IN THE SUPREME COURT OF MISSOURI

No. SC94085

CITY OF MOLINE ACRES, MISSOURI

Plaintiff /Appellant

vs.

CHARLES BRENNAN

Defendant/Respondent.

Appeal from the Circuit Court of St. Louis County
Honorable Mary B. Schroeder, Associate Circuit Judge
Cause No. 12SL-MU01295

Substitute Brief of Appellant

CURTIS, HEINZ,
GARRETT & O'KEEFE, P.C.

Kenneth J. Heinz, #24242
Carl J. Lumley, #32869
Edward J. Sluys, #60471
130 South Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725 – 8788
(314) 725 – 8789 (Fax)
Attorneys for Appellant
City of Moline Acres, Missouri

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Missouri Supreme Court Rules

Constitutional and Statutory Provisions

Municipal Ordinances

Other Resources

JURISDICTIONAL STATEMENT

This case examines whether the Appellant City of Moline Acres' ordinance establishing the infraction of a violation of public safety on roadways against motor vehicle owners and the associated automated traffic camera enforcement system conflict with the Missouri state statutes regarding speeding by vehicle operators and imposition of points upon an operator's license. Further, this case examines the manner in which the ordinance has been applied.

After the Eastern District of the Missouri Court of Appeals entered an Opinion on January 28, 2014, affirming the Trial Court's Order dismissing the prosecution of the instant case, this Court sustained Appellant's Application for Transfer on May 27, 2014.

This Court has jurisdiction to hear appeals on transfer from the Missouri Court of Appeals pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

On July 31, 2012, video and photographic images of an automobile owned by Respondent Charles W Brennan ("Mr. Brennan") were captured by an automated traffic enforcement system located on Highway 367 within the city limits of Appellant City of Moline Acres ("City"). [Legal File ("L.F.") at 19]. The automated traffic enforcement system calculated that the vehicle owned by Mr. Brennan was travelling at 56 miles per hour. [L.F. at 19]. The speed limit for Highway 367 at that location is 45 miles per hour. [L.F. at 19].[1]

On August 10, 2012, the video and photographic images were reviewed and a "Notice of Violation" was completed and issued to Mr. Brennan by Officer Quinn, a police officer with the City. [L.F. at 19]. The Notice of Violation was issued pursuant to Section 395.010 of the City's Municipal Code (the "Ordinance"), which was enacted through Ordinance No. 1084 on June 21, 2012. [L.F. at 21].

In the preamble to the Ordinance, the Board of Aldermen set forth its reasons for adopting the Ordinance:

> **WHEREAS**, the City of Moline Acres has become increasingly concerned with excessive speeding within its city borders; and
>
> **WHEREAS,** excessive speeding poses a serious risk and detriment to the

[1] The Trial Court's Judgment incorrectly references a 40 miles per hour speed limit. [L.F. at 32].

public including endangering motor vehicle operators, homeowners and pedestrians; and

WHEREAS, excessive speeding increases the number of serious accidents on the roads in the City of Moline Acres which public safety agencies must respond to; and

WHEREAS, the City of Moline Acres, pursuant to Section 304.120, RSMo, is authorized to make additional rules of the road or traffic regulations to meet their needs and traffic conditions; and

WHEREAS, it has long been recognized in Missouri, that motor vehicle owners have an obligation to ensure that their motor vehicle is operated in a manner consistent with all applicable traffic regulations even when they are not operating the motor vehicle; and

WHEREAS, it is in the best interests of the public health, safety and welfare of the citizens of the City of Moline Acres, to encourage the reduction in the number of vehicles that are driven on the City's roads and thoroughfares at dangerous rates of speed.

WHEREAS, recent regulations by the Missouri Department of Transportation have increased the cost of enforcing speed limits.

[L.F. at 21].

During the pendency of this Appeal, the Ordinance was amended. [Appendix at A8]. The amendments to the Ordinance included additional language which confirmed

that the Ordinance is "complementary to, and not instead of, Chapter 320 of the City's Code, as well as corresponding state statutes pertaining to the offense of speeding."[2] [Appendix at A8]. The Ordinance was also amended to provide that a violation of public safety on roadways occurs only if the owner's vehicle is travelling at a speed of more than ten miles an hour in excess of the posted speed limit. [Appendix at A8].

Section 395.010B as it read at the time Mr. Brennan received his Notice of Violation provided in pertinent part that:

> Every motor vehicle owner has a duty to ensure that their motor vehicle at all times complies with the prescribed speed limits. It shall be deemed a violation of Public Safety on Roadways for the Owner to permit their motor vehicle to be operated at a rate of speed in excess of the posted speed limit where the violation is captured by an Automated Traffic Enforcement System.

[L.F. at 22].

Thus, a person commits a violation of public safety on roadways when a vehicle they own is operated, whether by themselves or by someone else with their permission, at

---

[2] Chapter 320 of the City's Municipal Code includes the ordinance prohibiting operators from exceeding the posted speed limits, which is the ordinance that corresponds to the statutory provisions (Sections 304.009 and 304.010 RSMo) with which the Trial Court found the City's Ordinance at issue in this case, to be in conflict.

a rate of speed in excess of the posted speed limit. Section 395.010(D)(1) [L.F. at 23]; Section 395.010(B) [L.F. at 23]. The only sanction for a violation under the Ordinance is a fine of $130.[3] Section 395.010(E) [L.F. at 24]. Further, the Ordinance expressly provides that incarceration is not a possible sanction. Section 395.010(E) [L.F. at 24].

City police officers review the video and photographic images and ownership records, and determine whether a notice of violation should be issued. §395.010(D) [L.F. at 23]. The City's prosecutor, and if necessary at a hearing the municipal court, reviews information that may be submitted by vehicle owners to determine whether specific circumstances excuse, or justify, the owner's violation of the Ordinance. §395.010(D) [L.F. at 24]. These justifications are: (1) the posting of the speed limit was not in accordance with state or local law; (2) the operator of the vehicle was acting in compliance with the lawful order or direction of a police officer; (3) the operator of the vehicle violated the speed limit in order to yield the right-of-way to an approaching emergency vehicle; (4) the vehicle was being operated as an authorized emergency vehicle; (5) the vehicle was stolen and being operated without the effective consent of the

[3] The parties stipulated that the fine in this case was actually only $124 as stated in the Notice of Violation. [L.F. at 19 & 32]. The Ordinance originally provided for an alternative fine of $200 for violations in which the owner's vehicle was traveling in excess of 20 miles per hour over the posted speed limit, but that higher fine provision has been repealed. [Appendix at A3]

owner and the theft was reported to the appropriate law enforcement agency in a timely manner; (6) the license plate and/or tags were stolen and being displayed on a vehicle other than the one they were issued for and the theft was reported in a timely manner; (7) ownership of the vehicle had been transferred prior to the violation; and (8) any other issue or evidence deemed pertinent by the municipal court. [L.F. at 22-23]. The City's Ordinance states that "[e]very motor vehicle owner has a duty to ensure that their motor vehicle at all times complies with the prescribed speed limits." [L.F. at 22]. Accordingly, the Ordinance excuses owners whose vehicles were stolen or utilized without their "effective consent." [L.F. at 22].

The Ordinance provides that persons who wish to contest their violations, and do not pay the fine, shall receive a Notice to Appear in Court, with a court date. [L.F. at 25]. The Ordinance provides that persons who do not appear after receiving a Notice to Appear in Court shall be sent a summons to appear in Court. [L.F. at 25]. The Ordinance provides that if an individual does not appear after being summoned to do so, they shall be subject to prosecution for the additional charge of Failure to Appear in Court. [L.F. at 25]. The municipal court (and/or the circuit court *de novo*) makes the final determination on liability if a violation is contested.

In this case, Mr. Brennan was in fact sent two duplicate Notices of Violation, the initial notice had a due date of September 1, 2012, and the second notice had a due date of October 1, 2012. [L.F. 5 & 19]. The back of the Notice of Violation stated: "Full payment before the due date of this Notice will prevent this matter from being referred to

the prosecutor for the filing of an information in the Moline Acres Municipal Court. Upon filing of an information, a summons for you to appear in the Moline Acres Municipal Court will be issued and court costs will be assessed and become payable in addition to the amount of this fine." [L.F. at 20]. The Notice of Violation further provided: "COURT PROCEEDING: If you do not wish to resolve this matter outside of the municipal court system, and you do not remit payment as herein requested, a summons will be issued for you to appear in Municipal Court. Please be advised that once this matter has been filed in the Municipal Court, court costs will be assessed in addition to the fine set forth herein." [L.F. at 20]. Before issuance of a summons, Mr. Brennan's counsel entered on his behalf and certified his case for a jury trial in Circuit Court on October 3, 2012. [L.F. at 4 & 6].

On December 6, 2012, Mr. Brennan filed a "Motion to Dismiss Based on Defect in the Institution of the Prosecution." [L.F. at 6]. Mr. Brennan admitted in his motion that he was the owner of the vehicle in the Notice of Violation. [L.F. at 6]. Mr. Brennan alleged that he had been deprived of procedural due process, because the initial Notice of Violation did not provide a hearing date and because there was no evidence that he was driving his vehicle. [L.F. at 7]. Mr. Brennan further argued that the Ordinance was invalid in that it did not provide for the reporting of points against his driving license [L.F. at 12], and that it impermissibly shifted the burden of proof to him. [L.F. at 16]. On February 20, 2013, the parties argued Mr. Brennan's motion to dismiss. [L.F. at 31]. The parties stipulated that: (1) Mr. Brennan owned the vehicle identified in the Notice of

Violation; (2) the City did not know who was driving the vehicle at the time the violation occurred; and (3) Mr. Brennan faced a fine of $124. [L.F. at 32]. On March 12, 2013, the Trial Court sustained Mr. Brennan's motion to dismiss. [L.F. at 32-33].

The Trial Court, in sustaining Mr. Brennan's motion to dismiss, recognized the City's authority to enact traffic regulations, but found that the Ordinance conflicted with state law, specifically Sections 304.009 and 304.010 RSMo pertaining to speeding by vehicle operators. [L.F. at 32-33]. The Trial Court concluded that its determination that the Ordinance conflicted with state law was dispositive of Mr. Brennan's motion. [L.F. at 32]. The Trial Court also referenced the test stated by the Court in City of Creve Coeur v. Nottebrok, 356 S.W.3d 252 (Mo. App. E.D. 2011), for determining whether an ordinance offense is civil or criminal, alluding to the fact that it believed the Ordinance was not civil because the violation addressed conduct that is already a "crime" under the statutes. [L.F. at 33].

On January 28, 2014, the Eastern District of the Missouri Court of Appeals entered an Opinion affirming the Trial Court's Order dismissing the prosecution of the instant case. On May 27, 2014, this Court sustained the City's Application for Transfer.

POINTS RELIED ON

I. **The Trial Court erred in sustaining Mr. Brennan's motion to dismiss the City's prosecution for a violation of public safety on roadways, because the Ordinance does not conflict with State law, in that: (1) the Ordinance is validly enacted pursuant to the City's police powers, for the health, safety and welfare of its citizenry; (2) the Ordinance imposes a municipal infraction on vehicle owners that is in addition to, and not in conflict with, Sections 304.009 and 304.010 RSMo, which pertain to charges under state law of speeding by vehicle operators; (3) the Ordinance does not conflict with the point reporting requirements of Chapter 302 RSMo, because it addresses a non-moving violation of ownership responsibility and not a moving violation committed by vehicle operators; and (4) the Ordinance itself does not state that points shall not be assessed, and therefore any conflict that may exist with respect to the reporting of points arises from the application of the Ordinance, not the Ordinance as enacted.**

Section 304.120 RSMo

City of Creve Coeur v. Nottebrok, 356 S.W.3d 252 (Mo. App. E.D. 2011)

City of Kansas City v. Hertz Corp., 499 S.W.2d 449 (Mo. 1973)

II. **The Trial Court erred in sustaining Mr. Brennan's motion to dismiss the City's prosecution for a violation of public safety on roadways, because the Ordinance did not violate his due process rights, in that: (1) he waived notice with respect to his right to a hearing; (2) the Ordinance is civil, not criminal in nature, and therefore does not require the heightened due process protections afforded in state criminal matters; (3) the City had probable cause to issue the initial Notice of Violation to Mr. Brennan as the record owner of the vehicle; and (4) the Ordinance does not shift the burden of proof to Mr. Brennan.**

Section 302.302 RSMo

City of Creve Coeur v. Nottebrok, 356 S.W.3d 252 (Mo. App. E.D. 2011)

City of Kansas City v. Hertz Corp., 499 S.W.2d 449 (Mo. 1973)

City of St. Louis v. Cook, 221 S.W.2d 468, 469 (Mo. 1949)

ARGUMENT

I. **The Trial Court erred in sustaining Mr. Brennan's motion to dismiss the City's prosecution for a violation of public safety on roadways, because the Ordinance does not conflict with State law, in that: (1) the Ordinance is validly enacted pursuant to the City's police powers, for the health, safety and welfare of its citizenry; (2) the Ordinance imposes a municipal infraction on vehicle owners that is in addition to, and not in conflict with, Sections 304.009 and 304.010 RSMo, which pertain to charges under state law of speeding by vehicle operators; (3) the Ordinance does not conflict with the point reporting requirements of Chapter 302 RSMo, because it addresses a non-moving violation of ownership responsibility and not a moving violation committed by vehicle operators; and (4) the Ordinance itself does not state that points shall not be assessed, and therefore any conflict that may exist with respect to the reporting of points arises from the application of the Ordinance, not the Ordinance as enacted.**

During the pendency of this case, the Courts of Appeal have issued seven opinions (in addition to the Eastern District's opinion in this case) addressing the issue of camera enforcement of traffic ordinances. Those cases are: Smith v. City of St. Louis, 409 S.W.3d 404 (Mo. App. E.D. 2013), Unverferth v. City of Florissant, 419 S.W.3d 76 (Mo. App. E.D. 2013), Ballard v. City of Creve Coeur, 419 S.W.3d 109 (Mo. App. E.D. 2013), Edwards v. City of Ellisville, 426 S.W.3d 644 (Mo. App. E.D. 2013), Damon v. City of

Kansas City, 419 S.W.3d 162 (Mo. App. W.D. 2013), Brunner v. City of Arnold, 427 S.W.3d 201 (Mo. App. E.D. 2013) and City of St. Peters v. Roeder, ED100701,[4] Decided June 3, 2014, (Mo. App. E.D. 2014).[5] These seven cases all address intersection safety ordinances enforced by what are commonly referred to as red light cameras, whereas the instant Appeal involves a safety ordinance enforced through the use of speed cameras. However, these opinions all address issues relevant to the instant matter, and along with the Trial Court's Judgment in this case represent a significant departure from this Court's well-established state statute/municipal ordinance conflict analysis.[6]

Inexplicably, the Eastern District in Brunner, began its opinion by commenting "[t]his is yet another challenge to the validity and constitutionality of a municipal ordinance governing what are commonly referred to as 'red light camera enforcement systems,' and **we take another hike through a legal and unfortunately, political minefield.**" Brunner at 206. (Emphasis added). Contrary to this statement, there should

---

[4] A copy of the Opinion is included in the Appendix at A15.

[5] With the exception of Roeder, these cases all involve attempted class action suits against the various cities, whereas the instant case involves the prosecution of a single defendant, namely Mr. Brennan.

[6] This Court is now examining the reliance of the Circuit Court of the City of St. Louis on these opinions in Tupper v. City of St. Louis, SC94212 (application for transfer sustained on June 24, 2014).

be nothing political about the review of these various public safety enforcement ordinances; rather the review should be limited to the legality of such ordinances. The political/policy decisions regarding local traffic safety measures are not for the Courts to make, but rather are reserved to the duly elected municipal legislative bodies. This Court should rein in the lower courts and restore the appropriate deference Missouri Courts have long accorded local legislative decisions. As this Court has previously recognized: "[t]he indispensability of local self-government arises from problems implicit in the safety, order, health, morals, prosperity, and the general welfare of thickly populated areas." State ex rel Audrain County v. City of Mexico, 197 S.W.2d 301, 303 (Mo. 1946).

There has been significant public debate in Missouri regarding the use of cameras in the enforcement of traffic safety ordinances. The opposition ultimately boils down to a bald assertion that people cannot be held accountable in any way for the use of their vehicles unless a police officer chases them down while they are driving and hands them a ticket. However each year in Missouri a significant number of fatalities occur from automobile accidents. http://www.savemolives.com/facts-figures.html. In 2013, 756 deaths occurred in incidents involving automobiles. *Id*. This number is greatly reduced from the 1257 deaths that occurred in 2005. *Id*. The middle part of the last decade also happens to coincide with when camera technology became prevalent in Missouri. Despite the considerable animosity of some towards the use of such traffic safety cameras, they are an important tool available for use in the discretion of local elected officials to promote public safety and try to reduce the number of fatalities on Missouri's

roads, at intersections, at railroad crossings, in school zones, in work zones, near school buses,[7] or elsewhere. The use of cameras also protects the traveling public and law enforcement officers from the risks and impediments related to chasing vehicles and issuing tickets on the side of the road.

A. Standard of Review.

This Court reviews the dismissal of an indictment or information *de novo* when it raises purely questions of law. State v. Smothers, 297 S.W.3d 626, 632 (Mo. App. W.D. 2009) ("When the facts are uncontested and the only issue is a matter of statutory construction, we review the circuit court's dismissal of a felony complaint under a *de novo* standard.") "Statutory construction is a question of law, not fact; when the lower court rules on a question of law, it is not a matter of discretion." State v. Plastec, Inc., 980 S.W.2d 152, 154 (Mo. App. E.D. 1998). "The judgment of the trial court is afforded no deference when the law has been erroneously declared or applied." *Id.* at 154-155.

The instant case considers whether or not the Ordinance is valid under Missouri law, which is purely a question of law.

Traffic ordinances are enacted pursuant to a city's police powers. Deutsch v. City of Ladue, 728 S.W.2d 239, 241 (Mo. App. E.D. 1987). Courts "presume that an ordinance enacted pursuant to a municipality's police power is valid, and the party contesting the ordinance bears the burden of proving its invalidity." City of Creve Coeur v. Nottebrok, 356 S.W.3d 252, 258 (Mo. App. E.D. 2011). "The burden is on the party

[7] See 304.050.7 RSMo.

contesting the ordinance to negate every conceivable basis which might support it." *Id.* "If reasonable minds might differ as to whether a particular ordinance is reasonably related to the protection of the general health, safety or welfare of the public, then the issue must be decided in favor of the ordinance." *Id.*

The City's Ordinance is expressly based upon rational public policies and is designed to promote the health, safety and welfare of its citizens.

B. The City's Ordinance is valid under Missouri Law and is a proper exercise of the City's Police Power.

1. The Ordinance is consistent with this Court's holding in City of Kansas City v. Hertz Corp that vehicle owners can be liable for the manner in which others use their vehicles.

This Court in City of Kansas City v. Hertz Corp., 499 S.W.2d 449 (Mo. 1973), approved the imposition of liability based upon vehicle ownership for traffic violations.[8] The Kansas City ordinance in dispute in Hertz provided in part that:

> If any vehicle is found upon a street in violation of any provision of this chapter, the owner or person in whose name such vehicle is registered in

[8] While not at issue in this case, the imposition of joint liability for all owners of a vehicle under the Ordinance is consistent with the responsibilities that attach to joint ownership, as recognized by the U.S. Supreme Court in Bennis v. Michigan, 516 U.S. 442 (1996).

the records of any city, county or state shall be held prima facie[9] responsible for such violation, if the driver thereof is not present.

Id. at 451.

This Court rejected the argument of the owner appellant in Hertz that "an ordinance imposing liability upon an owner who was not driving or present but who had rented or bailed the car to another constituted a violation of the due process clause of the Missouri… Constitution." *Id.* at 451. This Court held that:

> The purpose of ordinances regulating parking is to permit the public streets to be used to their best advantage by the public. The maximum penalty is a relatively small fine and no potential incarceration. There is no public stigma attached to receiving a parking ticket and it has no effect upon one's driver's license or insurance cost. If the ticket is paid promptly, no court appearance is required. **The movement of automobile traffic is a major problem in the cities of this state.** Cars illegally parked contribute substantially to that problem and the enforcement of parking regulations is

[9] "The words 'prima facie', as used in this ordinance, do not mean the owner is presumed to be the driver. The phrase, as used here, means a rebuttable presumption exists that the car was not being operated by the driver without the consent of the owner and that the registration of the car is correct. Unless that presumption is rebutted, the ordinance imposes liability for the parking violation upon the owner." Hertz at 452.

> difficult and expensive. Most cars are driven by the owner, some member of the owner's family, or his employee or lessee and with the owner's consent. An ordinance imposing liability for the parking violation fine on the owner as well as the driver may very well result in fewer violations and thereby assist in the reduction of traffic problems.

Id. at 453 (Emphasis added).

The Court cited with approval an earlier decision of the Supreme Court of Massachusetts, and the observation therein that "the inconvenience of keeping watch over parked vehicles to ascertain who in fact operates them would be impracticable if not impossible." *Id.* at 452.

The City's Ordinance presents the same circumstances as in Hertz: (1) the penalty is a relatively small fine; (2) there is no potential incarceration; (3) there is no public stigma; (4) there is no effect on the owner's drivers' license; (5) there is no impact on insurance costs; and (6) no court appearance is required to pay the citation. This Court's reasoning in Hertz is equally applicable to the City's Ordinance and the structure of the Ordinance makes plain the City's reliance on the precedent of Hertz.[10]

---

[10] Even if points were required to be assessed for a violation of the City's Ordinance (which is not the case, see *infra* at Point I.D, pages 47-49), the punishment would continue to be minor under the Hertz decision. The assessment of two points for a municipal ordinance moving violation does not alone trigger any impact on an operator's

Although Hertz pertained to an ordinance involving parking tickets, both the ordinance in Hertz and the City's Ordinance serve the same goal, namely to alleviate issues concerning the safe and efficient "movement of automobile traffic." *Id.* at 453. Further, as with parking tickets, keeping watch over all roadways in the City at all times of day "would be impracticable, if not impossible." *Id.* at 452. Thus, the holding in Hertz is equally applicable to the instant case.

In his motion to dismiss, Mr. Brennan argued that a possible fine of $130.00 is not a small penalty. [L.F. at 8]. However, in State v. Marshall, 821 S.W.2d 550 (Mo. App. E.D. 1991), the Court considered a $300 fine for animal neglect to be a small fine. *Id.* at 552. The Seventh Circuit in Idris v. City of Chicago, Il, 552 F.3d 564 (7th Cir. 2009), considering a $90 fine for an intersection infraction, held that "[t]he interest at stake is a $90 fine for a traffic infraction, and the Supreme Court has never held that a property interest so modest is a fundamental right." *Id.* at 566. In City of Springfield v. Belt, 307 S.W.3d 649, 650 (Mo. banc 2010), this Court struck down the City of Springfield's administrative hearing procedure (not utilized by the City, which prosecutes such

---

license. Only the accumulation of points for multiple violations within a relatively short period of time results action against an operator's license. See Section 302.302 RSMo; and Section 302.304.3 RSMo ("The director shall suspend the license and driving privileges of any person whose driving record shows the driver has accumulated eight points in eighteen months.").

violations through its Municipal Court), but acknowledged that a $100 fine is a modest amount. Additionally, the Court in Kilper v. City of Arnold, Missouri, 2009 WL 2208404 (E.D. Mo. 2009),[11] found a fine of $94.50 to be minor. *Id.* at 13-17.

Mr. Brennan also complained of the purported stigma associated with the violation of public safety on roadways. [Transcript ("Tr") at 7, lines 21-25]. Hertz expressly rejected the notion that such minor offenses carry with them a public stigma. *Id.* at 453. Further, the Trial Court noted, and Mr. Brennan's Counsel conceded, that Mr. Brennan (who is a radio broadcaster) has purposefully brought public attention to himself concerning this violation. [Tr at 10, lines 11-13].

2. The Ordinance is authorized pursuant to Section 304.120 RSMo.

In Nottebrok, the Court recognized that "Missouri law provides that a municipal ordinance can impose liability on a vehicle owner if another person parks or operates the vehicle in violation of the ordinance." *Id.* at 260. Section 304.120.2 RSMo provides that "[m]unicipalities, by ordinance, may… [m]ake additional rules of the road or traffic regulations to meet their needs and traffic conditions." The City's Ordinance expressly references this statute and creates an additional traffic regulation to promote the public health, safety and welfare of its citizens. There is no need for state legislation that expressly allows for the use of camera enforcement technology as a method of policing, just as there is no need for legislation to authorize the use of cell phones, computers,

[11] A copy of the Court's Order is provided in the City's Appendix. [Appendix at A24].

electric cars or other technologies. See e.g. City of Jefferson City, Mo v. Cingular Wireless, LLC, 531 F.3d 595, 608 (8th Cir. 2008) ("Springfield is not required to update its Code for the purpose of recognizing the advent of each new form of technology"). Section 304.120 RSMo should be read consistently with the technology available at the present time to effectuate its purposes.[12] Even the Court in Brunner recognized "that the use of technology as a means of police enforcement will inevitably continue to increase." *Id*. at 222.

In apparent response to the 1973 decision in Hertz, which held that liability could be imposed upon rental companies for the actions of those drivers to whom they leased vehicles, the Missouri Legislature in 1975, added language now codified in Section 304.120.4 RSMo which prohibits cities from imposing liability on the "owner-lessor of a motor vehicle when the vehicle is being permissively used by a lessee and is illegally

---

[12] The use of cameras in traffic safety is not a new concept, and in fact they have been utilized in one form or other since 1909. Automated Traffic Enforcement Systems, 26 A.L.R. 6th 179, §2 (pub'd 2007). In 1909 the state of Massachusetts used a "photo-speed recorder" to capture photos of vehicles at timed intervals and the speed was calculated by measuring the reduction in the size of the vehicle as it moved away from the camera. *Id*. In the 1950s the state of New York began using photo technology to detect speeding vehicles. *Id*. Additionally, police radar was first developed and used in the late 1940s. *Id*.

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…" (emphasis added).[13]

The express prohibition on cities from holding an owner-lessor liable for the "illegal operation" of their vehicle, in certain limited circumstances, demonstrates the legislative authority of cities to hold owners of vehicles responsible for the illegal operation of vehicles in other circumstances. Following the cannon of statutory interpretation that the expression of one thing is to the exclusion of another,[14] the express prohibition against cities imposing liability based upon ownership for the illegal operation of a rental vehicle (if the owner identifies the lessee), implicitly allows cities to continue to impose such liability upon owners of motor vehicles in other instances as this Court recognized in Hertz.

If the legislature did not intend for cities to be allowed to impose liability upon owners of vehicles for the manner in which they are operated as well as parked, then the

---

[13] The Ordinance at issue herein complies with this exception. §395.010(B) [L.F. at 23].

[14] "It is a well-recognized rule of construction of ordinances and statutes that the maximum expression unius est exclusio alterius applies." State ex rel Winkley v. Welsch, 131 S.W.2d 364, 365 (Mo. App. E.D. 1939); "The 'inclusion-exclusion' rule is recognized in this state as a proper tool or aid for construing municipal ordinances." Kansas City v. Bibbs, 548 S.W.2d 264, 266 (Mo. App. 1977).

use of the word "operation" in Section 304.120.4 RSMo would be meaningless. Such an interpretation should be avoided as "[i]t is presumed that the legislature did not intend a meaningless act." State ex rel. SGI Hotels, L.L.C. v. City of Clayton, 326 S.W.3d 484, 489 (Mo. App. E.D. 2010). Accordingly, Section 304.120.4 RSMo should be interpreted as allowing cities to enact ordinances that hold owners liable for the manner in which their vehicles are operated.

Furthermore, Section 546.902 RSMo provides the City additional authority as a city located in St. Louis County to "enact and make all such ordinances and rules, not inconsistent with the laws of the state, as may be expedient for maintaining the peace and good government and welfare of the city and its trade and commerce . . ."[15] Also, Fourth Class cities, such as the Appellant City, have been granted the authority to "enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect . . ." Section 79.110 RSMo; see also Section 71.010 RSMo.

---

[15] Section 546.902 RSMo also gives the City broad authority to set fines, unless a statute prescribes a specific fine for the specific type of ordinance violation. There is no such statute in this instance.

Further, as noted above, this Court has recognized the "indispensable" nature of local control relative to the promotion of safety, order, health, morals, prosperity and general welfare. State ex rel. Audrain County, *supra,* at 303.

3. The Courts should not substitute their judgment for that of the City's Board of Aldermen with respect to legislative matters.

The adoption of the Ordinance at issue in this case is part of the City's legislative function. *See e.g.* Reynolds v. City of Independence, 693 S.W.2d 129, 132 (Mo. App. W.D. 1985) (Where an ordinance adopts a new policy or plan, as opposed to pursuing an existing plan already adopted, the act of adopting the ordinance is legislative). "Where an ordinance appears within the scope of delegated police power, the courts will not substitute their discretion for that of the legislative body which enacted the ordinance." State ex rel. Payton v. City of Riverside, 640 S.W.2d 137, 140 (Mo. App. W.D. 1982). "This is especially applicable to purely legislative acts of municipal corporations." *Id.*

The Trial Court acknowledged the City's authority to enact traffic ordinances. [L.F. at 33]. The Court of Appeals did not address this issue. The recent camera traffic safety enforcement opinions, up to and including Edwards, appear to acknowledge that ordinances, such as the one at issue in this case are within the scope of the municipal police powers. In fact, at page 15 of his Brief before the Court of Appeals, Mr. Brennan conceded that pursuant to Edwards and Unverferth the City's Ordinance was within the scope of the City's police powers. However, the opinions in Brunner and Roeder have unjustifiably cast some doubt over this issue.

In Brunner, the Court determined that the question as to whether the ordinance was a valid exercise of the police power required remand to the Trial Court. "Moreover, Appellants contend that the Ordinance was unreasonable because there exist numerous other methods – as proven by studies – City had available to decrease red light violations, promote the general welfare of citizens, and increase safety. Such methods include the use of roundabouts and the timing of lights. All of these are facts in determining the reasonableness of the Ordinance." *Id.* at 225. Furthermore, in Roeder the Eastern District appeared to go further in stating "[b]ecause a system without a mandatory assessment of points would do little to protect the public . . ." *Id.* at 6.

However, the question of reasonableness, was not raised by Mr. Brennan in his Motion to Dismiss, and should only be reached if someone challenging an ordinance can rebut the presumption of reasonableness. See e.g. Wells & Highway 21 Corp. v. Yates, 897 S.W.2d 56, 60-61 (Mo. App. E.D. 1995) (A zoning ordinance (which was legislative in nature) is presumed to be reasonable, and the challenging property owner has the burden of rebutting presumption). Even if the presumption can be rebutted, an ordinance should still be upheld if its reasonableness is fairly debatable. *Id.* at 61. Hertz, Nottebrok, and the recent opinions through Edwards, make it clear that the City's Ordinance is reasonably related to the promotion of the health, safety and welfare of the City's residents.

In some of the recent decisions from the Courts of Appeal, the Courts have also addressed allegations made by plaintiffs that the various public safety ordinances were

unlawfully enacted simply for revenue generation purposes. Mr. Brennan did not raise this issue in the instant case. While of course the City's Ordinance generates fine revenues, as with all traffic violations, such revenue does not negate the clear and obvious public safety impacts of the Ordinance. Further, the revenues generated are expended for the benefit of the public to provide necessary police and public safety services. The General Assembly has guarded against any potential for excessive revenue generation from traffic fines through the Macks Creek Law, codified in Section 302.341.2 RSMo. This statute, which was recently amended, provides that no city can generate more than thirty percent of its annual general operating revenue through traffic fines. If a city exceeds this statutory cap, then they are required to remit excess sums to the Director of Revenue, who then pays out such sums to the schools located in the municipality's county. Accordingly, the state legislature has established the boundaries on revenue generation through traffic enforcement on the part of municipalities.

Judicial determination of legislative matters, i.e. the weighing of different options to improve public safety or placing limits on total fine revenue, is an encroachment of the judiciary on the legislative functions of the municipalities, and violates the constitutional mandate of separation of powers. *See* Mo. Const. Art 2, Section 1. There are two broad categories of acts that violate the constitutional mandate of separation of powers. "One branch may interfere impermissibly with the other's performance of its constitutionally assigned [power] … [citations omitted]. Alternatively, the doctrine [of separation of powers] may be violated when one branch assumes a [power] … that more properly is

entrusted to another. [citations omitted]." I.N.S. v. Chadha, 103 S.Ct. 2764, 2790-91, 77 L.Ed.2d 317 (1983) (Powell, J., concurring). See State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228, 231 (Mo. banc 1997). This Court should restore the proper balance of the legislative and judicial branches by deferring to local legislative traffic safety choices. State ex rel. Audrain County, *supra,* at 303.

4. It has long been recognized that it is appropriate to hold vehicle owners responsible for the manner in which they, and others, operate their vehicle.

The United States Supreme Court, when considering a Kansas statute that allowed for the forfeiture of a vehicle where it was used to transport illegal liquor, stated:

> It is not unknown, or indeed uncommon, for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has intrusted it. . . . They have their counterpart in legislation imposing liability on owners of vehicles for the negligent operation by those intrusted with their use, regardless of a master-servant relation . . . They suggest that certain uses of property may be regarded so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner.

Van Oster v. State of Kansas, 272 U.S. 465, 467-468 (1926).

The Michigan Supreme Court considering a statute that placed liability on the owner of a vehicle for an injury caused by the negligent operation of their vehicle similarly stated:

> It is true that the automobile has become so perfected that it may not be classed as a 'dangerous instrumentality' when intelligently managed. It will not shy, balk, back up, or run away when properly directed, but may do all of these when managed by an inexperienced, incompetent, or reckless driver. When in control of such a one it becomes an exceedingly destructive agency as the daily toll of lives and the many injuries to persons chronicled by the newspapers attests. If the owner of such agency consents to turn it over to the control of an incompetent or reckless chauffeur he is not deprived of any legal right by holding him liable for its negligent operation when in such control and a greater degree of safety to the general public is likely to follow. . . . The owner of an automobile is supposed to know, and should know, about the qualifications of the persons he allows to use his car, to drive his automobile, and if he has doubts of the competency or carefulness of the driver he should refuse to give his consent to the use by him of the machine. The statute is within the police power of the state.

Stapleton v. Independent Brewing Co., 198 Mich. 170, 175 (Mich. 1917).

The United States Supreme Court in Bennis v. Michigan, 516 U.S. 442 (1996), upheld the forfeiture of a husband and wife jointly owned vehicle under Michigan's

statutory abatement scheme where the husband had used the vehicle to engage in elicit acts with a prostitute. Id. at 443-444. The wife defended against the abatement of her interest in the vehicle on the basis that when she entrusted her husband with the vehicle she did not know she would use it to violate Michigan's indecency law. Id. The Supreme Court granted *certiorari* to determine whether Michigan's abatement scheme deprived the wife of her interest in the forfeited vehicle without due process. Id. at 446. The Court noted that "A long an unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." Id. In upholding the validity of the Statute, the Supreme Court discussed its prior decision in Van Oster, as well as a number of other cases, at length and held:

> We conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue are too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced. The State here sought to deter illegal activity that contributes to neighborhood deterioration and unsafe streets. The Bennis automobile, it is conceded, facilitated and was used in criminal activity.

Id. at 453. (Internal citations and quotations omitted).

The ordinance approved in Hertz, like the City's Ordinance, "places responsibility upon the owner without any requirement that he be found to have been the driver, whether that finding is premised on a presumption or direct evidence." Hertz, *supra*, at

452. The Hertz Court recognized and approved that in such situations the "[l]iability for parking violation is not imposed because Hertz was a driver but because Hertz was the owner of the car." *Id.* at 454.

5. Similar Public Safety Ordinances have consistently been found to be valid in other states.

In addition to the aforementioned cases of Nottebrok and Hertz, public safety ordinances similar to the City's have been consistently upheld across the country.

The Seventh Circuit in Idris v. City of Chicago, *supra*, has also held that an intersection safety ordinance did not violate the substantive due process rights of auto owners who were fined pursuant to the program even if someone else was allegedly driving. The Idris court held that a vehicle owner's fundamental rights were not violated by having their vehicle photographed violating an intersection safety ordinance, and a $90 fine involved a property interest so modest it did not constitute a fundamental right. *Id.* at 566. In Idris, the ordinance (as in the present case) did not simply create a rebuttable presumption that the owner was driving, but imposed liability based upon ownership. *Id.* at 565.

In Mendenhall v. City of Akron, 374 Fed Appx 598 (6th Cir. 2010), the Sixth Circuit held an ordinance imposing liability on owners whose vehicles had been photographed by camera technology exceeding the posted speed limit to be civil in nature and non-violative of the plaintiff's due process rights. The Sixth Circuit stated:

As the district court found, the ordinance provides for notice of the citation,

> an opportunity for a hearing, provision for a record of the hearing decision, and the right to appeal an adverse decision. We agree with the district court that the ordinance and its implementation, as detailed in the stipulations, satisfy due process, and reject plaintiff's assertion that it violates due process to impose civil penalties for speeding violations irrespective of whether the owner was, in fact, driving the vehicle when the violation was recorded.

Id. at 600.

In Ware v. Lafayette City-Parish Consolidated Government, 2009 WL 5876275 (U.S. W.D. La 2009),[16] the court upheld the local "safespeed" and "safelight" programs finding that they were related to a legitimate public safety goal and that therefore, the plaintiffs failed to state a viable due process claim.

In City of Davenport v. Seymour, 755 N.W.2d 533 (Ia 2008), the Iowa Supreme Court found that the city's "automatic traffic enforcement" ordinance, which assesses civil penalties against the owners of vehicles photographed by camera technology, to be valid and not preempted by state law. "The fact that state law does not authorize the state to enforce its statute through certain remedial options does not mean that it forbids municipalities from the same course of action. In the context of state-local preemption,

---

[16] A copy of the "Report and Recommendation" is provided in the City's Appendix. [Appendix at A42].

the silence of the legislature is not prohibitory but permissive." *Id.* at 543.

In Gardner v. City of Cleveland, 656 F. Supp. 2d 751 (U.S.D.C. Oh 2009), the Court found that an ordinance imposing civil liability on an owner of a vehicle for red light and speed violations was rationally related to the city's goal of improving traffic safety.

In City of Aventura v. Masone, 89 So. 3d 233 (Fla. Dist. Ct. App. 2011), the Court reversed the lower Court's opinion and held that the municipality's "red light camera ordinance" was not expressly or impliedly preempted by state statute. As Florida, by statute, gives municipalities the authority to enact local ordinances which are not inconsistent with general law and also expressly recognizes the power of municipalities to regulate traffic in their jurisdictions by passing local ordinances, the Court found the ordinance to be a proper exercise of local authority.[17]

In State v. Arrington, 95 So.3d 324 (Fla. Dist. Ct. App. 2012), the Court upheld a Florida red light camera statute, finding that it did not violate the Equal Protection Clause

---

[17] However, earlier this month the Florida Supreme Court (in an opinion that is not yet final) quashed the opinion in this case and found that the city's ordinance was "expressly preempted by state law." In doing so the Court relied upon statutory language requiring that the city's ordinance be expressly authorized by statute. Masone v. City of Aventura, 2014 WL 2609201 (Fla. Sp. Ct. – Decided June 12, 2014). A copy of the Opinion is provided in the City's Appendix. [Appendix at A63].

of the Constitution. The plaintiff was issued a citation after being observed proceeding through a red light by a law enforcement officer and argued that those in his situation are similarly situated to motorists issued a red light camera violation, and thus, the differing penalties for the two violations violated equal protection principles. The Court disagreed and stated that the two classes of motorists are not similarly situated and, therefore, the differing penalties do not create a constitutional issue.

In contrast to the above cases, the Minnesota Supreme Court invalidated an ordinance holding the owner of a vehicle guilty of a petty misdemeanor where their vehicle was photographed running a red light. State v. Kuhlmann, 729 N.W.2d 577 (Minn. 2007). This decision should be distinguished here in light of the applicable Minnesota statute, which requires that:

> The provisions of this chapter [pertaining to traffic regulations] shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein.

Kuhlmann at 580; Minn.Stat. §169.022.

The Kuhlmann Court thereafter stated that "[w]e have held that this provision requiring uniformity and statewide application clearly showed the legislative intent to preempt this field except for the limited local regulation the statute expressly permitted." *Id.* at 580 (internal quotations omitted). Accordingly, in Minnesota local political

subdivisions can only enact those traffic regulations expressly authorized by the State, due to the State's preempting the field of traffic regulations. Conversely, political subdivisions in Missouri are authorized to "[m]ake additional rules of the road or traffic regulations to meet their needs and traffic conditions." Section 304.120 RSMo.

C. <u>The Ordinance does not conflict with Sections 304.009 and 304.010 RSMo.</u>

The Trial Court found that the Ordinance conflicted with Sections 304.009 and 304.010 RSMo.[18] Section 304.010 RSMo provides in pertinent part:

> 2. Except as otherwise provided in this section, the uniform maximum speed limits are and no vehicle shall be **operated** in excess of the speed limits established pursuant to this section . . . 11. **Any person** violating the provisions of **this section** is guilty of a class C misdemeanor, unless such person was exceeding the posted speed limit by twenty miles per hour or more then it is a class B misdemeanor."

(Emphasis added).

Section 304.009 RSMo provides that any violation of the speed limits set forth in Section 304.010 RSMo of five mile per hour or less, is an infraction, not a misdemeanor,

---

[18] Although Sections 304.009 and 304.010 RSMo were the basis for the Trial Court's decision, those statutes were not pled by Mr. Brennan in his motion to dismiss. [L.F. 7 – 17].

and that no points are to be assessed. Accordingly, the State statutory scheme makes it an offense for a person to **operate** a vehicle in excess of the posted speed limits. Section 301.010 RSMo provides that "[a]s used in section[] 304.010 . . . the following terms mean . . . 'Operator', any person who operates or drives a motor vehicle. The Missouri Supreme Court has defined the terms "operating" or "driving" of a vehicle as "all acts necessary to be performed in the movement of a motor vehicle from one place to another or fairly incidental to the ordinary course of its operation, including not only the act of stopping en route for purposes reasonably associated with transit, but all acts which are reasonably connected with entering the vehicle at point of departure and alighting therefrom at destination." Thaller v. Skinner & Kennedy Co., 315 S.W.2d 124, 130 (Mo. banc 1958).

Section 301.010 RSMo defines "owner" as "any person, firm, corporation or association, who holds the legal title to a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee of mortgagor shall be deemed the owner for the purpose of this law."

Accordingly, the terms "owner" and "operator" have distinct and different meanings for purposes of Section 304.010 RSMo, and they are not interchangeable. Similarly, the Ordinance provides distinct definitions for "owner" and "operator."

Section 395.010.A [L.F. 22]. "Owner" is defined as "the owner(s) of a motor vehicle as shown on the motor vehicle registration records of the Missouri Department of Revenue or the analogous department or agency of another state or country." Section 395.010.A [L.F. 22]. "Operator" is defined in the Ordinance as "any person who operates or drives a motor vehicle and has the same meaning as 'Driver'." Section 395.010.A [L.F. 22].

State statutes are enforced in the Circuit Courts, whereas municipal ordinances are enforced in the Municipal Courts. The City's ordinances are enforced through its Municipal Court. Pursuant to Section 479.020.1 RSMo, the City's Municipal Judge only has "original jurisdiction to hear and determine all violations against the ordinances of the municipality." Further, Section 479.170.1 RSMo mandates that if "in the progress of any trial before a municipal judge, it shall appear to the judge that the accused ought to be put upon trial for an offense against the criminal laws of the state and not cognizable before him as municipal judge, he shall immediately stop all further proceedings before him as municipal judge and cause the complaint to be made before some associate circuit judge within the county." Further, ordinance violations are governed by separate procedures set forth in Rules 37 and 38, whereas criminal prosecutions are governed by Rules 19 through 36.

Accordingly, the Municipal Court presides over cases involving Municipal ordinance violations, and not cases that involve violations of state criminal laws. This distinction is evident in the context of the prosecution of traditional speeding violations. If an individual is charged under the state statutes (Sections 304.009 and 304.010 RSMo),

they would be charged with a misdemeanor, prosecuted in State Court, and subject to three points on their license pursuant to Section 302.302 RSMo. Conversely, if an individual is charged under a corresponding municipal ordinance, they would be charged with a municipal ordinance violation, prosecuted in Municipal Court and subject to only two points on their license pursuant to Section 302.302 RSMo. [LF at 26].

This Court in Strode v. Director of Revenue, 724 S.W.2d 245, 246-247 (Mo. banc 1987) when considering a defendant charged with driving with excessive blood alcohol content recognized:

> A person charged with violating a municipal ordinance faces far less serious sanctions than does a person charged with violating §§ 577.010 or 577.012. The state law violations are Class B and Class C misdemeanors respectively for first offenses; subsequent violations range from Class A misdemeanors (prior offenders) to Class D felonies (persistent offenders). § 577.023, RSMo 1986. Municipal ordinance violations are merely quasi-criminal in nature. *Tolen v. Missouri Dept. of Revenue,* 564 S.W.2d 601, 602 (Mo.App.1978). The fact that there are collateral consequences to convictions under § 577.010 and § 577.012 which do not attach to municipal convictions both explains and justifies the legislature's requirement that greater care be taken with warrantless arrests for violations of §§ 577.010 and 577.012 than with municipal violations.

Id. at 247-48.[19]

In recognition of the distinction between the state criminal laws and municipal ordinances, the Missouri General Assembly has enacted Chapter 300 RSMo setting forth a model traffic code which may, at the discretion of local elected officials, be adopted by municipalities. Alternatively, cities can adopt customized ordinances.

In this case, the Trial Court and the Court of Appeals misapplied State v. Ostdiek, 351 S.W.3d 758 (Mo. App. W.D. 2011). That case does not disregard the two separate traffic enforcements regimes under state law and municipal ordinance. Rather, it holds that a state law charge can be issued notwithstanding the existence of a parallel ordinance.

Unlike the state speeding statutes and similar ordinances, the Ordinance at issue in this case establishes a mechanism for liability to be placed upon the **owners** of motor vehicles for the manner in which their vehicles are operated. The two offenses are therefore completely distinct. The fact that both offenses involve vehicles travelling at excessive speeds does not place the two in conflict. Holding the owner of a vehicle liable for the manner in which it is operated is different from holding a vehicle driver

---

[19] The Eastern District in City of St. John v. Brockus, ED99644, 2014 WL 2109108 (Mo. App. E.D. - Decided May 20, 2014), also recognized this distinction between state and municipal prosecutions. A copy of the Opinion is included in the City's Appendix. [Appendix at A55].

responsible for the manner in which he/she operates a vehicle.

1. The Ordinance is valid under established conflict analysis.

Traffic ordinances must be consistent, and not in conflict, with state law. See e.g. Sections 71.010 and 304.120.3 RSMo. "Where its language will permit an ordinance should be construed so as to uphold its validity as against a construction which would invalidate it." Kansas City v. LaRose, 524 S.W.2d 112, 117 (Mo. banc 1975).

Municipalities are authorized to pass ordinances that supplement a state law, but may not pass ordinances that create an irreconcilable conflict. Page Western, Inc. v. Community Fire District of St. Louis County, 636 S.W2d 65, 67 (Mo. banc 1982). "The test for determining if a conflict exists is whether the ordinance permits what the statute prohibits or prohibits what the statute permits," *Id.* (Internal quotations omitted). "Local regulations may exceed state requirements, so long as they do not prohibit what state law permits." Babb v. Missouri Public Service Commission, 414 S.W.3d 64, 74 (Mo. App. W.D. 2013) (quoting Borron v. Farrenkopf, 5 S.W.3d 618, 623 (Mo. App. W.D. 1999). The Ordinance does not prohibit enforcement of the state speeding laws, but instead applies in parallel with them. Nothing in the Ordinance allows a vehicle operator to exceed the posted speed limits in the City or punishes a vehicle operator for complying with those same speed limits. The Ordinance does not permit a prohibited act or prohibit a permitted act.

In City of St. Louis v. Scheer, 139 S.W. 434 (Mo. 1911), the Missouri Supreme Court considered whether a conflict existed between a state statute prescribing that milk

contain not less than 8.75% of solids not fat, and a St. Louis ordinance which required only 8.5%. The Court held:

> Whatever the rule elsewhere, in Missouri the doctrine is firmly established that, so long as an ordinance, within the grant of municipal legislative power, falls within (that is, does not exceed, or is not inconsistent with) the state statute, there is no conflict or inconsistency in the sense making the ordinance void. Contra, if it goes beyond the limits of the municipal grant of power; if it in excess of the standard and limitations of the statute; if it add[s] provisions prohibited by the statute-it is in conflict therewith in the sense making the ordinance void."

Id. at 436.

This Court thereafter discussed its prior ruling in City of St. Louis v. Klausmeier, 112 S.W. 516 (Mo. banc 1908):

> It was held, in effect, that a lower municipal standard for milk was not in the nature of an authorization to sell in violation of the state law. It was merely prohibitory in character. It did not invite or permit a violation of the statute. It was the mere exercise of a proper municipal discretion not to bring the machinery of city courts and city laws into operation to prosecute for violation in excess of the municipal standard. By so doing, the state is

left to enforce its own law at all points and to the full limit . . ."[20]

Scheer at 436.

Similarly in the instant case, the City's Ordinance does not infringe upon the State's right (or ability) to enforce its speeding laws, nor the ability of the City's police officers to charge operators under either the state statutes or its municipal ordinances addressing speeding by a vehicle operator. The Ordinance does not invite vehicle operators to violate state speeding laws. Klausmeier provides an illustration of when an ordinance and a statute conflict, as this Court found a conflict where St. Louis' milk ordinance prescribed a higher minimum solids requirement than the state. This caused a conflict because "a person might sell skimmed milk containing 9.25 percent of solids, as prescribed by the state law, and still be guilty of an offense under the ordinance [which required 10.5 percent solids]." *Id.* at 519.

In Kansas City v. Carlson, 292 S.W.3d 368 (Mo. App. W.D. 2009), the Court considered whether a conflict existed with respect to a municipal ordinance that prohibited smoking in bars and billiard parlors, in light of the state's Indoor Clean Air Act (ICAA), which was enacted "to provide persons with access to smoke-free air in certain areas in certain public places." *Id.* at 372. The ICAA excluded from the definition of public places: "[b]ars, taverns, restaurants that seat less than fifty people,

---

[20] This recognizes the distinction between the State and Municipal Courts, as discussed *supra*.

bowling alleys and billiard parlors, which conspicuously post signs stating that 'Nonsmoking Areas are Unavailable'." *Id.* The Kansas City ordinance prohibited smoking in "all enclosed places of employment within the City" and "all enclosed public places within the City." *Id.* A public place is defined as "any enclosed area to which the public is invited or in which the public is permitted." *Id.* There was no exception in the ordinance for bars or billiard parlors. The Carlson Court found that the ICAA was a "prohibitory statute," and distinguished itself from Klausmeier, *supra*, which involved a statute that set a standard for authorized conduct. *Id.* at 374:

> *Klausmeier* and *Stenson*[21] do not tell us that a state exemption from a statutory prohibition is an authorization. Rather, the statutes at issue in *Klausmeier* and *Stenson* set standards for authorized conduct-the level of solids in milk, the length of motor vehicles on highways. The ordinances at issue in *Klausmeier* and *Stenson* set a different standard and expressly conflicted with the state laws because conduct was affirmatively authorized under the state law, yet illegal under the municipal ordinance.

---

[21] City of St. Louis v. Stenson, 333 S.W.2d 529 (Mo. App. E.D. 1960) (In Stenson, the Court found that an Ordinance prohibiting the use of commercial vehicles on state highways within the City that exceeded thirty-three feet in length, conflicted with a state statute that prohibited the use of commercial vehicles in excess of forty-five feet in length.

Id.

Unlike the state speeding statutes and the City's speeding ordinance, the Ordinance establishes a mechanism for placing responsibility upon the owners of motor vehicles **for the unsafe manner** in which their vehicles are operated. The two offenses are different, and the fact that both involve vehicles travelling at excessive speeds does not place them in conflict. An ordinance holding the owner of a vehicle liable for unsafe operation by another does not conflict with a statute holding a vehicle driver responsible for the manner in which he/she operates the vehicle, as it cannot be reasonably said that the state law "affirmatively authorize[s]" owners to allow their vehicles to be operated in an unsafe manner.

More recently in Smith v. City of St. Louis, *supra*, the Court considered the City of St. Louis' red light camera program, which authorized the use of automated camera technology to enforce the City's existing traffic code. *Id*. at 407-408. The Court stated in Smith that "[b]ecause the enactment of reasonable traffic regulations is a proper exercise of City's police power, and because City is a constitutional charter city possessing broad authority to enact legislation, we also reverse the trial court's judgment in favor of Respondents on their claim that the Ordinance conflicts with state law." *Id*. at 407. It should be noted that the Court in Smith later stated that "[w]hile we question the trial court's decision as to whether the Ordinance conflicts with Missouri statutes, neither party appeals that determination. Accordingly, we do not and cannot address that issue here." *Id*. at 426, fn. 11.

Also, in Unverferth v. City of Florissant, *supra,* the Court considered the City of Florissant's red light camera program which utilizes a rebuttable presumption that the owner of a vehicle was operating a vehicle that violated a red light signal. This Court found that Florissant's ordinance did not conflict with the state laws regarding the running of red lights. *Id.* at 98-99.

Similar to the ordinances in Smith and Unverferth, the instant Ordinance is not in conflict with the state laws addressing speeding by vehicle operators.

2. Edwards was wrongly decided on the issue of conflict with state law.

As noted earlier, subsequent to Smith and Unverferth, the Courts of Appeals have handed down several other decisions on the use of cameras with respect to traffic safety enforcement. In Ballard, *supra*, the Court reviewed the City of Creve Coeur's owner-liability red light ordinance. However, the decision did not address the issue of conflict as it was not raised on appeal. Chronologically, the next opinion issued by the Court of Appeals was that in Edwards, *supra*, wherein the Court reviewed the City of Ellisville's owner-liability red light ordinance. Edwards is the most significant of these seven opinions to the instant appeal in that both the Ellisville ordinance and the Ordinance in the instant case place responsibility upon the owner of the vehicle. Further, the Court of Appeals in this matter relied heavily upon the decision in Edwards, in affirming the Trial Court's finding that there was a conflict between the Ordinance and the applicable state statutes. The Edwards Court opined that because Section 304.281 RSMo, pertaining to

running red lights, regulates the conduct of "drivers and pedestrians," the Ellisville ordinance impermissibly expanded liability for running a red light to owners, thus rendering the ordinance in conflict with the statute. Edwards at 663-664.

The Edwards Court's finding of conflict was based upon a determination that only those expressly required to obey red light signals (pedestrians and drivers) under the statute can be punished for a violation. The Court stated that the ordinance "unmistakably permits what the statute prohibits – prosecution and penalization of persons who are neither drivers nor pedestrians for running a red light." *Id.* At 663-64. The Court continued: "[t]his municipal expansion of liability for running a red light conflicts with the state statute regulating the same subject." *Id.* at 664. In other words, the Court concluded, without any basis, that the statute authorizes owners to allow their vehicles to be operated without regard to traffic laws. But the statute does not prohibit imposition of ownership-based responsibility.

The unfounded conclusion that the statute's requirement that drivers and pedestrians obey traffic signals, prevents vehicle owners from being held responsible for the manner in which their vehicle is operated, with their permission, is inconsistent with Section 304.120.4 RSMo. Section 304.120.4 RSMo, a discussed in detail *supra*, provides in pertinent part that a municipality cannot "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 . . . ."

Implicit in the express exception for leased vehicles, is authorization for municipalities to hold vehicle operators liable for the manner in which their vehicles are parked **or operated**.

Furthermore, in City of St. John v. Brockus, *supra*, the Eastern District found that an ordinance that allowed for primary enforcement[22] of a seatbelt violation, did not conflict with a state statute that prohibited the primary enforcement of the state's seatbelt statute. In doing so the Court relied upon this Court's decision in Strode, *supra*, and held:

> Similar to the statute at issue in Strode, here, the ordinance and state law prohibit the same conduct but differ in language relating to enforcement of the prohibited conduct. Importantly, the clear and unambiguous language of Section 307.178 limits its bar on primary enforcement to its own provisions. The statute states that "[n]o person shall be stopped, inspected, or detained solely to determine compliance **with this subsection**." Section 307.178 (emphasis added). A plain reading of this sentence reflects the legislature's intent to prohibit primary enforcement of Section 307.178. We presume that the legislature did not insert idle verbiage or superfluous language in the statute. Hoffman v. Van Pak Corp., 16 S.W.3d 684, 689

[22] I.e. that a traffic stop can be conducted even if the only suspicion of wrongdoing is the failure of the driver to use his or her seatbelt.

(Mo. App. E.D. 2000). Rather, each word, clause, sentence, and section of the statute must be given meaning. Id. The unambiguous meaning of the phrase "with this subsection" does not allow this Court to apply the prohibition of primary enforcement beyond Section 307.178. While the Legislature has the authority to prohibit municipalities from enforcing their seat belt laws on a primary basis, it has not exercised that authority within Section 307.178 or any other state statute. Simply put, the limiting language of Section 307.178 has no application to traffic stops predicated on municipal ordinances.

In the instant case, both the state statute and the Ordinance are aimed at achieving the same goal, namely reducing the instances of speeding vehicles on roadways. The speeding statute and ordinance do so by punishing drivers, whereas the Ordinance does it by imposing liability on vehicle owners. While the statute and Ordinance differ in their approaches at mitigating the same societal danger, they are not in conflict. In a similar vein, the fact that St. John's ordinance and the state seatbelt statute differ on enforcement, i.e., whether a suspected violation is grounds to conduct a traffic stop, does not render them in conflict with one and other. While a vehicle owner cannot be charged with a misdemeanor under the state statute (or an infraction under the City's corresponding "speeding" ordinance) when they are not identified as the driver, this does not nullify the City's Ordinance at issue in this case.

In Babb, *supra*, the Western District employed the established conflict analysis in

concluding that the City of Clarkson Valley could employ more stringent regulatory standards than those imposed by the state with respect to solar arrays:

> Local regulations may exceed state requirements, so long as they do not prohibit what the state law permits. A city may only enact ordinances in conformity with state law on the same subject. However, while the State may have no concern and therefore no restrictions regarding the use of reflective materials that shine bright sunlight into a neighbor's window, or the way the solar panels may appear from the street or a neighboring property so as to devalue neighboring property, these are clearly areas of great concern to the City and the citizens thereof. These types of restrictions are within the police powers of the City.

Babb at 74 (internal quotations and citations omitted).

Similarly, the state has not yet directly regulated the manner in which vehicle owners allow their vehicles to be operated, and cities are not prohibited from adopting such regulations. Instead, cities have express authority under Section 304.120 RSMo.

D. Chapter 302 RSMo only requires the assessment of points against an *operator* convicted of certain traffic violations, not an *owner* who has been found to have violated a public safety ordinance.

Chapter 302 RSMo pertains to drivers' licenses and includes a statutory scheme for the assessment of points against **operators** of vehicles convicted of certain traffic violations. Points reported pursuant to Chapter 302 are assessed against state operators'

licenses. For instance, Section 302.302.2 RSMo, which pertains to operating a vehicle without a valid license, provides that the director of revenue shall "assess an **operator** points for a conviction." (Emphasis added). As a further example, Section 302.302.5 RSMo provides that "[t]he director of revenue shall put into effect a system for staying the assessment of points against an **operator**" if the violator completes a defensive driving course. (Emphasis added).

The point system created by Chapter 302 RSMo affects the drivers' licenses of those who are convicted of certain traffic violations. It does not require points against an operator's license for breaches of a public safety ordinance by a vehicle owner. As with the City of Creve Coeur in Nottebrok, *supra*, "[t]he City intended to impose liability on a vehicle owner for a violation, not the "operator," unless one of the enumerated exceptions applied." *Id.* at 262. In Unverferth, the Court again stated "that the Creve Coeur ordinance imposed strict liability on vehicle owners for a violation of its ordinance, not drivers. *Id.* We held in Nottebrok that the ordinance was drafted with language that did not prohibit a moving violation committed by a *driver*, but was intended to hold vehicle *owners* liable for vehicles found to be present in an intersection during a steady red signal." Unverferth at 97 (italicized in original). The Court in Edwards incorrectly held that "[b]ecauase the Ordinance allows a driver to commit a moving violation without being assessed points on his or her license, the Ordinance conflicts with Missouri law."

Id. at 665.[23] Neither the ordinance in Edwards nor the Ordinance in this case, allow a "driver" to commit a moving violation while escaping points, rather violators are held responsible as owners for the manner in which those whom they have allowed to use their vehicle operate their vehicle, and drivers remain subject to other ordinances.

The finding of conflict with the point reporting requirements in Damon and Brunner, *supra*, is readily distinguishable as the Kansas City and Arnold ordinances both operated on a rebuttable presumption that the owner of the vehicle was driving, which is not the case in this matter.

E. The City's Ordinance's provisions are separate and severable.

The Ordinance itself does not state that points will not be assessed against the driver's license. So even assuming *arguendo* that a violation of the City's Ordinance should require the assessment of points, nothing in the Ordinance states that points are not to be assessed. Thus, the City's Ordinance would not be in conflict with Section 302.302 RSMo. As with potential issues regarding the notices, discussed *infra*, any concern pertaining to the assessing and reporting of points would not relate to the Ordinance as adopted by the elected officials, but to the implementation of the Ordinance by City employees. [24] Even if the City's employees had failed to properly enforce the

---

23 Similarly, Roeder, *supra*, was incorrectly decided on this issue.

[24] While the Director of Revenue could seek to compel reporting under Section 302.225 RSMo, Mr. Brennan would appear to lack standing to raise this issue, as Mr. Brennan is

Ordinance previously, it does not prevent the City from subsequently enforcing it. See e.g. Kansas City v. Wilhoit, 237 S.W.2d 919, 924 (Mo. App. W.D. 1951) ("[T]he failure of municipal authorities to enforce a zoning ordinance against some violators does not preclude its enforcement against others. Nor does the fact that city officials fail to enforce the zoning ordinance against a violator estop the city from subsequently enforcing it against him." – internal citations omitted).

Further, even if this Court should find that the City's Ordinance somehow prohibits the assessment of points in a manner contrary to state law, which it does not, each section and subsection of the Ordinance is separate and severable,[25] such that any such provision could be invalidated by the Court without invalidating the entire ordinance. Where one provision of an ordinance is found to be invalid, a court should not strike down the remainder of the ordinance as void "unless it may be judicially found that the City Council would not have passed the entire enactment if it had known of such invalidity." Pearson v. City of Washington, 439 S.W.2d 756, 762 (Mo. 1969). The City's Ordinance expressly states that its sections and subsections are to be separate and

---

essentially claiming that he should be facing the possibility of stricter sanctions for allegedly violating the City's Ordinance. "Generally, only those adversely affected by a statute have standing to challenge the constitutionality of a statute." State v. Young, 362 S.W.3d 386, 396 (Mo. banc 2012).

[25] [L.F. at 25].

severable. [L.F. at 25].[26] Thus, Mr. Brennan's possible conviction of the infraction would not be invalid for failing to require the assessment of points.

---

26 The Eastern District in Roeder, *supra*, refused to sever the City of St. Peters' red light camera ordinance, despite an express provision allowing severance, for two reasons: (1) the Court did not believe Arnold would have adopted the ordinance if points were required to be assessed; and (2) severability only applies to ordinances that are found to be unconstitutional in part, not ordinances that conflict with state law. The City's Ordinance in this case contains no express provision, unlike Arnold's ordinance, that points are not to be assessed; and Courts may indeed sever ordinance provisions that are found to be in conflict with state law. *See* Pearson, *supra*.

II. The Trial Court erred in sustaining Mr. Brennan's motion to dismiss the City's prosecution for a violation of public safety on roadways, because the Ordinance did not violate his due process rights, in that: (1) he waived notice with respect to his right to a hearing; (2) the Ordinance is civil, not criminal in nature, and therefore does not require the heightened due process protections afforded in state criminal matters; (3) the City had probable cause to issue the initial Notice of Violation to Mr. Brennan as the record owner of the vehicle; and (4) the Ordinance does not shift the burden of proof to Mr. Brennan.

A. Standard of Review.

This Court reviews the dismissal of an indictment or information *de novo* when it raises purely questions of law. State v. Smothers, *supra*, at 632. ("When the facts are uncontested and the only issue is a matter of statutory construction, we review the circuit court's dismissal of a felony complaint under a *de novo* standard.") "Statutory construction is a question of law, not fact; when the lower court rules on a question of law, it is not a matter of discretion." State v. Plastec, Inc., *supra*, at 154. "The judgment of the trial court is afforded no deference when the law has been erroneously declared or applied." *Id*. at 154-155.

The instant case considers whether or not the Ordinance and the prosecution against Mr. Brennan are valid under Missouri law, which are purely questions of law.

B. Mr. Brennan waived notice with respect to his right to a hearing.

Mr. Brennan argued in his motion to dismiss that the notice he received was defective. "Under both the federal and state constitutions, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Nottebrok at 257. Mr. Brennan has certainly had a meaningful opportunity to be heard in this case. After receiving a Notice of Violation, Mr. Brennan's Counsel entered his appearance and had the case certified for a jury trial. [L.F. at 4 & 6]. In certifying the matter for a jury trial, Mr. Brennan waived any question as to whether he had been deprived of adequate notice under the State and Federal Constitutions. "To preserve a constitutional question for review in this Court, it must be raised at the earliest possible opportunity; the relevant sections of the Constitution must be specified; the point must be preserved in the motion for new trial, if any; and, it must be adequately covered in the briefs." St. Louis County. v. Prestige Travel, Inc., 344 S.W.3d 708, 712-13 (Mo. banc 2011) (quoting In re. H.L.L., 179 S.W.3d 894, 897 (Mo. banc 2005).

However, even if this Court should elect to review the notices issued by the City, and find that the City's notices are inadequate; such a determination does not affect the validity of the Ordinance, but instead concerns the City's manner of administration of its Ordinance. See Kansas City v. Wilhoit, *supra*. If deemed appropriate by this Court, the City will of course revise its notices. However, any such revision to the notices would not require an amendment to the Ordinance, because the Ordinance remains valid.

C. The Ordinance is Civil, not Criminal in nature, and therefore not subject to heightened due process standards.

Courts in Missouri consider that "[p]rosecutions for violation of a city ordinance are in this state regarded as a civil action with quasi criminal aspects." City of Independence v. Peterson, 550 S.W.2d 860, 862 (Mo. App. W.D. 1977); City of Webster Groves v. Erickson, 789 S.W.2d 824, 826 (Mo. App. E.D. 1990) ("Municipal ordinance violations are said to be quasi-criminal in nature" - Internal quotations omitted); and Jordan v. City of Kansas City, 972 S.W.2d 319, 324 (Mo. App. W.D. 1998) ("A violation of a municipal ordinance is a civil proceeding, not a criminal one." – citing Frech v. City of Columbia, 693 S.W.2d 813, 814 (Mo. banc 1985)).

The Court in Nottebrok, *supra*, held that:

> An automated traffic ordinance is considered to be a civil ordinance where (1) the ordinance includes express language indicating a municipality's intention to consider a violation of the ordinance to be civil in nature; (2) the ordinance imposes a sanction that does not involve an affirmative disability or restraint on the individual but merely imposes a fine without assessing points against an individual's driver's license; (3) the civil, non-point penalty for violating the ordinance is assessed without regard to the individual's knowledge or state of mind at the time of the violation; (4) the presence of the deterrent purpose of the sanction may serve civil as well as punitive goals; (5) the behavior to which the sanction applies is not already

a crime; (6) the ordinance is rationally connected to the broader, legitimate non-punitive purpose of promoting public safety; and (7) the sanction imposed by the ordinance does not appear excessive in relation to the ordinance's purpose of promoting public safety.

Id. at 257-258.

"These factors do not uniformly weigh in favor of finding an ordinance is criminal or civil in nature, but the balance of factors weigh in favor of finding a civil or criminal nature." Brunner at 232. The Trial Court pointed to the fifth factor in finding that the Ordinance was impermissible as a civil infraction, stating that "[t]he statutes as set out in Chapter 304 should apply to all speeding cases, but the ordinance specifically exempts the violation from criminal prosecution and consequences and instead imposes a civil fine." [L.F. at 38].

However, as discussed *supra*, the Ordinance does not punish the operator for statutory misdemeanor "speeding" or for the parallel municipal ordinance violation of speeding, but instead places liability on the owner of the motor vehicle for a public safety violation. Like the Creve Coeur ordinance, the Ordinance in this case is civil under the Nottebrok factors, and Mr. Brennan received the same level of due process the Court approved in Nottebrok. Accordingly, a prosecution under the Ordinance does not require the heightened procedural protections afforded by the Fifth, Sixth and Eighth Amendments to the U.S. Constitution. Nottebrok at 257.

In Brunner, the Eastern District applied the Nottebrok factors and found the red

light ordinance to be criminal in nature, in part because: (1) there was no expression of intent by the legislative body for the violation to be civil in nature; and (2) the ordinance carried with it the threat of imprisonment. In the instant case, the City expressed an intent for the violation to be civil, in that the fine section refers to a "civil fine," and the same section expressly precludes the sanction of imprisonment. Section 395.010(E) [L.F. at 24]. Further, unlike in Smith and Unverferth, the City's notice to Mr. Brennan did not contain the language condemned by the Court of Appeals which stated that it is an alleged violator's "best interest to pay this immediately." [L.F. 19-20].

The notice to Mr. Brennan in this case afforded an opportunity to resolve this matter in a way that avoided a court appearance, consistent with the decision in Hertz (at 453). Mr. Brennan has waived any requirement for additional notice.

D. The City is not required to establish that Mr. Brennan was operating the vehicle at the time the violation occurred.

Mr. Brennan complained in his motion to dismiss that the City did not have probable cause to believe that he was driving his vehicle. [L.F. at 7]. The City's Ordinance plainly states that a violation "is based upon ownership, without regard to whether the Owner was operating the motor vehicle at the time of the infraction . . ." Accordingly, the City did not need to have probable cause to believe that Mr. Brennan was operating the vehicle, but rather only that based on public records he was the owner of the vehicle (a fact he admits). [L.F. at 6].

E. The City has not impermissibly shifted the burden of proof.

The City accepts that it has the burden of proof to establish beyond a reasonable doubt that the defendant committed the charged infraction. State v. Howard, 540 S.W.2d 86, 88 (Mo. banc 1976) ("The burden of proof is on the State throughout the trial to establish by evidence the guilt of the accused beyond a reasonable doubt"). See also City of St. Louis v. Rollins, 32 S.W.3d 187, 189 (Mo. App. E.D. 2000). Therefore, the City must prove, and it cannot shift the burden to the defendant, that: (1) the defendant owned the vehicle; and (2) the defendant's vehicle exceeded the posted speed limit. The burden of establishing either of those elements has not been shifted to Mr. Brennan. As acknowledged in Hertz, proof of ownership includes a rebuttable presumption of consent to operation. Hertz at 452.

Mr. Brennan erroneously argued in his motion to dismiss that the opportunity the Ordinance provides to demonstrate the applicability of a justification defense to the charged infraction renders the Ordinance invalid. The Ordinance provides an opportunity for vehicle owners to submit affidavits to inform the prosecutor as to why the violations should be excused. These include justifications such as the vehicle was stolen or that ownership had been transferred prior to the date of the violation. [L.F. at 22-23]. These justifications relate to the City's authorized presumption in the Ordinance that the vehicle was being operated with the owner's permission at the time the offense occurred.

"Where a statute or ordinance defines and creates an[] offense and contains a proviso exempting a class therein from its operation, it is not necessary for the

prosecution to negative the proviso." City of Brentwood v. Nalley, 208 S.W.2d 838, 840 (Mo. App. E.D. 1948). "The applicability of the exemption contained in the proviso is an affirmative defense, and the burden of proving facts which will invoke the exception contained in the proviso is upon the party accused." *Id.* The state legislature similarly determined[27] in creating a statutory justification defense, that such a defense is an affirmative defense, therefore requiring a defendant to plead and prove its applicability.

The City, in allowing defendants to submit an affidavit stating a justification defense, has created a mechanism consistent with Hertz to allow for an expedient resolution for those cases where the vehicle's otherwise improper speed was justified, or where the owner is excused from liability due to the vehicle having been stolen or the applicability of another excuse set forth in the Ordinance. The City is **not** required to negate the existence of a justification in each case, if the issue is not interjected by the defendant. The City's Ordinance, therefore, does not improperly shift the burden of proof to a defendant charged with violating the Ordinance.

The Court in City of Knoxville v. Brown, 284 S.W.3d 330 (Tn. App. 2008), rejected a "burden of proof" argument similar to the one made by Mr. Brennan in his motion to dismiss. In response to the defendant's improper description of the ordinance, the Court in City of Knoxville stated as follows:

"We next address Defendant's arguments that City Code §17-210 violates Defendant's due process rights. Defendant argues that City Code §17-210

[27] Section 563.026 RSMo

> essentially creates an impermissible rebuttable presumption of guilt against the owner of a vehicle, which can be rebutted by the owner setting forth who actually was in control of the vehicle at the time the vehicle was used to run a red light. We disagree with this characterization. What Defendant fails to acknowledge is that City Code §17-210 makes the owner of the vehicle responsible for a red light violation, **regardless of who was driving the vehicle**. The City Code merely permits the responsible vehicle owner to shift responsibility for the violation to the actual driver of the vehicle in certain circumstances. This does not mean that the owner of the vehicle was not in violation of the City Code. Since the City at all times must establish the necessary elements of its case by the requisite burden of proof, we reject Defendant's argument that City Code §17-210 violates his due process rights."

Id. at 338-339 (Emphasis added).

Missouri law recognizes that "[c]riminal statutes which do not expressly provide for a mental state may be enforced as strict liability offenses where they are public welfare offenses, the penalties involved are small, and the conviction does no great damage to the offender's reputation." State v. Marshall, *supra*, at 552. In Marshall, the Court, considered Section 578.009.1 RSMo (1986) which stated: "[a] person is guilty of animal neglect when he has custody **or ownership** or both of an animal and fails to provide adequate care or adequate control." *Id*. at 551 (emphasis added). The court

concluded that the state was not required to prove intent or "guilty knowledge" as "[t]he penalty is relatively small, possible imprisonment of not more than 15 days and or a fine not to exceed $300." *Id.* at 552. In accordance with the Court's decision in Marshall, the Ordinance, which is civil and not criminal, constitutes a permissible imposition of owner liability. This Court in City of St. Louis v. Cook, 221 S.W.2d 468, 469 (Mo. 1949) recognized that "[s]tatutes or ordinances providing a rule of evidence, in effect, that a shown fact may support an inference of the ultimate or main fact to be proved are well within the settled power of the legislative body; and such legislative provisions do not violate provisions of the federal or state constitutions." Hertz as discussed herein is consistent with Cook, in that it authorizes use of a rebuttable presumption with respect to the owner's consent to the use of their vehicle by the operator.

In Damon, the Western District cited to Sandstrom v. Montana, 442 U.S. 510, 523 (1979) for the notion that "a rebuttable mandatory presumption is unconstitutional when the presumed fact is an element of the crime charged because it violates the constitutional presumption of innocence as to every element of a crime and because it invades the factfinding function of the jury." Damon at 191. This is distinguishable from the instant case, because the violation is not a "crime," it is an infraction under a municipal ordinance. Similarly, the Court in Brunner erroneously equated an ordinance violation as a crime. *Id.* at 230-231

CONCLUSION

The City's Ordinance establishes a public safety infraction by a vehicle owner as authorized by Section 304.120 RSMo and does not conflict with the state statutes pertaining to speeding by vehicle operators and the imposition of points. Even if this Court should find that the initial notice received by Mr. Brennan was somehow deficient despite his waiver of further notice, or that points should be assessed for a violation, this Court should still confirm the validity of the Ordinance.

Based upon the foregoing, the City respectfully requests that this Court reverse the Trial Court's dismissal of this case.

Respectfully submitted,

CURTIS, HEINZ, GARRETT &
O'KEEFE, P.C.

/s/Kenneth J. Heinz
Kenneth J. Heinz, #24242
Carl J. Lumley, #32869
Edward J. Sluys, #60471
130 South Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725-8788
(314) 725-8789 (Fax)

Attorneys for Appellant City of Moline Acres, Missouri

Certificate of Compliance

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Appellant's Brief includes the information required by Rule 55.03.
2. The Appellant's Brief complies with the limitations contained in Rule 84.06.
3. The Appellant's Brief, excluding cover page, signature blocks, certificate of compliance, and certificate of service, contains 16,253 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Appellant's Brief was prepared.

/s/ *Kenneth J. Heinz*

Certificate of Service

I hereby certify that the Brief and Appendix thereto were was sent through the Court's electronic filing system to

the following attorneys of record this 26th day of June, 2014:

W. Bevis Shock
7777 Bonhomme Ave., Ste. 1300
St. Louis, MO 63105

and

Hugh A. Eastwood,
7777 Bonhomme Ave., Ste. 1603
St. Louis, MO 63105

Attorneys for Respondent/Defendant.

/s/ Kenneth J. Heinz