IN THE SUPREME COURT OF MISSOURI

No. SC83503

STATE OF MISSOURI, ex rel.,
SUNSHINE ENTERPRISES OF
MISSOURI, INC., d/b/a SUNSHINE
TITLE AND CHECK ADVANCE,
Appellant,

v.

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

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT
ED 77979

JOINT BRIEF OF AMICI CURIAE MUNICIPALITIES OF FLORISSANT, BELLEFONTAINE NEIGHBORS, COOL VALLEY, HAZELWOOD, AND NORMANDY

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JURISDICTIONAL STATEMENT

The municipalities of Florissant, Bellefontaine Neighbors, Cool Valley, Hazelwood, as Amici Curiae in support of the Board of Adjustment of the City of St. Ann ("Board of Adjustment"), and the City of St. Ann ("St. Ann") adopt the Jurisdictional Statement contained in the Brief of the Board of Adjustment and St. Ann.

STATEMENT OF FACTS

The municipalities of Florissant, Bellefontaine Neighbors, Cool Valley, Hazelwood, as Amici Curiae in support of the Board of Adjustment and St. Ann, adopt the Statement of Facts contained in the Brief of the Board of Adjustment and St. Ann.

POINTS RELIED ON

THE ST. ANN BOARD OF ADJUSTMENT DID NOT ERR IN DENYING THE REQUEST OF SUNSHINE ENTERPRISES FOR A USE VARIANCE BECAUSE SECTION 408.500 R.S.MO DOES NOT PREEMPT THE CITY'S ZONING ORDINANCE IN THAT: (A) THE STATUTE DOES NOT EXPRESSLY PREEMPT THE AREA OF LAND USE WITH REGARD TO SUNSHINE ENTERPRISES' BUSINESS, AND (B) CITY OF ST. ANN ORDINANCE NO. 2074 IS NOT IN CONFLICT WITH SECTION 408.500 R.S.MO AND THEREFORE, CREATES NO IMPLICIT PREEMPTION.

1. McDermott v. Calverton Park, 454 S.W.2d 577 (Mo. banc 1970).
2. Chapter 89, R.S.Mo
3. Section 408.500, R.S.Mo
4. Missouri Division of Finance Regulations, 4 CSR140-11.010, et. seq.

ARGUMENT

THE ST. ANN BOARD OF ADJUSTMENT DID NOT ERR IN DENYING THE REQUEST OF SUNSHINE ENTERPRISES FOR A USE VARIANCE BECAUSE SECTION 408.500 R.S.MO DOES NOT PREEMPT THE CITY'S ZONING ORDINANCE IN THAT: (A) THE STATUTE DOES NOT EXPRESSLY PREEMPT THE AREA OF LAND USE WITH REGARD TO SUNSHINE ENTERPRISES' BUSINESS, AND (B) CITY OF ST. ANN ORDINANCE NO. 2074 IS NOT IN CONFLICT WITH SECTION 408.500 R.S.MO AND THEREFORE, CREATES NO IMPLICIT PREEMPTION.

INTEREST OF AMICI

This case is before the Court pursuant to the Court's April 24, 2001, Order granting the Application for Transfer from the Missouri Court of Appeals, Eastern District, of the Board of Adjustment of the City of St. Ann ("Board of Adjustment") and the City of St. Ann ("St. Ann"). The Board of Adjustment and St. Ann seek a ruling that Section 408.500 R.S.Mo (1994),[1] does not preempt St. Ann Ordinance No. 2074, which prohibits a payday loan establishment from all zoning districts within the City of St. Ann. Section 408.500 does not give payday loan companies the unfettered right to operate in every municipality, but rather simply requires such establishments to pay a registration fee to the State, and subjects them to regulations established by the Division of Finance.

Amici Curiae, the municipalities of Florissant, Bellefontaine Neighbors, Cool Valley, Hazelwood, and Normandy, have either enacted, or have pending before their

legislative bodies, ordinances similar to St. Ann's Ordinance 2074. The preemption argument advanced by Sunshine Enterprises ("Sunshine") would invalidate these ordinances or preclude their adoption, regardless of the Cities' justification in adopting them. Amici Curiae have a strong interest in preserving a municipality's authority to enact zoning ordinances to protect the public health, safety, morals and welfare, that extends beyond the instant matter, and in ensuring that, when the validity of a local ordinance is challenged, it is subject to proper review. Further, counsel for Amici have significant experience in municipal litigation involving the validity of local ordinances. The City of Florissant has been involved in litigation involving a similar city ordinance.[2]

Accordingly, Amici Curiae submit this brief in support of the Board of Adjustment and St. Ann and respectfully contend that a rule requiring municipalities throughout the State to permit the location of payday loan establishments within their boundaries, regardless of the suitability of the use for the municipality, simply because Missouri contemplated such business would be carried on in the State, is contrary to the broad grant of authority afforded to municipalities regarding zoning laws by Chapter 89

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[1]All references are to R.S.Mo (1994) unless otherwise indicated.

[2]The City of Florissant was involved in litigation in the United States District Court for Eastern District of Missouri wherein the Honorable E. Richard Webber upheld a City of Florissant ordinance prohibiting short-term loan establishments from locating within that City. See North County Payday Loans, Inc. v. City of Florissant, Missouri, 4:00CV00045 ERW (E.D. Mo. Jan. 21, 2000) (included in the attached appendix).

of the Revised Statutes of Missouri and this Court's decision in McDermott v. Calverton Park, 454 S.W.2d 577, 584 (Mo. banc 1970) (holding that the zoning laws of Missouri permit a local government to validly permit residential-only zoning, thereby excluding all commercial uses from a municipality).

A. STANDARD OF REVIEW

On transfer of a case from the Missouri Court of Appeals, the Missouri Supreme Court considers the case as though an original appeal. Missouri Supreme Court Rule 83.09; Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 127 (Mo. banc 1985).

Further, a reviewing court reviews the decision of the Board of Adjustment and not the decision of the trial court. State ex. rel. Teefey v. Board of Zoning Adjustment, 24 S.W.3d 681, 684 (Mo. banc 2000). The scope of review is limited to whether the Board's action is supported by competent and substantial evidence upon the whole record or whether it was arbitrary, capricious, unreasonable, unlawful or in excess of its jurisdiction. Id. at 684. In determining whether there is substantial evidence to support the Board's decision, the reviewing court is to view the evidence, along with its reasonable inferences, in a light most favorable to the Board's decision. Id. The decision of the Board should be held illegal and void if the Board exceeds the authority granted to it. Id.

In determining whether a state statute preempts a municipal ordinance, the Court asks two questions: (1) Has the Missouri General Assembly expressly preempted the area?; and (2) Is the ordinance in conflict with state law? Page Western, Inc. v. Community Fire Protection District of St. Louis County, 636 S.W.2d 65, 66 (Mo. 1982).

In determining whether a municipal ordinance conflicts with a state statute and is, thus, void, the test is whether the ordinance prohibits that which the statute permits. Morrow v. City of Kansas City, 788 S.W.2d 278, 281 (Mo. 1990). A municipal ordinance may, however, supplement a state statute and regulate aspects of businesses which are not specifically addressed in the state law. Page Western, Inc., 636 S.W.2d at 67-68.

B. SECTION 408.500 R.S.MO DOES NOT PREEMPT A CITY FROM ENACTING AN ORDINANCE PROHIBITING PAYDAY LOAN ESTABLISHMENTS.

Section 408.500 does not preempt a city from enacting an ordinance prohibiting payday loan companies.[3] Section 408.500 is limited to the regulation of interest rates and fees which payday loan companies, such as Sunshine, may charge. § 408.500 R.S.Mo; see also Barry Service Agency Co. v. Manning, 891 S.W.2d 882, 885 (Mo. App. W.D. 1995) (describing § 408.500 as "a statute regulating the interest rates and fees charged by Missouri lenders exclusively engaged in the business of making unsecured loans under $500.00.") (emphasis added). Mere contemplation by the State that payday loan businesses will be carried on within Missouri simply does not indicate a legislative intent

[3]The City of St. Ann's Ordinance No. 2074 defines "short-term loan establishment" as: "[a] business engaged in providing short term loans to members of the public as a primary or substantial element of its operations and which is not licensed . . . as a bank or savings and loan association." The Ordinance prohibits short-term loan establishments from all zoning districts of the City of St. Ann.

that a payday loan business must be permitted in at least one zone established by a city and cannot be excluded from all zones of a city. That Missouri regulates the amount of interest that may be charged by payday loan businesses is far from an endorsement of such businesses, and, in fact, suggests nothing more than that the legislature recognized a need to protect the public by enacting a statutory ceiling on permissive interest rates. A proper construction of the statute reveals that an ordinance prohibiting short-term loan establishments from all zoning districts of a city does not conflict with Section 408.500.

The consequences of a finding that an ordinance prohibiting state regulated business is per se invalid will be severe. Such a rule will invalidate any local zoning ordinance that has the effect of prohibiting a state-regulated land use. State statutes authorize and regulate slaughterhouses, meat processing plants, dairy factories, casinos and any business operation involved in the manufacture, packing, storage, sale or distribution of food. See, e.g., §§ 196.190, 196.240 and 265.300, et seq., R.S.Mo. State statutes also authorize and regulate agricultural and farming operations. See, e.g., §§ 137.017, 274.030, and Chapters 261 and 266, R.S.Mo. Missouri taxing statutes obviously contemplate the conduct of a plethora of lawful businesses within the state, without regard to the nature of the business or the potential effect on neighboring properties. Under a per se rule prohibiting municipalities from excluding state regulated enterprise, local governments—even bedroom communities, with or without local retail—would be helpless to exclude by zoning any business use, no matter how deleterious, because under such a rule, state regulation of these businesses "contemplates" that they may be carried on anywhere in the State.

Further, if allowed, such a rule would effectively transform the State legislature into a super zoning authority contrary to the fact-sensitive inquiry contemplated under Chapter 89, R.S.Mo.[4] The Missouri legislature simply could not have intended Section 408.500 to carry this kind of sweeping effect. It is a fundamental principle of statutory construction that legislative intent must be ascertained by seeking, inter alia, to avoid an unjust, absurd, unreasonable, or oppressive result. St. Louis County v. Taggert, 866 S.W.2d 181, 182 (Mo. App. E.D. 1993).

As explained below, under a proper reading, Section 408.500 does not preempt Ordinance 2074 or other similar ordinances. As further explained, the validity of an ordinance should be determined under traditional zoning analysis—that is whether the ordinance is substantially related to achieving some legitimate purpose as applied to a particular tract of land.

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[4]Section 89.020 R.S.Mo expressly grants the following zoning powers to local governments:

> For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of all cities . . . is hereby empowered to regulate and restrict the . . . location and use of buildings, structures and land for trade, industry, residence or other purpose.

(emphasis added).

C. SECTION 408.500 DOES NOT EXPRESSLY PREEMPT ORDINANCE NO. 2074.

It is beyond dispute that Section 408.500 does not expressly require municipalities to allow payday loan businesses to operate within their boundaries. Nothing in the statute addresses the location of a payday loan establishment or indicates that Sunshine or any other short-term loan establishment has a right or protected interest in operating its business or utilizing its state license in a particular city. Nor does the statute expressly or impliedly limit, in any way, the rights of municipalities to enact zoning ordinances regulating or prohibiting payday loan companies in order to protect the public health, safety, morals and welfare. Likewise, the Division of Finance regulations on payday loan companies, 4 CSR140-11.010, et. seq., are silent with respect to where payday loan companies may operate and whether municipalities may prohibit such businesses.

That Section 408.500 R.S.Mo. does not expressly limit the rights of a municipality to enact zoning ordinances regulating or prohibiting payday loan companies in order to protect the public health, safety, morals, and welfare is further illustrated by looking at examples of statutes that do contain specific exceptions to a city's zoning authority. Compare, for example, the specific exceptions to local zoning authority found in Chapter 89 of the Revised Statutes of Missouri, entitled "Zoning and Planning." Section 89.020.2 characterizes a group home for the "mentally or physically handicapped" as a "single family dwelling or residence" regardless of local regulation, and Section 89.010 excludes any reference to churches, thus prohibiting the exercise of

local authority over religious uses of land. See Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451 (Mo.1959).

Here, Section 408.500 regulates limited aspects of payday loan establishments. It is, essentially, a licensing statute. Completely absent from the statute are any provisions concerning the location of payday loan businesses. The absence of such provisions illustrates that any conceivable preemptive effect of Section 408.500 does not extend to the location of short-term loan establishments. See Page Western, Inc., 636 S.W.2d at 66.

D. SECTION 408.500 DOES NOT IMPLICITLY PREEMPT ORDINANCE NO. 2074.

Nothing in Section 408.500 implies a legislative intent to thwart a municipality's otherwise broad zoning powers by requiring every municipality, regardless of the elected officials' judgment regarding the most appropriate use of the land within the municipality, to permit a payday loan business to carry on its activities within its boundaries.

The broad powers of a municipality to enact zoning laws have long been recognized. See Calverton Park, 454 S.W.2d at 584 (holding that municipalities, acting reasonably and upon consideration of pertinent circumstances, may enact zoning schemes that exclude all commercial activity). As noted above, moreover, Chapter 89 R.S.Mo, governing a municipality's zoning authority, requires municipalities to allow only two types of uses: group homes and residential or outpatient facilities for the treatment of alcohol and other drug abuse. See §§ 89.020.2 and 89.143.1, R.S.Mo. Importantly,

Section 89.040 R.S.Mo expressly permits a municipality to enact regulations to promote the general welfare "with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality."

It is clear that requiring a municipality to permit a payday loan business to locate within its boundaries merely because the State contemplates the presence of such business within Missouri cannot be reconciled with this Court's opinion in Calverton Park, permitting a municipality to adopt a residential-only zoning scheme, excluding all commercial uses, including, necessarily, payday loan establishments.

The line of cases involving the invalidation of a municipality's licensing or regulatory authority when that authority is exercised contrary to a similar state scheme is not comparable to this case and bears no application here.

For example, in Hagerman v. City of St. Louis, 283 S.W.2d 623, 628-29 (Mo. 1955), it is stated that "businesses and occupations that are lawful and useful may not be oppressed or prohibited by harsh enactments." This case, however, is distinguishable. Importantly, Hagerman is not a preemption or zoning case and does not concern a municipality's right to control land and building uses. Instead, Hagerman is concerned with the authority of a municipality to regulate the operation of a jewelry auction business located within its boundaries. The City ordinance in Hagerman was not found void due to preemption by a state statute, but rather was due, in part, to its violation of the Missouri Constitution's prohibition against special laws. Moreover, the Court in

Hagerman did not rely on a per se rule against regulating "lawful and useful business," but rather relied on authorities precluding regulation of the sale of general merchandise at auction that "did not have any relation to the public health, safety or welfare . . ., and, if considered as police regulations, were . . . arbitrary and unreasonable and imposing unnecessary restrictions on auction sales." Id. at 629-630. Under a preemption analysis, a city's reasoning in enacting a particular ordinance would be ignored.

Similarly, in Page Western, Inc, 636 S.W.2d at 67, an ordinance adopted by the Board of Directors of the Community Fire Protection District of St. Louis County was at issue. There, the ordinance was in direct conflict with a state law regarding the regulation of the sale of gasoline at self-service filling stations. Under state statute, the Director of Agriculture was charged with the duty to examine the surroundings, environments, and construction of the premises of gas stations and to see that they are kept in such condition as to be reasonably safe from fire and explosion, and not likely to cause injury to adjoining property or to the traveling public. The statute further authorized the Director to make such rules and regulations as would effectuate the purpose of the chapter. Pursuant to the authority granted by statute, the Department of Agriculture, Division of Weights and Measures, issued regulations governing service station dispensing systems and permitted a variety of self-service gasoline dispensing equipment in those regulations. However, the St. Louis County Community Fire Protection District passed an ordinance expressly prohibiting gas pumps which allowed the self-service filling with gasoline of motor vehicles by customers. Page Western, 636

S.W.2d at 66-67. In view of the direct conflict between the State regulations and the ordinance, the Court held that the ordinance was void. Id. at 67.

Similarly, careful examination of the factual circumstances in State ex rel. Collins v. Keirnan, 207 S.W.2d 49, 53 (K.C. Ct. App. 1947), reveals that the statement that "[a] business or occupation licensed by the state may be regulated by the city within reasonable limits if the regulation does not impair the right under the state license, but it cannot entirely prohibit such licensed business or occupation" bears no application to this case. In State ex rel. Collins, the issue was not preemption—in fact the court found that the city ordinance did not conflict with the state statute. 207 S.W.2d at 53. Rather, the issue was whether a city official could refuse to grant a city liquor license on his determination that the applicant failed to meet state licensing standards despite a state official's findings to the contrary. Id. at 54. In this context, the appellate court explained: "[a]fter the State Supervisor of Liquor Control has issued a license the director of liquor control of the city has no power to inquire into the facts upon which the action is based. The city official is only concerned with the enforcement of the city ordinances under such circumstances." Id. Thus, the case involved attempted enforcement of a state statute by a city official in a manner that directly conflicted with a state official's prior determination. State ex rel. Collins is not a preemption case or a zoning case—the City at issue was found to be in error because it was attempting to reexamine the validity of a liquor license already granted by the State. This case simply is inapposite.

Likewise, City of Meadville v. Caselman, 227 S.W.2d 77 (Mo. App. 1950) (commercial use of billiard tables); State ex rel. Burnau v. Valley Park Fire Protection District of St. Louis County, 477 S.W.2d 734 (Mo. App. 1972) (firework sales); Crackerneck Country Club, Inc. v. City of Independence, 522 S.W.2d 50 (Mo. App. 1974) (Sunday liquor sales)) also involve the invalidation of a municipality's licensing or regulatory authority when that authority is exercised contrary to a similar state scheme and are inapposite to this case.

Further, whether a business is "lawful and useful" simply because it may obtain a state license is highly questionable and, in the case of payday loan companies, has been hotly debated in courts and legislatures, including the federal legislature, throughout the Country. Senator Joseph Lieberman has called payday loan companies "one of the most expensive consumer products in existence." "Payday Loans" Trap Poor, Senator Charges, Cin. Post (Dec. 17, 1999) (included in attached Appendix). Indeed, annual interest rates on payday loans can run at the "exorbitant rate of 365%." See Pinkett v. Moolah Loan Comp., No. 99C2700, 1999 WL 1080596 (Nov. 2, 1999 (N.D.Ill)) (included in attached Appendix); see also Hayes v. County Bank, 713 N.Y.S.2d 267 (S.Ct. N.Y. 2000) (included in attached Appendix) (plaintiff alleged that nine payday loans made to her bore annual interest rates of 638.75%, 912.50%, 1,596.95%, 1,825.05%, 912.50%, 815.75%, 1,825.05%, 912.55% and 912.55%). As of late 1999, payday loans were prohibited in 19 states. New Lenders with Huge Fees Thrive on Workers with Debts, N.Y. Times (June 18, 1999) (included in attached Appendix). As

such, it is crucial that the reasoning behind a city's ordinance is examined before declaring a given ordinance void for prohibiting a State regulated business.

As properly read, Section 408.500 simply permits loan companies to exist within the State, requires them to pay a registration fee, and subjects them to certain regulations. Nothing in the statute expressly or impliedly limits the ability of any municipality from prohibiting payday loan companies within its boundaries. Accordingly, Ordinance No. 2074 does not prohibit that which Section 408.500 permits and is not in conflict with the statute.

E. THE VALIDITY OF AN ORDINANCE SHOULD BE DETERMINED UNDER A TRADITIONAL ZONING ANALYSIS.

As Ordinance 2074 is not pre-empted by § 408.500 or void, the validity should be considered under a traditional zoning analysis. The scope of appellate review for a zoning ordinance is limited. The reviewing court may not substitute its judgment for the judgment of the zoning authority. In Missouri, a zoning ordinance must be substantially related to achieving some legitimate purpose as applied to a particular tract of land. The touchstone of the inquiry is reasonableness. See Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963). Notably, ordinances are presumed to be valid and lawful and should be construed to uphold their validity. Parking Systems Inc. v. Kansas City Downtown Redevelopment Corp., 518 S.W.2d 11, 16 (Mo. 1974). Any uncertainty about the reasonableness of a zoning regulation must be resolved in the government's favor. Heidrich v. City of Lee's Summit, 916 S.W.2d 242, 248 (Mo. App. 1995). When

reviewing legislative actions, the scope of review is not limited to the record presented to the legislative body. Id.

While the complete exclusion of a commercial land use may be of questionable validity, that local determination, in the absence of a specific contrary preemption, deserves consideration on its own merits:

> Whether a use may be wholly prohibited may depend upon whether it bears a reasonable relationship to the purposes of zoning in light of the existing municipal zoning pattern, and the past, present, and foreseeable future development of land use within its borders, to which other factors may be added including the area of the municipality, the size of its population, and the impact, if any, of the use involved, upon land values and the general public welfare.

McQuillin, Municipal Corporations (3rd Edition Revised) Vol. 8, §25.119.10 (1997). These are the exact factors traditionally considered when determining the validity of a zoning ordinance. See Calverton Park, 454 S.W.2d at 581 (upholding complete exclusion of all commercial uses). "Upon review, [a] court may reverse a legislative action 'only if arbitrary and unreasonable, meaning that the decision is not fairly debatable.'" State ex rel. Huljon, Ltd. v. Jefferson County, 964 S.W.2d 531, 535-36 (Mo. App. E.D. 1998) (quoting Heidrich v. City of Lee's Summit, 916 S.W.2d at 248).

A per se rule against local regulation of land and building use when it involves a "lawful and useful business" does not allow for such an inquiry and ignores a city's

unique, legislative judgments on local development by imposing the preemption doctrine in a rigid, overly broad manner.

The legislature has recognized that cities must be able to zone in a way that suits the municipality's needs. Chapter 89, R.S.Mo.; Calverton Park, 454 S.W.2d at 581 (explaining that nothing in zoning statutes "indicate[s] a legislative intent that, under all circumstances, a municipality must provide for more than one use in its zoning ordinance."). Absent some conflict with state law, elected local officials should make such decisions, not the courts. St. Ann was exercising just this power when it amended its zoning code to prohibit short-term loan establishments. Since there is no conflict between Section 408.500 and Ordinance 2074, St. Ann's ordinance is a proper exercise of zoning authority and should be upheld.

CONCLUSION

For the forgoing reasons, Amici Curiae respectfully submit that Ordinance No. 2074 is not preempted or rendered void by Section 408.500 R.S.Mo. and request this Court to remand this decision to Court of Appeals for a determination of the validity of the Ordinance under traditional zoning analysis.

Respectfully submitted,

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CERTIFICATE REQUIRED BY SPECIAL RULE 1(c)

The undersigned certifies that this Brief complies with the limitations contained in Special Rule No. 1(b) and the Missouri Supreme Court Rules, that this Brief contains 4246 words, and that the floppy disk filed herewith has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this Joint Brief of Amici Curiae, both hard copy and disk copy, was mailed first class, postage prepaid, this 2nd day of June, 2001, to:

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APPENDIX