents are subject to the Village of Evergreen's police powers.

Assuming, arguendo, Respondents established their right as a matter of law to the various easements claimed in their First Amended Petition, it is clear that any such purported easement rights are subject to the Village of Evergreen's police powers.

It is well established that citizens hold their property rights and interests subject to the valid exercise of the state's, and its subdivisions', police power. In *Nemours v. City of Clayton*, 175 S.W.2d 60 (Mo. App. 1943), the court analyzed the conflict between individual property rights and the state's valid exercise of police power. The court in *Nemours* noted:

> [E]very citizen holds his property subject to the valid exercise of the police power, and that in the event of a conflict between his individual interest and those of society as a whole, he must subordinate his private rights to a

> reasonable and proper exercise of the police power for the promotion and furtherance of what is conceived to be the general welfare. So it is, we observed, that the state, when fulfilling its duty of protecting the rights and property of persons while upon or using roads within its borders, may extend its supervision to roads not duly constituted public highways if commonly used for public travel (*Phillips v. Henson*, 326 Mo. 282, 30 S.W.2d 1065); and so likewise may a city, in the exercise of the power delegated to it by the state, regulate the use of vehicles or other means of transportation upon all streets and roadways which are rightfully made use of by the public within its municipal limits, regardless of their legal status. This for the reason that it is the public use to which a street is put that gives rise to the city's right and duty to regulate the movement of traffic upon it, so that if a street is in fact permitted to be made use of for the pleasure and convenience of the public at large, the character of its legal ownership will be immaterial upon the question of its being subject to regulation and control by proper city ordinances.

Id. at 65 (citations omitted).

Accordingly, even if one were to assume, for sake of argument, that Respondents had established their right to judgment as a matter of law on the issues of easements, which point Appellants vehemently deny, it is clear that such rights would be subject to Village of Evergreen's police powers. As such, summary judgment was inappropriate and the trial court's ruling should be reversed.

C. Respondents believed the "parking area" was public property.

In Counts I through IV and VI of their First Amended Petition, Respondents alleged certain prescriptive rights to the "parking area." Respondents prayed the court to declare an easement present on the parking area for access to the cemetery. Row Crop Road leads to Orla Holman Cemetery, but does not abut it. The grassy area between the cemetery and Row Crop Road has been referred to as the "parking area" by the parties. (LF 670, 990) For the reasons developed below, Respondents were not entitled to a prescriptive easement over this area.

Orla Holman Cemetery was created by means of a conveyance to Laclede County in 1902. (LF 666, 683) Respondent Susan Rector, President of the Cemetery Association and a named plaintiff in the trial court, acknowledged the cemetery was owned by Laclede County. (LF 768, 769, 770) Ms. Rector also testified she believed the parking area was part of the cemetery. (LF 768, 769) Numerous cemetery patrons testified they considered the parking area part of the cemetery. Elizabeth Davis testified she believed the parking area was a public area. (LF 761) David Buck assumed the parking area was owned by the cemetery. (LF 764) Mary Wilson also understood the parking area to be part of the cemetery proper. (LF 773)

In *Rosemann v. Adams*, 398 S.W.2d 855 (Mo. 1966), the court heard a case wherein the claimant sought a prescriptive easement for a walkway where claimants believed it was a *public* way. The Missouri Supreme Court noted that a claimant for a prescriptive easement will not succeed upon his claim if, at the time of his use of the route, he thought it was a public way. *Id.* at 857.

Here, members of Respondents' Association, including its President, which President herself is a plaintiff in this case, believed the "parking area" was part of the cemetery, a cemetery which is owned by Laclede County. To paraphrase the Supreme Court in *Rosemann*, respondents were not entitled to summary judgment on their claims for prescriptive easements while they collectively believed the area on which they received the easement was public property.

D. Respondents presented no evidence of the scope or consistency of their use of the parking area.

In order for Respondents to prevail on their claim for a prescriptive easement, they must show that their use has been continuous, uninterrupted, visible and adverse for a period in excess of ten years. *White v. Millington Living Trust*, 785 S.W.2d 782 (Mo. App. S.D. 1990). Respondents bear the burden of proving by clear and convincing evidence these requirements, and if there is a failure in any one of the elements, the claim is defeated. *Jacobs v. Roschevitz*, 20 S.W.3d 598, 600 (Mo. App. S.D. 2000). The law does not favor prescriptive easements. *Id.*

Continuous use can be shown without showing that the use is constant. However, there is still a requirement that the use be consistent over time. *Whittom v. Alexander-Richardson*, 851 S.W.2d 504 (Mo. 1993).

Here, Respondents merely state in their Statement of Uncontroverted Facts that they have mowed the parking area for more than ten years and that their use of the parking area has been actual, open, notorious, continuous, and adverse. (LF 140-141) Affidavits submitted in support of a motion for summary judgment must state facts, not

conclusions. *Zerebco v. Lolli Bros. Livestock Market*, 918 S.W.2d 931 (Mo. App. 1996). Legal conclusions labeled as statements of fact are not binding on either the party opposing summary judgment or the court. *Universal Underwriters Ins. v. Johnson*, 905 S.W.2d 529, 533 (Mo. App. 1995).

Accordingly, Respondents' bare legal conclusions concerning the nature of their use of the parking area are no substitute for statements of fact. A review of Respondents' Statement of Uncontroverted Facts reveals an absence of any facts upon which the court could conclude that Respondents' use of the parking area was open, notorious, continuous and adverse. (LF 135-143) There are no facts in Respondents' Statement of Uncontroverted Facts upon which the trial court, or this court, could determine the nature, scope, or frequency of Respondents' claimed use of the parking area. As such, it is clear Respondents were not entitled to summary judgment, and the decision of the trial court must be reversed.

E. Evidence was present showing Respondents' use of the parking area was permissive.

It is well established in Missouri that the permissive use of an easement cannot ripen into a prescriptive easement. *Homan v. Hutchison*, 817 S.W.2d 944 (Mo. App. 1991). Here, there was evidence present before the trial court that Respondents' use of the parking area was permissive. Appellants produced an affidavit from Billy Massey, the previous land owner, that indicated cemetery patrons had been given permission to access the cemetery. (LF 61-62) Mr. Massey stated in his affidavit that he and his family had owned the property surrounding the cemetery from the 1940s until 2002. (LF 61)

Mr. Massey further stated that his father granted permission to cemetery patrons to park on his property and access the cemetery. (LF 62) Subsequent to his affidavit, Mr. Massey testified by deposition that his father had not given anyone permission to visit the cemetery. (LF 942) As such, ambiguous statements were present in the record on the issue of permissive use of the parking area.

Appellants respectfully submit that these ambiguous statements constitute a factual dispute, preventing the court from entering summary judgment in Respondents' favor. The presence of two ambiguous statements is dispositive on a motion for summary judgment. A factual dispute is present. The trial court did not have the authority to weigh the credibility of conflicting testimony when determining summary judgment. *North Central County Fire Alarm System, Inc. v. Maryland Heights Fire Protection District*, 945 S.W.2d 17 (Mo. App. 1997). Accordingly, the trial court erred in entering summary judgment for Respondents and this court must reverse.

F. The trial court relied on numerous legal conclusions.

As stated above, legal conclusions do not provide a sufficient foundation for summary judgment motions. Only statements of fact, rather than legal conclusions, can establish the right to summary judgment. *See, Zerebco*, 918 S.W.2d at 934; *Universal Underwriters*, 905 S.W.2d at 532. Here, a review of Respondents' Statement of Uncontroverted Facts reveals numerous legal conclusions. Such legal conclusions are evident in paragraphs 30, 45, 51, 52, 53, 54, 55, 59, 60 and 61 of Respondents' Statement of Uncontroverted Facts. (LF 139-143) Appellants will not unduly prolong their brief by reciting these paragraphs verbatim. Suffice it to say Respondents labeled as statements of

fact legal conclusions on issues such as denial of access, the elements necessary to establish prescriptive easements, the effect of signage erected by the Village of Evergreen, the extent of the Village's authority to regulate Row Crop Road, whether Respondents have been denied access to the cemetery, and whether Respondents' use of Row Crop Road and the parking area has been continuous, uninterrupted, visible and adverse. No predicate facts are present in the record that could serve as a basis for these conclusions. As such, it is apparent the trial court relied upon them in granting summary judgment for respondents. Such reliance is improper and cannot serve as the basis for summary judgment. *Universal Underwriters*, 905 S.W.2d at 533. Accordingly, the trial court's grant of summary judgment must be reversed.

POINT RELIED ON III

The trial court erred in entering permanent injunctions against Appellant Village of Evergreen because said injunctions are overbroad in that: (a) Appellant Village of Evergreen is endowed with police powers pursuant to §§ 80.090 and 304.120 R.S.Mo. authorizing it to control roads and regulate traffic within its boundaries; (b) Appellant Village of Evergreen is prohibited under the injunction from limiting the public's use of the parking area in any way; (c) Appellant Village of Evergreen is prohibited from enacting any reasonable time restrictions on the public's use of Row Crop Road; and (d) the injunction effectively deprives Appellant Village of Evergreen of its lawful exercise of powers delegated to it by the legislature.

As set forth in Points I and II, Appellants have shown that summary judgment was erroneously entered in favor of Respondents because Respondents were not entitled to judgment as a matter of law and because disputed issues of material fact were present. In addition to these errors, Appellants further submit the trial court erred in entering injunctions which are overbroad and effectively deprive the Village of Evergreen of the lawful exercise of its legislated powers.

The form and scope of injunctions are governed by Rule 92.02(e). Injunctions must be in specific terms and must describe in reasonable detail the acts restrained. *Id.* Injunctions must clearly and specifically delineate the acts or things enjoined so there will be no misunderstanding or confusion by those subject to it. *City of Bridgeton v. City of St. Louis*, 18 S.W.3d 107, 115 (Mo. App. 2000); *Farmers Mutual Fire Ins. Co. v. Farmer*, 795 S.W.2d 104, 109 (Mo. App. S.D. 1990). Injunctions are remedies which

should be used sparingly and in clear cases only. *Commission Row Club v. Lambert*, 161 S.W.2d 732, 736 (Mo. App. 1942). Judgments awarding injunctions should be framed so as to only afford the relief to which the complainant is entitled, and so as not to interfere with legitimate and proper actions by those against whom it is directed. *Id.* So drastic and dictatorial are injunctions that their terms must specifically and clearly describe the acts enjoined so the parties will know their rights. *Id.* As a general rule, courts of equity will not enjoin municipal legislative action. *May Dept. Stores Co. v. County of St. Louis*, 607 S.W.2d 857, 870 (Mo. App. 1980). Finally, injunctions which can "interfere with legitimate and proper action by the defendants in the future" are overbroad and unenforceable. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 375 (Mo. banc 2003).

A. The Village of Evergreen can control roads and regulate traffic within its boundaries.

As discussed in Point I, Section A, of their brief, Appellants have demonstrated that the Village of Evergreen is granted certain powers under §§ 80.090 and 304.120 R.S.Mo. Among these powers are the Village's absolute right to regulate roads within its boundaries and enact ordinances regulating traffic. Appellants will not unduly prolong their brief by repeating those authorities herein.

B. The trial court's injunction prohibits the Village of Evergreen's regulation of the parking area.

The trial court ordered Appellants to remove any signage limiting the public's use of the parking area. (LF 1037) The trial court further enjoined Appellants from *any interference with* use of the parking area by persons visiting the cemetery. (LF 1038) The

overbroad nature of these aspects of the judgment are readily apparent. For example, the Village of Evergreen could not pass an ordinance and post a sign at the parking area advising the public that "overnight parking is prohibited" or "no hunting allowed." For that matter, signage simply indicating "no littering" could be construed as a violation of the court's prohibition on signage.

These few examples are sufficient to illustrate the overbroad nature of the trial court's judgment. They also illustrate the lack of specificity and reasonable detail required by Rule 92.02(e). Moreover, these examples demonstrate how the court's judgment interferes with legitimate and proper actions of the Village of Evergreen.

C. The Village of Evergreen is prohibited from enacting reasonable time restrictions on the use of Row Crop Road.

The court's judgment specifically restrains and permanently enjoins the Village of Evergreen "from limiting use of Row Crop Road to any particular times of day." (LF 1038) As previously noted, the only destination for a traveler on Row Crop Road, other than property owned by Appellant Plaster Trust, is the Orla Holman Cemetery. As such, it is obvious the court intended to guarantee 24/7 access to the cemetery.

Concerning access to cemeteries, this court can draw reasonable inferences from existing statutes. The Legislature has addressed this issue when dealing with private burial grounds surrounded by private property. In those instances, § 214.132.1 R.S.Mo. provides the public is entitled to *reasonable* ingress and egress for purposes of visiting the cemetery. Clearly, the Legislature does not believe the public has unfettered access rights to cemeteries, and saw fit to limit access to reasonable hours. Moreover, this issue

has been addressed by the courts in *State v. Metje*, 298 S.W.2d 128 (Mo. App. 1954). *Metje* involved a criminal prosecution for lewd behavior occurring in a cemetery at 2:30 in the morning. In addressing the issues on appeal, the court observed that cemeteries are generally used during daylight hours. It went on to add that "It is a matter of common knowledge, of which we take *judicial notice*, that people do not ordinarily go into cemeteries at night." *Id.* at 131 (emphasis added). Here, Appellant Village of Evergreen is prohibited from enacting any reasonable time restriction on the public's use of Row Crop Road. Both the Legislature and the courts have recognized the general right to regulate cemetery access to reasonable, or daylight, hours. Appellant Village of Evergreen has this right, and the court's judgment clearly infringes upon it. Moreover, patrons of the Orla Holman Cemetery have acknowledged they do not visit the cemetery after dark and have no reasonable interest in doing so. (LF 780, 776, 765 and 760)

The Village of Evergreen is entitled to impose reasonable time restrictions on the use of Row Crop Road to regulate access to the cemetery. The trial court's judgment prohibits the exercise of this power. As a result, the injunctive relief entered by the trial court is overbroad because it interferes with legitimate and proper action by Appellant Village of Evergreen. *See, Doe v. TCI Cablevision*, 110 S.W.3d 363, 375 (Mo. banc 2003). Accordingly, the judgment of the trial court must be reversed.

D. The trial court's injunctive relief deprives the Village of Evergreen of its lawful exercise of powers.

As noted above, the various injunctions and orders entered by the trial court operate to prohibit the lawful exercise of police power by the Village of Evergreen. For

example, the trial court's prohibition against signage on Row Crop Road and the parking area operates to prohibit the posting of speed limits or "no littering" signs. The judgment specifically prohibits any limits on uses of Row Crop Road to particular times of day. (LF 1038) The trial court permanently enjoined the Village of Evergreen from *any* interference with the general public's use of the parking area.

The breadth of the trial court's rulings have the effect of enjoining the Village of Evergreen from exercising the legislative powers delegated to it in §§ 80.090 and 304.120 R.S.Mo. It has been held that "a court of equity will not enjoin a municipal legislative body from exercising legislative powers." *May Dept. Stores Co. v. County of St. Louis*, 607 S.W.2d 857, 870 (Mo. App. 1980). This is true even if the exercise of legislative power is unconstitutional or ultra vires, and the persons aggrieved by such actions might be required to obtain relief through the courts. *Id.* Here, the trial court's judgment contravenes this well-established principle and operates to deprive the Village of Evergreen of its lawful exercise of police power as delegated by the Legislature. For this reason, the trial court's judgment must be reversed.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the decision of the trial court granting summary judgment must be reversed. Respondents did not demonstrate they were entitled to judgment as a matter of law. Additionally, disputed issues of material fact were present precluding summary judgment. Finally, the injunctive relief entered by the trial court was over-broad and deprived the Village of Evergreen from exercising its legitimate police powers.

Certificate of Compliance with Rule 84.06 and Certificate of Service

Pursuant to Rule 84.06(c), counsel for Appellants certifies that this brief complies with the limitations contained in Rule 84.06(b). There are 9,042 words in this brief. Counsel for Appellants relied upon the word of his word processing system in making this certification.

Pursuant to Rule 84.06(g), counsel for appellants certifies that the diskette filed herewith has been scanned for viruses and is virus-free.

Further, counsel for Appellant states that Appellants' brief in the within cause was by him served, either by hand delivery or by ordinary mail, postage prepaid, in the following stated number of copies addressed to the following named persons at the address shown, all on this 27th day of August, 2007:

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IN THE CIRCUIT COURT OF CAMDEN COUNTY, MISSOURI

FILED
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ORLA HOLMAN CEMETERY, INC., and SUSAN RECTOR,	)	
Plaintiffs,	)	
v.	)	
THE ROBERT W. PLASTER TRUST, and STEPHEN R. PLASTER, Trustee of the Robert W. Plaster Trust,	)	**Case No. 105CV546CC**
and	)	
VILLAGE OF EVERGREEN,	)	
Defendants.	)	

JUDGMENT

Pending before this Court is Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment. After an extended hearing where all counsel were permitted an opportunity to argue their respective motions, and after consideration of the pleadings and exhibits filed, the Court hereby grants Plaintiffs' Motion for Partial Summary Judgment and denies Defendants' Motion for Summary Judgment and finds as follows:

1. Plaintiffs' Motion for Partial Summary Judgment is granted with respect to Counts I-IV and Count VI of Plaintiffs' First Amended Petition;

2. Defendants' Motion for Summary Judgment is denied;

3. Plaintiffs have demonstrated that they are entitled to judgment based upon facts about which there is no genuine dispute;

4. Defendants have failed to demonstrate that they are entitled to summary judgment; and

5. Plaintiffs dismiss Count V of Plaintiffs' First Amended Petition without prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Plaintiffs, Orla Holman Cemetery, Inc., and Susan Rector, and against Defendants, The Robert W. Plaster Trust, Stephen R. Plaster, Trustee of the Robert Plaster Trust, their successors in interest, if any, and those claiming title under them and the Village of Evergreen, its successors in interest, if any, and those claiming title under it ("Defendants") on Counts I-IV and Count VI, that all court costs are taxed against the Robert W. Plaster Trust and the Village of Evergreen and that Defendants are permanently restrained and enjoined from interfering with or obstructing Row Crop Road, and, in addition, Defendants are permanently restrained and enjoined as follows:

1. Defendants are permanently enjoined from maintaining or operating any gate or gates on Row Crop Road between State Highway V and the northern most point of the Orla Holman Cemetery.

2. Defendants are hereby ordered to remove all gate(s) currently located on Row Crop Road between State Highway V and the northern most point in the Orla Holman Cemetery;

3. Defendants are hereby ordered to remove any signage purporting to limit or intended to limit the public's use of Row Crop Road or the area lying between the east boundary of the Orla Holman Cemetery and the east boundary of Row Crop Road referred to as the Cemetery Parking Area. The Parking Area is more particularly described as:

> Beginning at the Northeast (NE) corner of the Cemetery, thence East 63 feet, more or less, to the East side of Row Crop Road, thence Southerly along said Road to a point due East of the Southeast (SE) corner of the Cemetery, thence Westerly to the Southeast corner of the Cemetery, then Northerly along the East boundary of the cemetery to the Point of Beginning.

4. Defendants are hereby enjoined and restrained by permanent injunction from erecting or displaying any signage indicating that Row Crop Road is closed;

5. Defendants are hereby enjoined and restrained by permanent injunction from placing any signage on Row Crop Road or the Parking Area that the general public must "Keep Out;"

6. Defendants are hereby enjoined and restrained by permanent injunction from restricting use of Row Crop Road to any person, persons or entity, including, but not limited to, Orla Holman Cemetery members;

7. Defendants are hereby enjoined and restrained by permanent injunction from limiting use of Row Crop Road to any particular times of day;

8. Defendants are hereby enjoined and restrained by permanent injunction from taking actions to deter a reasonable person from utilizing Row Crop Road to freely access the Orla Holman Cemetery;

9. Defendants are hereby enjoined and restrained by permanent injunction from communicating false statements concerning use of Row Crow Road to access the Orla Holman Cemetery;

10. Defendants are hereby enjoined and restrained by permanent injunction from any interference with use of the Parking Area, by persons visiting the Orla Holman Cemetery, including, but not limited to, fencing the Parking Area in a manner which would inhibit Cemetery visitors from utilizing the entire Parking Area to access the Orla Holman Cemetery;

11. Count V of Plaintiffs' First Amended Petition is dismissed without prejudice; and

12. Costs are taxed to the Robert W. Plaster Trust and the Village of Evergreen.

SO ORDERED this 19TH day of January, 2007.

The Honorable Carl D. Gum, Jr.

Missouri Revised Statutes

Chapter 80
Towns and Villages
Section *80.090*

August 28, 2006

Trustees--power to pass certain ordinances.

80.090. Such board of trustees shall have power:

(1) To pass bylaws and ordinances to prevent and remove nuisances;

(2) To prevent, restrain and suppress bawdy-houses, gambling houses and other disorderly houses within the limits of such town, or any addition to said town, or any commons thereto attached;

(3) To restrain and prohibit gambling;

(4) To license, tax and regulate merchants, peddlers and auctioneers, and to regulate and prohibit the sale or giving away of intoxicating liquors under merchants' licenses in such towns; provided, that druggists and pharmacists may sell upon prescriptions, as is provided by law;

(5) To provide for licensing and regulating and prohibiting dramshops and tippling houses, public shows, circuses, theatrical and other amusements, to the distance of one-half mile from the corporate limits of such town;

(6) To prohibit the firing of firearms;

(7) To prevent furious and unnecessary riding or driving of any horse or other animal within such town, or such part thereof as they may think proper;

(8) To establish night watches and patrols;

(9) To erect and maintain calabooses, poorhouses and hospitals;

(10) To prevent the introduction and spreading of contagious diseases;

(11) To organize and maintain fire companies;

(12) To prevent and extinguish fires;

(13) To establish fire limits and to define the limits within which wooden buildings, stables, manufactories and other structures which may increase the danger of calamities from fires shall not be erected;

(14) To establish and provide for wells, cisterns and pumps;

(15) To regulate the construction of chimneys and flues thereof, and to appoint an inspector of chimneys and flues, and to define the duties and fix the compensation thereof;

(16) To establish and regulate markets;

(17) To erect and repair bridges and culverts;

(18) To erect, repair and regulate wharves and the rate of wharfage;

(19) To regulate the landing and stationing of steamboats, rafts and other watercraft;

(20) To provide for the inspection of lumber, building material and for provisions to be used or offered for sale in such town, or to be exported therefrom;

(21) To regulate the storage of gunpowder and other combustible materials;

(22) To regulate the slaughtering of animals;

(23) To license, tax, regulate and prohibit ball and tenpin alleys, billiards and pool tables, or other tables upon which games are played for pay or amusement;

(24) To license, tax, regulate and prohibit all other games for pay or amusement; provided, that no permission shall be given to bet money, property or other thing upon any game, or to license any such game;

(25) To license, tax and regulate wagons and teams, livery, sale and feed stables, and any vehicle or team kept or let for pay;

(26) To license, tax and regulate hay, grain and stock scales;

(27) To levy and collect taxes upon property and the licenses herein provided for;

(28) To borrow money for the improvement of such town, or to supply the same with water or gas;

(29) To open and form public squares, avenues, drains and sewers, and to keep the same cleaned and in order;

(30) To locate and lay out new streets and alleys;

(31) To establish the grade of streets and alleys;

(32) To determine and fix the width of sidewalks, and the material of which the same may be built; and

(33) To widen streets heretofore laid out in such town, and to appoint three commissioners to assess the damages done to property upon which such street or alley may be located, deducting from such damages the amount of benefit, if any, such street or alley, or the widening thereof, may be to the same; but all assessments so made by the commissioners shall be reported, as soon as may be, to the board of trustees, who may approve or reject the same; and all persons aggrieved by such assessment may, within fifteen

days after receiving notice of such assessment, appeal therefrom to the next circuit court of the county, by giving notice of such appeal to said board of trustees at least fifteen days before the first day of the term to which said appeal is taken; and the circuit court, on such appeal, shall be possessed of the case and proceed therewith to final judgment, according to law. In all cases of assessment or appeal, the land to be used for or occupied by the street or alley may be taken possession of for the purpose of establishing and improving such street or alley, as soon as the amount of damages so assessed shall be tendered to the owner;

(34) Also to open, clear, regulate, grade, pave or improve the streets and alleys of such town;

(35) To provide for lighting the streets and erecting lamps thereon;

(36) To regulate and prohibit the running at large of dogs, hogs, cattle and horses in the streets and alleys of such town, and to impose and collect tax on dogs not exceeding one dollar each;

(37) To impose and appropriate fines for forfeitures and penalties for breaking or violating their ordinances;

(38) To levy and collect taxes;

(39) To regulate the enclosure of any common field belonging to or within the limits of such town; and

(40) To pass such other bylaws and ordinances for the regulation and police of such town and commons thereto appertaining as they shall deem necessary, not repugnant to and contrary to the laws of the state.

(RSMo 1939 § 7248)

Prior revisions: 1929 § 7097; 1919 § 8547; 1909 § 9436

CROSS REFERENCES:

Auctioneers, not maintaining a business office in municipality, exempt from license, RSMo 71.620

Farmers, selling own produce, exempt from license, RSMo 150.030

(1955) Where retail supermarket store building was located partly in village and partly in fourth class city, each could impose on operator thereof a merchant's license tax (or privilege tax) measured by gross sales of supermarket, and village tax was valid although most of sales were without its boundaries. Food Center of St. Louis v. Village of Warson Woods (Mo.), 277 S.W.2d 573.

(1965) Insofar as this section purports to permit a charter city to annex territory by ordinance alone it is unconstitutional. City of Hannibal v. Winchester (Mo.), 391 S.W.2d 279.

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Missouri General Assembly

Missouri Revised Statutes

Chapter 304
Traffic Regulations
Section *304.120*

August 28, 2006

Municipal regulations--owner or lessor not liable for violations, when.

304.120. 1. Municipalities, by ordinance, may establish reasonable speed regulations for motor vehicles within the limits of such municipalities. No person who is not a resident of such municipality and who has not been within the limits thereof for a continuous period of more than forty-eight hours, shall be convicted of a violation of such ordinances, unless it is shown by competent evidence that there was posted at the place where the boundary of such municipality joins or crosses any highway a sign displaying in black letters not less than four inches high and one inch wide on a white background the speed fixed by such municipality so that such sign may be clearly seen by operators and drivers from their vehicles upon entering such municipality.

2. Municipalities, by ordinance, may:

(1) Make additional rules of the road or traffic regulations to meet their needs and traffic conditions;

(2) Establish one-way streets and provide for the regulation of vehicles thereon;

(3) Require vehicles to stop before crossing certain designated streets and boulevards;

(4) Limit the use of certain designated streets and boulevards to passenger vehicles;

(5) Prohibit the use of certain designated streets to vehicles with metal tires, or solid rubber tires;

(6) Regulate the parking of vehicles on streets by the installation of parking meters for limiting the time of parking and exacting a fee therefor or by the adoption of any other regulatory method that is reasonable and practical, and prohibit or control left-hand turns of vehicles;

(7) Require the use of signaling devices on all motor vehicles; and

(8) Prohibit sound producing warning devices, except horns directed forward.

3. No ordinance shall be valid which contains provisions contrary to or in conflict with this chapter, except as herein provided.

4. No ordinance shall impose liability on the owner-lessor of a motor vehicle when the vehicle is being permissively used by a lessee and is illegally parked or operated if the registered owner-lessor of such vehicle furnishes the name, address and operator's license number of the person renting or leasing the vehicle at the time the violation occurred to the proper municipal authority within three working days

from the time of receipt of written request for such information. Any registered owner-lessor who fails or refuses to provide such information within the period required by this subsection shall be liable for the imposition of any fine established by municipal ordinance for the violation. Provided, however, if a leased motor vehicle is illegally parked due to a defect in such vehicle, which renders it inoperable, not caused by the fault or neglect of the lessee, then the lessor shall be liable on any violation for illegal parking of such vehicle.

(RSMo 1939 § 8395, A.L. 1943 p. 659, A. 1949 S.B. 1113, A.L. 1975 H.B. 83)

Prior revisions: 1929 § 7780; 1919 § 7596

(1960) Funds of city derived from on-street parking meters held properly used as a means of financing off-street parking facilities. Automobile Club of Missouri v. City of St. Louis (Mo.), 334 S.W.2d 355.

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Missouri General Assembly

C
Vernon's Annotated Missouri Rules Currentness
Supreme Court Rules
Rules of Civil Procedure
Part III. Rules Relating to Special Actions
Rule 92. Injunctions

→92.02. Temporary Restraining Order--Notice--Preliminary Injunction--Bond-- Form and Scope

(a) Temporary Restraining Order--With Notice.

(1) *When Issued.* The court shall not grant a temporary restraining order unless the party seeking relief demonstrates that immediate and irreparable injury, loss, or damage will result in the absence of relief.

(2) *Proof Required.* A party seeking a temporary restraining order shall support that request with a verified petition or affidavit reciting the specific facts that support the showing required by Rule 92.02(a)(1).

(3) *Required Notice.* Except as provided in Rule 92.02(b), no temporary restraining order shall issue without reasonable notice at least twenty-four hours before the hearing on the motion to the party against who relief is sought.

(4) *Form.* A temporary restraining order shall be endorsed with the date and hour of issuance, shall be filed forthwith in the clerk's office and entered of record, and shall set forth specific facts that support the showing required by Rule 92.02(a)(1).

(5) *Duration.* A temporary restraining order shall expire within such time after entry, not to exceed fifteen days, as the court fixes. The court may extend the order for additional periods, not to exceed fifteen days each, if the party seeking relief shows that the grounds specified in Rule 92.02(a)(1) continue to exist.

(b) Temporary Restraining Order--Without Notice.

(1) *When Issued.* A party seeking a temporary restraining order without notice shall make the showing required under Rule 92.02(a). The court shall not grant a temporary restraining order without prior notice to the party against whom relief is sought unless the party seeking relief establishes that notice cannot be given or notice would defeat the purpose of the order.

(2) *Proof Required.* A party seeking a temporary restraining order without notice shall file a verified petition or affidavit reciting the specific facts that support the showing required by Rule 92.02(b)(1).

(3) *Form.* A temporary restraining order granted without notice shall be endorsed with the date and hour of issuance, shall be filed forthwith in the clerk's office and entered of record, and shall set forth specific facts that support the showing required by Rule 92.02(b)(1). A temporary restraining order failing to set forth such specific facts is void ab initio.

(4) *Duration.* A temporary restraining order granted without notice shall expire within such time after entry, not to exceed ten days, as the court fixes. The court may extend the order for additional periods, not to exceed ten days

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each, after notice to the party against whom relief is sought. The court may dispense with such notice only if the party seeking relief establishes that notice cannot be given to the party against whom relief is sought or notice would defeat the purpose of the order.

(5) *When Set Aside.* On one day's notice to the party who obtained the temporary restraining order without notice, or on such shorter notice as the court may prescribe, the adverse party may appear and move to dissolve or modify the order. At the hearing, the burden shall be upon the party seeking the temporary restraining order to establish a right to relief.

(6) *Sanction for Failure to Provide Required Notice.* If the court finds that a party obtaining a temporary restraining order without notice did not have a reasonable basis to proceed without notice, the party shall be presumed to have acted in bad faith and to have violated Rule 55.03(b). The thirty-day provisions of Rule 55.03(c)(1)(A) shall not apply to proceedings under this Rule 92.02(b)(6).

(c) Preliminary Injunction.

(1) *Notice.* A preliminary injunction shall not issue unless the party against whom relief is sought is given prior notice and an opportunity to be heard.

(2) *Time.* If a temporary restraining order is in effect for more than thirty days without a hearing on an application for a preliminary injunction, the court shall schedule a hearing at the earliest possible date. The hearing shall take precedence over all other matters except older matters of the same character. The hearing on the application for a preliminary injunction may be delayed past these limits if all parties consent.

(3) *Consolidation With Hearing on the Merits.* At any time the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application for a preliminary injunction. Any evidence received upon an application for a preliminary injunction admissible at the trial on the merits becomes part of the trial record and need not be repeated at the trial. This Rule 92.02(c)(3) shall be so construed and applied to preserve any party's right to trial by jury.

(d) Bond. No injunction or temporary restraining order, unless on final hearing or judgment, shall issue in any case, except in suits instituted by the state in its own behalf, until the plaintiff, or some responsible person for the plaintiff, shall have executed a bond with sufficient surety or sureties to the other party, in such sum as the court shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction or temporary restraining order to the parties enjoined, or to any party interested in the subject matter of the controversy, conditioned that the plaintiff will abide by the decision that shall be made thereon and pay all sums of money, damages and costs that shall be adjudged if the injunction or temporary restraining order shall be dissolved. In lieu of the bond the plaintiff may deposit with the court such sum, in cash, as the court may require sufficient to secure such amount.

(e) Form and Scope of Injunction or Temporary Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the petition or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

CREDIT(S)

(Adopted June 5, 1980, eff. Jan. 1, 1981. Amended Dec. 9, 1980, eff. Jan. 1, 1981; Sept. 28, 1993, eff. Jan. 1, 1994; June 17, 1997, eff. Jan. 1, 1998.)

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BILL NO. 05-15

ORDINANCE NO. 05-15

AN ORDINANCE AUTHORIZING THE VILLAGE OF EVERGREEN, MISSOURI TO CONTRACT WITH EMPIRE RANCH, INC. FOR THE ERECTION AND MAINTENANCE OF AN UNLOCKED GATE WHICH MAY BE OPEN AND SHUT ACROSS ROW CROP ROAD AT A POINT NORTH OF THE INTERSECTION OF ROW CROP ROAD AND LACLEDE COUNTY ROAD VV.

WHEREAS, Row Crop Road, from its beginning to its point of terminus, lies entirely within the corporate boundaries of the Village of Evergreen, Missouri; and

WHEREAS, Row Crop Road serves as a means of access for use by owners of land adjacent to said Row Crop Road; and

WHEREAS, the presence of traffic through and about Row Crow Road has on various and frequent occasions given rise to nuisance activities on and in the area surrounding Row Crop Road, including, but not limited to, noise, litter, the unauthorized dumping of waste materials, and criminal activity such as poaching, illicit drug use and illicit drug sales; and

WHEREAS, the Village of Evergreen has determined to exercise its police powers pursuant to a compelling interest to protect the safety and health of its residents and in the prevention of crime within the Village;

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF TRUSTEES OF THE VILLAGE OF EVERGREEN, MISSOURI AS FOLLOWS:

SECTION 1. The Village of Evergreen, Missouri, is hereby authorized and directed to erect and maintain a barricade across Row Crop Road at a point north of the intersection of Row Crop Road and Laclede County Road VV, in the form of an unlocked gate which can be opened and shut by pedestrians and motorists seeking to utilize row Crop Road, in order to eliminate the nuisance referred to above and thereby to preserve the public peace, health and safety of the people residing within the Village of Evergreen, Missouri in the vicinity of Row Crop Road.

EXHIBIT

H

SECTION 2. Any person, corporation or association who shall, without the authorization and consent of the Village of Evergreen, interfere with said barricade or attempt to remove same or removes same or otherwise damages same shall be guilty of a misdemeanor and punished by a fine not to exceed $500.00 or by imprisonment not to exceed 90 days or by both such fine and imprisonment.

SECTION 3. EFFECTIVE DATE: This ordinance shall be in full force and effect from and after its passage and approval by the Chairman of the Board of Trustees.

Passed and approved by the Board of Trustees of the Village of Evergreen, Missouri, this 19th day of January, 2005.

Stephen R. Plaster

Chairman, Board of Trustees

Attest:

Larry Weis

Village Clerk

Paul M. JONES et al., Appellants,

v.

CITY OF JENNINGS, Respondent.

No. 40646.

Missouri Court of Appeals,
Eastern District,
Division Three.

Dec. 11, 1979.

Motion for Rehearing and/or Transfer to Supreme Court Denied Feb. 15, 1980.

City passed an ordinance to barricade a public street, and the owners of property abutting the street brought an action seeking a declaratory judgment that the ordinance was invalid and an injunction to prevent the city from erecting the barricade. The Circuit Court, St. Louis County, Harry J. Stussie, J., found the ordinance valid, and the property owners appealed. The Court of Appeals, Reinhard, J., held that: (1) the city was vested by statute with the power to barricade the street; (2) the barricade was not a statutorily prohibited obstruction; and (3) enactment of the ordinance was not arbitrary and capricious.

Affirmed.

1. Municipal Corporations ⟹657(2)

Third-class city did not exceed its authority under statute by enacting ordinance directing street department to barricade a public street. V.A.M.S. § 304.120.

2. Highways ⟹85

Person owning property abutting public highway has right of ingress and egress to and from his property and to abutting highway, including right to reach system of public highways, but his right of ingress and egress is subject to reasonable restrictions under police power of state in protecting public and facilitating traffic. V.A.M.S. § 229.030.

3. Highways ⟹154

Barricade erected as traffic control device which merely imposes some circuity of route is not a prohibited obstruction within the meaning of statute. V.A.M.S. § 229.-030.

4. Municipal Corporations ⟹657(1)

Ordinance providing for erection of barricade on public street in residential neighborhood to prevent through traffic was not arbitrary and capricious where evidence showed that traffic on street was excessive.

5. Municipal Corporations ⟹703(1)

Community may in exercise of its police powers restrict flow of traffic into residential area in order to reduce noise, traffic hazards and litter.

6. Municipal Corporations ⟹657(1)

Ordinance providing for the barricading of public street was not void on its face because it stated that its purpose was to protect the interests of people residing on particular blocks of the street.

A. E. Nick, Ferguson, for appellants.

Lloyd E. Eaker, Clayton, for respondent.

REINHARD, Judge.

Plaintiffs brought this action against the City of Jennings seeking a declaratory judgment that the city's Ordinance No. 1183 was invalid. They also prayed for injunctive relief to prevent defendant from erecting a barricade across Ellison Drive pursuant to the said ordinance. The trial court found the ordinance valid and entered judgment in favor of defendant. Plaintiffs appeal from that judgment.

This suit arose out of the passage of Ordinance No. 1183 [1] by the Jennings City

1. BILL NO. 1201

ORDINANCE NU. [sic] 1183

AN ORDINANCE AUTHORIZING THE STREET DEPARTMENT OF THE CITY OF JENNINGS, MISSOURI TO BARRICADE ELLISON DRIVE AT THE BOUNDARY LINE SEPARATING THE CITY OF JENNINGS AND THE CITY OF FERGUSON

WHEREAS, the resident property owners of the 9000 and 9100 blocks of Ellison Drive with-

Council. The Ordinance authorizes and directs the Jennings Street Department to erect a barricade at the city limits between Ferguson and Jennings on Ellison Drive. The ordinance was passed in response to a petition submitted by residents of Jennings whose property abutted Ellison and Clarion Drives. The petition asserted that increased traffic on these streets created a traffic hazard and produced an increase in litter and noise in the area. The petition requested that barricades be placed on both Ellison and Clarion; however, the ordinance passed by the Jennings City Council authorized a barricade on Ellison only.

Ellison Drive is a short two block street in Northland Hills No. 2 subdivision. It lies partly in both Jennings and Ferguson and the subdivision plat was approved by both cities in 1955 and the street was dedicated to public use forever. Ellison runs in a generally east-west direction, dead-ending at Canfield to the west and intersecting Solway Drive to the east. East of Solway it becomes Meadowlark Avenue. Approximately half way between Canfield and Solway is Forge Drive which runs north from Ellison. Forge Drive is the only other street intersecting with Ellison. Residents of the subdivision can at present travel east on Ellison to reach Solway and then proceed south on Solway to reach West Florissant Road, a major arterial road in St. Louis County. They can also travel west on Ellison to reach Canfield and then travel south on Canfield to reach West Florissant. Under the ordinance, a barricade is to be placed midway between Forge Drive and Solway and will prevent those living west of the barricade from travelling east on Ellison to reach Solway.

Plaintiffs are the City of Ferguson and residents of Ferguson who own property abutting Ellison Drive. On appeal, they contend the enactment of Ordinance 1183 was an ultra vires act by Jennings since no statute, expressly or impliedly grants the city the authority to barricade a street. Plaintiffs further contend that the ordinance violates § 229.030 RSMo 1969 which provides: "Public roads shall be cleared of all obstructions therein that hinder or interfere with travel or traffic thereon . . ."

In *State ex rel. Schmitz v. City of St. Louis*, 555 S.W.2d 848 (Mo.App.1977), this court considered the question of whether a city had the power to barricade a public street. We concluded there that the delegation of authority in § 304.120.2(1) RSMo 1975 Supp.[2] permitted the City of St. Louis to enact an ordinance barricading a public street.

in the City of Jennings, Missouri have petitioned the City Council of the City of Jennings, Missouri to barricade the said street at the boundary line separating the two cities, and—

WHEREAS, the City Street Department, Police Department and Fire Department have made inspections of the said street and found that the residents of an apartment complex north of the City of Jennings as well as others are using the street to avoid the signalized intersections along West Florissant Avenue and thus creating a nuisance on said street by overloading the neighborhood street with through traffic and littering the street and the yards with trash, debris, beer bottles, wine bottles and soft drink cans and bottles and polluting the residential area with noise and foul odors.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF JENNINGS, MISSOURI AS FOLLOWS:

SECTION 1. The Street Department of the City of Jennings, Missouri is hereby authorized and directed to construct a barricade across Ellison Drive at the boundary line separating the City of Jennings, Missouri and the City of Ferguson, Missouri in order to eliminate the nuisance above referred to and to thereby protect the interests of the people residing within the City of Jennings, Missouri in the 9000 and 9100 blocks of said street.

SECTION 2. Any person, corporation or association who shall interfere with said barricade or attempt to remove same or removes same or otherwise damages same shall be guilty of a misdemeanor and punished by a fine not to exceed $500.00 or by imprisonment not to exceed 90 days or by both such fine and imprisonment.

SECTION 3. EFFECTIVE DATE: This ordinance shall be in full force and effect from and after its passage and approval by the Mayor.

2. Section 304.120.2 provides: "Municipalities, by ordinance, may: (1) Make additional rules of the road or traffic regulations to meet their needs and traffic conditions."

Plaintiffs argue that we should distinguish *Schmitz* because the City of St. Louis, as a constitutional charter city has broader powers over its roads and streets than a third class city like Jennings. While the court in *Schmitz* discussed various constitutional and statutory sections which delegate powers to the City of St. Louis, it relied on § 304.120.2(1) in reaching its conclusions that the City of St. Louis had the power to barricade a public street.

[1] Section 304.120 is a delegation of power to all classes and types of cities and municipalities within this state; its provisions apply to constitutional charter cities as well as third class cities. If its provisions vest a charter city with the power to barricade a street, they also vest all other classes of cities with the same power. Therefore, we conclude that Jennings did not exceed its authority by enacting Ordinance No. 1183.

[2] Nor do we agree with plaintiffs' assertion that the ordinance is void because it conflicts with § 229.030 which prohibits obstructions in the public streets. A person owning property abutting a public highway has a right of ingress and egress to and from his property and to the abutting highway, including the right to reach the system of public highways. However, he does not have the right to travel in any particular direction from his property or upon any specific part of the public highway right-of-way. His right of ingress and egress is subject to reasonable restrictions under the police power of the state in protecting the public and facilitating traffic. *State ex rel. Highway Commission v. Meier*, 388 S.W.2d 855, 857 (Mo. banc 1965).

[3] The barricade proposed by Jennings does not prevent plaintiffs from reaching the general system of public streets and highways, rather, it merely imposes some inconvenience on them in terms of a route to reach the highway system. A barricade erected as a traffic control device which merely imposes some circuity of route is not a prohibited obstruction within the meaning of § 229.030. *State ex rel. Schmitz v. City of St. Louis*, 551 S.W.2d at 851. We rule this point against plaintiffs.

[4] Plaintiffs' final point alleges that the enactment of Ordinance No. 1183 by Jennings was arbitrary and capricious because it was passed to hinder traffic and to protect private interests of the residents of Jennings residing in the 9000 and 9100 blocks of Ellison. "The terms 'arbitrary' and 'capricious' mean willful and unreasoning action, without consideration of and in disregard of the facts and circumstances . . . ." *Monachino v. Rohan*, 13 Misc.2d 729, 178 N.Y.S.2d 246, 248 (Sup.Ct.1958). Our examination of the record leads us to conclude that Jennings' action was not arbitrary and capricious.

First, we find ample evidence to support a finding that excessive traffic utilized Ellison. The results of a one week traffic survey revealed that with two way traffic, as many as 940 vehicles travelled on Ellison in one day with the most concentrated traffic being at traditional rush hours. The lowest number of vehicles that passed in a day was 557, this number being recorded on a Sunday. Citizens of Jennings who owned property abutting Ellison also stated that at times, they had difficulty in getting out of their driveways and that the traffic caused a great deal of noise.

Second, we believe the relative actions of the two cities must be examined in order to determine if Jennings' action was arbitrary. It is apparent that at least a significant portion of the traffic congestion was caused by residents of Ferguson who used Ellison to avoid the traffic signals on West Florissant, and particularly that part of the congestion was caused by the development of a 414 unit apartment complex in Ferguson. Ferguson then, had at least some affirmative duty to cooperate with Jennings to reduce the excessive traffic on Ellison. The evidence in the record indicates that the Ferguson City Council rejected a plan recommended by the Ferguson Traffic Commission to make Ellison and Clarion one way streets. It is unclear from the record whether the plan was proposed before or after the adoption of the barricade ordinance. In any event, it is clear that offi-

cials of Ferguson had no interest in cooperating in this matter. In fact, the City Manager testified that there was no traffic problem on Ellison. The attitude of the officials of Ferguson is a factor the trial court could consider in determining whether Ordinance No. 1183 was arbitrary and capricious.

[5, 6] Finally, we cannot agree with plaintiffs' argument that the ordinance is void on its face because it states that it was to "protect the interest of the people residing within the City of Jennings, Missouri in the 9000 and 9100 blocks of said street." A community may in the exercise of its police powers restrict the flow of traffic into a residential area in order to reduce noise, traffic hazards and litter. *County Board of Arlington County v. Richards*, 434 U.S. 5, 7, 98 S.Ct. 24, 26, 54 L.Ed.2d 4 (1977). While the residents of the 9000 and 9100 blocks of Ellison may benefit more directly from the ordinance than other members of the public, this fact alone does not minimize its overall purpose as a traffic control device designed to restrict the flow of traffic into this residential area and thereby to protect the public.

Judgment affirmed.

DOWD, P. J., and CRIST, J., concur.

STATE of Missouri, Respondent,

v.

Charles Alvin WILLIAMSON, Appellant.

No. 39600.

Missouri Court of Appeals,
Eastern District,
Division Two.

Dec. 18, 1979.

Motion for Rehearing and/or Transfer to Supreme Court Denied Feb. 15, 1980.

Defendant was convicted in the City of St. Louis Circuit Court, Floyd McBride, J., on one of two counts of illegal sale of controlled substance, and defendant appealed. The Court of Appeals, Gunn, P. J., held that: (1) although there were certain inconsistencies in State's evidence, evidence was sufficient to support defendant's conviction; (2) there was no abuse of discretion in permitting detective, who allegedly made purchase of controlled substance from defendant, to refer to police report of the incident prepared by another detective, who had accompanied him when he made the purchase, to refresh his memory; and (3) there was no abuse of discretion in allowing criminalist to testify, as expert witness, on results of his tests to determine the content of the alleged controlled substance.

Judgment affirmed.

1. Criminal Law ⇐1144.13(3), 1159.2(5)

Appellate court in criminal case does not substitute its judgment for that of jury but reviews evidence in light most favorable to verdict and determines whether there was substantial evidence from which jury could reasonably find the issue in harmony with evidence.

2. Criminal Law ⇐1159.2(5)

Mere fact that contradictions or inconsistencies exist in testimony presented in criminal prosecution does not prevent it from being substantial evidence, for conflicts, inconsistencies and weight to be given such testimony are for jury to resolve.

3. Criminal Law ⇐553

Jury, in criminal prosecution, may believe or disbelieve all, part, or none of testimony of any witness.

4. Criminal Law ⇐1159.2(5)

In criminal prosecution, testimony of a single witness, despite inconsistencies, may be sufficient to constitute substantial evidence.

5. Drugs and Narcotics ⇐127

In prosecution for illegal sale of controlled substance, seemingly illogical incon-