IN THE SUPREME COURT OF MISSOURI

NO. SC91640

ST. LOUIS ASSOCIATION OF REALTORS,
APPELLANT,

v.

CITY OF FERGUSON,
RESPONDENT.

On Appeal From The Circuit Court of St. Louis County, Missouri
The Honorable Mary Elizabeth Ott, Circuit Judge, Division 31
Case No. 07CC-003604

SUBSTITUTE BRIEF OF APPELLANT

DEVEREUX MURPHY, LLC

STEPHEN C. MURPHY #23887
JOSEPH F. DEVEREUX, III, #62016
190 Carondelet Plaza, Suite 1100
ST. Louis, Missouri 63105
Telephone: (314) 721-1516
Facsimile: (314) 721-4434
smurphy@devereuxmurphy.com
jfdevereuxiii@devereuxmurphy.com

Attorneys for Appellant
St. Louis Association of Realtors

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State ex rel. Missouri Health Care Ass'n v. Missouri Health Facilities Review Committee, 768 S.W.2d 559 (Mo. App. 1988);

Warth v. Seldin, 422 U.S. 490 (1975);

JURISDICTIONAL STATEMENT

This case challenges the validity of a Missouri municipal ordinance on statutory and constitutional grounds. It is not within the specific, limited jurisdiction of the Supreme Court of Missouri, and fell within the general appellate jurisdiction of the Missouri Court of Appeals. On March 15, 2011 a two-to-one majority of the Court of Appeals held that Appellant lacked standing, and upheld the decision of the trial court. The dissenting judge filed a certification under Rule 83.03, and on April 22, 2011 the Supreme Court of Missouri accepted jurisdiction.

POINTS RELIED ON

The trial court erred in finding that Appellant lacks standing, because Appellant met all of the requirements of associational standing.

State ex rel. Missouri Health Care Ass'n v. Missouri Health Facilities Review Committee, 768 S.W.2d 559 (Mo. App. 1988);

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977);

Real Estate Board of Metropolitan St. Louis v. City of Jennings, 808 S.W.2d 7 (Mo. App. 1991);

Humane Society of United States v. Hodel, 840 F.2d 45 (D.C. App. 1988);

STATEMENT OF FACTS

Appellant, St. Louis Association of Realtors ("SLAR"), is a voluntary trade association organized as a Missouri not-for-profit corporation. (Tr. 32, 45). SLAR is affiliated with the Missouri Association of Realtors and the National Association of Realtors. (Tr. 37-8). SLAR challenged the validity of Ordinance No. 2006-3257, as amended by Ordinance No. 2006-3270 (the "Ordinance") of Respondent City of Ferguson, on statutory and constitutional grounds. The City of Ferguson is a constitutional charter city. The case was tried without a jury on December 17, 2008. The trial raised two basic issues: first, the right of SLAR to bring this challenge; and second, SLAR's specific claims that the Ordinance is an invalid exercise of authority by the City of Ferguson, based on the lack of authority in its charter, and various constitutional and statutory deficiencies. On January 5, 2010, almost thirteen months later, the trial judge dismissed the case for lack of standing and did not reach the merits. (L.F.46).

1. The Ordinance

Ordinance No. 2006-3257 (P's Exh. 2) and Ordinance No. 2006-3270 (P's Exh. 4) amended Title 7, Article VII and Title 42, Article II, Sections 42-57 through 42-62 of the Municipal Code of Ferguson. These ordinances created a licensing and regulatory structure for owners of residential real property in Ferguson who want to lease or rent that property.

Title 7 of the Municipal Code of Ferguson, entitled "Buildings and Building Regulations," deals generally with minimum construction and maintenance requirements for improved real property in the city. Specifically, it addresses permitting for electrical,

plumbing, mechanical, grading work and the like, establishes minimum codes for housing, establishes standards for the determination and demolition of dangerous and vacated structures, and addresses stormwater management.

The Ordinance amends certain portions of the city's minimum housing standards established in Title 7, and adds the provisions at issue here. Specifically, Section 42-57 of the Ordinance requires a municipal license for the leasing or occupancy of residential rental property: "No person shall permit the offer for rent, lease, or occupancy [of] any residential rental property . . . without a license." (P's Exh. 2, at 7) Further, no one can permit the "continued occupancy" of such property without maintaining a license (P's Exh. 2, at 7), and no occupancy permit will be issued unless the landlord has a license to rent. (P's Exh. 2, at 8). It is unlawful for a landlord to "continue to lease or accept rental payments for premises when a . . . . license has been suspended or revoked" (P's Exh. 2, at 8), and unlawful "for any occupant to inhabit or pay rent for premises" for which the license has been suspended or revoked. (P's Exh. 2, at 8). Furthermore, a rental license can be revoked or suspended "if there is a delinquency in any taxes, license fees, or other amounts due the city" (P's Exh. 2, at 8); non-compliance on even one rental unit applies to all rental units of the same owner. (P's Exh. 2, at 10).

The "business of renting and leasing residential rental property" is divided into two classifications: "responsible," for those who have "met all of the requirements for such license, have maintained their residential rental property in good condition and free of nuisance;" and "provisional," for those who "may not" meet those requirements and

who "may require additional monitoring or inspections, or who, because of the actions or conduct by the tenants, may cause a nuisance to exist." (P's Exh. 2, at 11).

Licenses are issued for a period of one year and require an annual fee. (P's Exh. 2, at 11). An annual interior and exterior inspection of the premises by a certified ASHI inspector is required for a "provisional" landlord. (P's Exh. 2, at 11). "Provisional" landlords must submit an affidavit "stating whether any tenant over the age of eighteen is registered as a sex offender pursuant to the law of any state or should be registered as a sex offender pursuant to the laws of any state." (P's Exh. 2, at 11). All licensees must "hire and maintain a local manager for each dwelling or dwelling units. Each such manager must reside within twenty-five miles of the residential rental property that he or she manages." (P's Exh. 2, at 10).

Licenses may be reclassified by the City, from "responsible" to "provisional," on the following grounds:

> 1. Serious violations or repeated violations (whether minor or serious) of the City's property maintenance, housing and building codes so as to constitute a nuisance or a danger to the public health, safety or welfare; or
>
> 2. Unreasonable conduct by the Owner or Tenant on or about the property or immediately–surrounding areas which may, taken alone or taken with the other conduct, constitutes [sic] a nuisance to neighbors or the neighborhood; or
>
> 3. Criminal conduct (either under state law or ordinance) by the Owner or Tenants on or about the property or immediately–surrounding areas; or

4. Repeated violations of the requirements for occupancy of residential structures; or

5. False statements made in the application for license or any required inspection report; or

6. Failure to pay appropriate fees and/or fines for violations.

(P's Exh. 2, at 13). Licenses may be suspended or revoked on the following grounds:

1. Repeated serious violations of the City's property maintenance, housing and building codes so as to constitute a nuisance or a danger to the public health, safety or welfare; or

2. Outrageous conduct by the Owner or Tenants on or about the property or immediately–surrounding areas which may, taken alone or taken with other conduct, constitutes [sic] a nuisance to neighbors or the neighborhood or a danger to the public health, safety or welfare; or

3. More than one incident involving criminal conduct (either under state law or ordinance) by the Owner or Tenants on or about the property or immediately–surrounding areas; or

4. Repeated violations of the requirements of occupancy of residential structures; or

5. False statements made in the application for license or any required inspection report about any matter which affects the eligibility for such license; or

6. Failure to pay appropriate fees and/or fines for violations; or

7. Failure to comply with conditions of a provisional license.

P's Exh. 2, at 14.

2. Ferguson's Charter

Section 2.1 of the City of Ferguson's charter (P's Exh. 1) provides as follows: "The city shall have all powers which the General Assembly of the State of Missouri has authority to confer upon any city, provided such powers are consistent with the Constitution of this state and are not limited or denied by this charter or by statute. The City shall, in addition to its home rule powers, have all powers conferred by law." (P's Exh. 1). Section 11.6 of the charter then specifically differentiates between the power to impose license taxes and the power to "license, tax and regulate" businesses, and thereby does "limit or deny" the authority granted to the city's government:

SECTION 11.6 OBJECTS OF LICENSING, TAXATION AND REGULATION

> The council shall have power by ordinance to license, tax and regulate all business services, occupations, professionals, vocations, activities or things of any nature which are now or may hereafter be enumerated by state statute for any statutory, special charter or constitutional charter cities, but the foregoing shall not be taken to affect or impair the general power of the city to impose license taxes upon any business, vocation, pursuit or calling, or any class or classes thereof now or hereafter not prohibited by law. Any ordinance imposing a license tax may divide and

> classify any subject of taxation and may impose a different tax upon each class, but the tax shall be uniform for each class. All licenses shall be issued for such periods as may be provided by ordinance, but no such period shall exceed one year.

There is no other authority in the charter that might apply specifically to the regulation of residential landlords.

3. Standing

SLAR does not own real estate in Ferguson or pay taxes there. Some individual members of SLAR do own residential real estate in Ferguson, and pay taxes. SLAR's standing to challenge the Ordinance is based on its representational status, on behalf of its members. SLAR's evidence with regard to standing consisted of the following:

(a) Bylaws. Article II of SLAR's bylaws (P's Exh. 5) sets out six basic objectives:

> **Section 1.** To unite those engaged in the recognized branches of the real estate profession for the purpose of exerting a beneficial influence upon the profession and related interests.
>
> **Section 2.** To promote and maintain high standards of conduct in the real estate profession as expressed in the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS®.

Section 3. To provide a unified medium for real estate owners and those engaged in the real estate profession whereby their interests may be safeguarded and advanced.

Section 4. To further the interests of home and other real property ownership.

Section 5. To unite those engaged in the real estate profession in this community with the Missouri Association of REALTORS® and the NATIONAL ASSOCIATION OF REALTORS®, thereby furthering their own objectives throughout the state and nation and obtaining the benefits and privileges of membership therein.

Section 6. To designate, for the benefit of the public, individuals authorized to use the terms REALTOR®, REALTORS®, and REALTORS®-ASSOCIATE as licensed, prescribed, and controlled by the NATIONAL ASSOCIATION OF REALTORS®.

Article XIII, Section 2 of the Bylaws lists thirteen authorized standing committees, including a "Legislative Committee." SLAR has various categories of membership, including real estate brokers and salespersons, appraisers, lenders, title companies, and various so-called "affiliate members."

Membership in SLAR as a "Realtor" consists of "[i]ndividuals who as sole proprietors, partners, corporate officers, or branch office managers, are engaged actively in the real estate profession including buying, selling, exchanging, renting or leasing, managing, appraising for others for compensation, counseling building, developing or subdividing real estate." (P's Exh. 5 § IV (1)(a) (1). Other classifications of membership

in SLAR include "Realtor-Associates," who are affiliated with a Realtor, and "Affiliate Members," who "shall be real estate owners and other individuals or firms who, while not engaged in the real estate profession . . . have interests requiring information concerning real estate, and are in sympathy with the objectives of the Association." (P's Exh. 5, § IV (1) (d)).

(b) Vision Statement. SLAR adopted a Vision Statement (P's Exh. 3) a number of years ago, as follows: "The St. Louis Association of Realtors strives to enhance the professionalism and success of REALTORS and advocates private property rights."

(c) Testimony of Meggie Deverux. Meggie Devereux testified as SLAR's Government Affairs Director. (Tr. 31.) She described SLAR's organization and committee structure, and specifically identified the following activities: "We have a legislative department where it's myself and one other person, where we lobby local municipal governments, St. Louis County, the City of St. Louis. We also deal with a Political Action Committee, our Issues Mobilization Committee, in all, we have about five committees that deal with diversity issues, urban affairs issues, legislative, legal issues. We also do fundraising events, things of that nature." (Tr. 31.) All of these activities are involved in different ways in trying to monitor and influence legislation and proposed legislation that affects SLAR's members, specifically with regard to ownership rights. Ms. Devereux's responsibilities included attendance at municipal meetings, communication with municipal employees, and correspondence and lobbying efforts designed to promote the interests of SLAR's members. (Tr. 32-33.)

Ms. Devereux identified three members of SLAR who own residential rental property in Ferguson, and made it clear they are not the only ones: "There are additional members who own property in the City of Ferguson as rental property" (Tr. 44.); "[t]here are additional members that we made contact with who weren't willing to participate in the lawsuit. So, yes, there are additional members." (Tr. 46.) SLAR does not maintain records of the individual property ownership of its members. (Tr. 44.)

SLAR has initiated litigation on a number of occasions challenging ordinances, or defending members citied for violation of what SLAR believes to be objectionable ordinances. Some cases are brought directly in SLAR's name, others in the name of individuals directly affected by the ordinance. (Tr. 52.) Some litigation involves real estate brokerage activities, such as restrictions on the use of signs and other advertising, while other cases involve property rights, such as University City's requirement that vacant lots be registered with the city (Tr. 34) and Bellefontaine Neighbors' requirement of periodic home inspections. Litigation is recommended by the appropriate SLAR committee, authorized by SLAR's board of directors, and conducted by use of SLAR's attorneys at SLAR's expense. In some cases, litigation is supported financially by the state and federal associations. The challenge of the Ferguson Ordinance was authorized in this fashion. (P's Exh. 7, Tr. 34-5).

(d) Testimony of Dennis Norman. Dennis Norman testified that he is a past president of SLAR and currently a member of the Issues Mobilization Committee. (Tr. 51.). He identified earlier litigation of SLAR in challenging certain ordinances. One of these cases involved the authority of the City of St. Louis to require brokers to maintain a

business license (Tr. 54), and another the attempted licensing of landlords in Jennings (Tr. 56). When asked whether SLAR's prior litigation "always involve brokerage rights," he answered: "No . . . . In fact, most of them I'm familiar with are usually over private property rights." (Tr. 54.) He described the procedural history by which challenging the Ferguson ordinance was approved by SLAR's committee structure and its board of directors. (Tr. 53.) He also identified specific sections of the Ferguson Ordinance that are objectionable to SLAR, and identified three current members SLAR who also own residential rental property in Ferguson (Tr. 54.)

(e) Testimony of Glen Sperry, John Williams, and James Crews. Three witnesses identified themselves as both members of SLAR and as having an ownership interest, either individually or through an interest in a limited liability company, in rental residential real estate in Ferguson. Mr. Sperry identified himself as a licensed real estate agent and member of SLAR for 22 or 23 years, who has owned a residence at No. 8 Verdale Court in Ferguson for four or five years. (Tr. 23.) He owns the property as a rental and pays tax on it, and has obtained a rental license from the City. (Tr. 24.) Mr. Crews identified himself as a licensed real estate agent who has belonged to SLAR for over fifteen years. (Tr. 59.) He is an owner of a limited liability company which owns residential rental properties in Ferguson, on which he pays taxes. (Tr. 60.) He has obtained a rental license from Ferguson (Tr. 71.) Mr. Williams testified that he has been a member of SLAR since 1983, and that he owns a residential rental property at No. 19 Paul in Ferguson. (Tr. 60-61.) He also has a rental license. (Tr. 77.)

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT APPELLANT LACKS STANDING, BECAUSE APPELLANT MET ALL OF THE REQUIREMENTS OF ASSOCIATIONAL STANDING.

Standing is the "requisite interest of an adversary in the subject of the suit as an antecedent to the right of relief." State ex re. Missouri Health Care Ass'n v. Missouri Health Facilities Review Committee, 768 S.W.2d 559, 561 (Mo. App. 1988) (hereafter "MHCA"), citing State ex rel. Schneider v. Stewart, 575 S.W.2d 904, 909 (Mo. App. 1978). In general, a litigant must have: (1) suffered an injury, or "invasion of a legally protected interest which is concrete and particularized and actual or imminent;" (2) there must be a causal connection between the injury and conduct complained of; and (3) there must be a likelihood that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1972).

The United States Supreme Court has recognized that an association has standing to bring suit on behalf of its members when three conditions are satisfied: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 344 (1977). The Missouri Supreme Court has adopted the same test. Missouri Health Care Ass'n v. Attorney General, 953 S.W.2d 617, 620 (Mo. 1997) (en banc); Missouri

Outdoor Advertising Ass'n v. Missouri State Highways & Transportation Comm'n, 826 S.W.2d 342, 344 (Mo. 1992) (en banc). SLAR's right as an association to bring a declaratory judgment action against a municipal ordinance has previously been upheld. Real Estate Board of Metropolitan St. Louis v. City of Jennings, 808 S.W.2d 7 (Mo. App. 1991).

The trial court held that none of the three associational standing requirements was satisfied. First, the court held that the "individual members [of SLAR] are not directly affected by the fee and licensing structure set out in the Ordinance at issue herein." Because the testimony only identified three of approximately 9,000 members as actually owning property in the city of Ferguson "[t]herefore the vast majority of SLAR members are not affected either directly or indirectly by the Ordinances in the City of Ferguson." (L.F. 48.)

This finding misreads the literal wording and purpose of the representational standing cases. First, there was no evidence that there were only three SLAR members who own property in Ferguson – there were simply three who testified, without any indication of how many others there might be. Second, it is not necessary for an association to show that all, or even some specific percentage, of the association's members have the individual capacity to sue. If that were true, showing that a majority of SLAR members own rental property in Ferguson would not suffice.

In Warth v. Seldin, 422 U.S. 490 (1975), the Supreme Court addressed the issue: "Even in the absence of injury to itself, an association may have standing solely as the representative of its members . . . .The association must allege that its members, or any

one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." Id. at 511 (emphasis added). The Warth case was quoted in Citizens for Rural Preservation, Inc. v. Robinette, 648 S.W.2d 117, 133-34 (Mo. App. 1982).

In the MHCA case, supra, an association of health care providers intervened to oppose the issuance of a certificate of need to Barnes Hospital by a state licensing authority. Standing to challenge the issuance required that a facility be located within fifteen miles of the proposed facility. The court stated: "A voluntary membership association . . . may have standing in one of two ways. An association may have standing in its derivative capacity by seeking judicial relief from injuries to its own rights, or in its representative capacity by seeking to vindicate whatever rights its members may enjoy. . . In its representative capacity, an association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action . . . that would make out a justiciable case had the members themselves brought suit." Id. at 561 (emphasis added), quoting Citizens for Rural Preservation, supra. Clearly, few of the member institutions in a statewide hospital association met that criterion, but the court found that the association had representational standing: "Some of the members of MHCA do have standing to sue in their own right . . . . Therefore, the first requirement is met." Id. at 562, citing the Robinette case.

The trial court here is apparently imposing a standard that Missouri's appellate courts do not recognize: "The evidence at trial indicated that the association does not keep track of which of its members are property owners but of the nearly 9,000 members

only three would be named as actually owning property in the City of Ferguson. Therefore the vast majority of SLAR members are not affected either directly or indirectly by the Ordinance in the City of Ferguson." The issue is not what records SLAR keeps or does not keep with regard to property ownership in over one hundred municipalities in the St. Louis metropolitan area, by over 9,000 members in SLAR, nor how many affected members it can locate. The issue is whether a member of SLAR who is also an owner of rental real estate in Ferguson has a legally protected interest in opposing the municipal licensing and regulation of that ownership and could bring that challenge by himself; the testimony of Glen Sperry alone established that. It would serve no purpose to produce numerous witnesses to indentify the same individual right to bring the suit – indeed, one purpose of recognizing the representational status of an association is "to minimize the possibility of multiple actions by individual members." MHCA, at 562.

The three SLAR members who testified clearly had standing individually to challenge the Ordinance. As owners of rental property they are directly impacted by the various requirements of the Ordinance – that is, they must apply and pay for an annual license, permit the inspections of the exterior and interior of their properties by code compliance officials, hire a property manager who lives within twenty five miles, and so on. The "injury complained of" is the burden and expense these obligations impose, and it is, of course, "causally connected" to the Ordinance which created the obligations. The "injury" will be redressed by a favorable decision by virtue of invalidating the ordinance. It is not necessary for an injury to have occurred – for example, the eviction of a tenant

for failure of one of these landlords to obtain the license - because one of the main purposes of declaratory relief "is to resolve conflicts in legal rights before a loss occurs." Ferguson Police Officers' Ass'n v. City of Ferguson, 670 S.W.2d 921, 925 (Mo. App. 1984). See Holland Furance Co. v. City of Chaffee, 279 S.W.2d 63 (Mo. App. 1955) (declaratory judgment action appropriate to challenge invalid levy of tax on plumbers and gas fitters); Northgate Apartments, L.P. v. City of North Kansas City, 45 S.W.3d 475 (Mo. App. 2001) (declaratory judgment action appropriate to challenge ordinance authorizing condemnation, at a future date). See also State ex rel. Whiteco Industries, Inc. v. Bowers, 965 S.W.2d 203, 206-7 (Mo. App. 1998).

The trial court also assumes that the Ferguson Ordinance has no "indirect" impact on SLAR's members. The work of the various committees identified by SLAR's witnesses is based in part on establishing precedents that influence the consideration of similar legislation by other, municipalities, and would affect many other members. For example, the impact of the City of Dellwood v. Twyford, 912 S.W.2d 58 (Mo. 1995) (en banc), a case defended by SLAR, was not just to prevent the small municipality of Dellwood from requiring a registration fee as a pre-condition for putting up a "for sale" sign, but to establish a precedent for use in discussions (and, if unsuccessful, in future litigation) with numerous other municipalities.

Second, the trial court concluded that "the interests that this lawsuit seeks to protect are not germane to the purpose of the St. Louis Association of Realtors . . . . The Associations [sic] purposes are clearly articulated within its Bylaws . . . and relate totally to Realtors and Real Estate agents engaged in the Real Estate Profession." This

conclusion simply disregards one of the six stated objectives of the association, found in Article II, Section 4 of its bylaws: "To further the interests of home and other real property ownership." It disregards the Vision Statement of SLAR. It disregards the different classifications of membership in the association, which, in addition to brokers and salespeople, include appraisers, developers, managers, buyers, seller, and landlords. (P's Exh. 5, Art. IV, §1(a)(1)). It disregards the only testimony at trial on the subject (from Meggie Devereux and Dennis Norman) in which the many committee, staff and professional activities of SLAR directed at property ownership issues, unrelated to brokerage activities, were described. The decision to bring this lawsuit was made by the appropriate committee and the directors of SLAR, and the uncontroverted evidence was that the aims of the lawsuit are consistent with one of the purposes of the association in advancing private property rights. Certainly, an organization can have more than one purpose, and the fact that many of its activities are directed at brokerage issues does not rule out a legitimate interest in protecting private property rights as well.[1]

In Humane Society of United States v. Hodel, 840 F.2d 45 (D.C. App. 1988), the Court of Appeals for the District of Columbia established a broad interpretation of what is meant by the term "germane." Quoting International Union, UAW v. Brock, 477 U.S. 274, 289-90 (1986), the Hodel court noted that "[a]ssociations and organizations are

[1] We suspect that the hospital association in the MHCA case, supra, had other purposes than opposition to certificates of need, or even the approval of the construction of competing hospital facilities.

beneficial in that they can (1) "draw upon a pre-existing reservoir of expertise and capital . . . [possessing] specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack;" (2) attract members whose "primary reason" for joining is "often to create an effective vehicle for vindicating interests that they share with other;" and (3) possess a self-policing mechanism guaranteeing a modicum of fair representation: "[t]the very forces that cause individuals to band together in an association thus provide some guarantee that the association will work to promote their interests." Id. at 55.

The Supreme Court's decision in UAW signaled the courts of appeals that they should not unduly confine the occasions when associations may bring legal actions on behalf of their members. *Hodel*, 840 F.2d at 55-56. "A restrictive reading of the germaneness requirement prevents associations for utilizing their expertise and research resources related to the subject matter of the lawsuit." Id. at 56. Also, too restrictive an interpretation of the germaneness requirement would undercut the interests of members who join an organization in order to create an "effective vehicle for vindicating interests that they share with others." Id., quoting UAW, supra, at 290. Finally, the self-policing character of associations assures that associational policymakers will not run roughshod over the strongly held views of the association members in fashioning litigation goals. Id.

Thus, the Court of Appeals for the District of Columbia held that the germaneness standard requires only that an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together. Id. In characterizing the

germaneness requirement as mandating mere pertinence between litigation subject to organizational purpose, the Court of Appeals joined a number of courts which declared the germaneness test of associational standing as undemanding. See, e.g. National Constructors Ass'n v. National Electrical Contractors Ass'n, 498 F. Supp. 510, 521 (D.Md. 1980) (defining germaneness standard as allowing suits by groups whose purposes are pertinent or relevant to claim at issue); American Insurance Ass'n v. Selby, 624 F. Supp. 267, 271 (D.D.C.) (1985) (stating that "an association's litigation interests must be truly unrelated to its organizational interests before a court will declare that those interests are not germane") (emphasis added).

Furthermore, since the decision in *Hodel*, both the Ninth Circuit and the Second Circuit have followed its reasoning to hold that the germaneness standard is undemanding, stating that mere pertinence between the litigation subjects and organizational purpose is sufficient. See, e.g., Presidio Golf Club, National Park Service, 155 F.3d 1153 (9th Cir. 1998); Building & Construction Trades Council v. Downtown Development, Inc., 448 F.3d 138, 147-149 (2d Cir. 2006).

Here, the germaneness requirement of the associational standing test has been satisfied. SLAR's members and their clients and customers have an interest in owning and renting residential property free from unconstitutional and unduly burdensome ordinances. Both SLAR's Bylaws and Vision Statement specifically state that one of the association's purposes is to advocate private property rights. SLAR's members include developers and landlords as well as brokers and salespeople. The litigation is consistent with prior litigation brought or supported by SLAR in which private property rights were

at issue. The goal of the present litigation is to protect SLAR's members' private property rights which are being encroached upon by the Ordinance. Individuals become members of SLAR to advance and safeguard their property rights. In the present circumstance, there are members of SLAR whose personal property rights are being undercut by the Ferguson's Ordinance. Certainly, there is no better indication that an action is consistent with the purposes of an organization than the vote of its directors, who are charged with carrying out those purposes.

Both the trial court and the majority in the Court of Appeals rely on what they perceive to be the purposes of SLAR, as opposed to what the trial record clearly shows. The appellate court asserts that "the evidence reveals that only a minutia of SLAR's membership claims constitutionally cognizable injuries related to rental property ownership in the city," that "it is apparent that the overriding interest of the membership is to promote, safeguard and enhance the real estate profession," that this challenge only concerns "a few of its members who incidentally happen to own residential property, but fails to promote the shared common interests of SLAR's members," and so one. With all due respect, these statements are simply supposition about the interests of SLAR's members, and disregard the organizational approval of the claim and the numerous examples of SLAR's having used its resources in areas that involve real property rights without a direct impact on brokerage. The undisputed evidence at trial was that this lawsuit was pertinent to SLAR's objectives and approved by its directors; there was no evidence of any disagreement within SLAR of the decision to bring the lawsuit. The decisions of a Missouri board of directors shall not be disturbed absent proof of "fraud,

illegal conduct, or an irrational business judgment," Ironite Products Co. v. Samuels, 985 S.W.2d 858,862 (Mo. App. 1998).

The majority in the Court of Appeals relies primarily on Missouri Growth Association v. Metropolitan St. Louis Sewer District, 941 S.W. 2d 615 (Mo. App. 1997). That case was a challenge by a number of individuals and organizations of a change in MSD's methods of billing. The case is based entirely on the failure of MSD to submit the billing increase to a vote under the Hancock Amendment, Article X, Section 229a) of the Missouri Constitution. Because SLAR did not prove that it paid MSD wastewater user charges, it was held to lack standing. Specifically, "at trial, St. Louis Association of Realtors' executive vice-president testified he was not sure which [of two for-profit corporations owned by St. Louis Association of Realtors] owns the county real estate and therefore, which corporation pays MSD wastewater user charges. Thus, based on the record, St. Louis Association of Realtors did not meet its burden of proving it paid sewer charges. Consequently, it did not meet its burden in proving it had standing in its own right to bring this suit. Therefore, the trial court did not err in finding St. Louis Association of Realtors' lack of standing." Id. At 621 (emphasis added.)

Under the Missouri Constitution, this was the end of the inquiry as to SLAR, because representational standing has not been permitted in a Hancock case. In order to have standing under the Hancock Amendment, a plaintiff must prove that it is a payer of the fee or tax challenged; since SLAR did not do this, it lacked standing. Article X, Section 23 of the Missouri Constitution spells this out: "Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county or other

political subdivision shall have standing to bring suit in a circuit court of proper venue…" (emphasis added.) Only taxpayers are authorized to make Hancock Amendment challenges, see State ex rel. City of Desloge v. St. Francois County, 245 S.W. 3d 855 (Mo. App. 2007) (county itself lacks standing, but individual officials do not, since they are taxpayers); Fort Zumwalt School District v. State of Missouri, 896 S.W. 2nd 918, 921 (Mo. 1995) (en banc) ("By its own language, Section 23 limits the class of persons who can bring suit to enforce the Hancock Amendment to 'any taxpayers.' In doing so, Section 23 recognizes that any apparent injury to the [organization] is merely derivative of the taxpayers' injury."); Fireman's Retirement System v. City of St. Louis, 2006 WL 2403955 (Mo. App. E. D.).

In addition, the Missouri Growth Association court did find that several individual plaintiffs were subject to the MSD use charges, and thus did have standing. The court then addressed the merits, and ruled that there was no Hancock Amendment violation. On two bases, therefore, the court's observations about SLAR's representational standing were not required by the decision, and were dicta. And even in its discussion of representational standing, the court implicitly found that SLAR did not meet the first of the three Hunt requirements: "The charter purpose of SLAR is to promote the interests of real estate dealers. Because these real estate dealers do not pay their own sewer bills, they would not have standing to bring this suit." Id. at 621 (emphasis added.) The court concludes: "[E]ven if we do not apply the Hunt factors in the present case, neither Missouri Growth Association, St. Louis Association of Realtors, nor CAI-St. L have standing in this suit because they merely assert the same claims as their individual

members. They assert MSD violated the Hancock Amendment in instituting its new ordinance without voter approval. Because these are legally separate and distinct organizations from their members, they must assert a legal interest separate from its member…[N]one of the organizational plaintiffs do so…" Id. at 622.

The challenge in the present case is based on Ferguson's lack of authority (under both its charter and Missouri statutes) and constitutional grounds. Although a Hancock Amendment challenge was originally pleaded, that claim was ultimately abandoned after a separate taxpayer plaintiff, DPN LLC, sold its property in Ferguson and voluntarily dismissed its claim.

Even if representational standing were applicable to the actual Missouri Growth Association holding, that court simply states, in effect, that the imposition of sewer charges is so remote from the purposes of the organizations involved, including SLAR, as not to be "germane." There was no evidence in that case, as there is here, of the rational and important objective of promoting private property rights by challenging what SLAR believes to be an invalid restriction on the right to own residential rental property.

Third, the trial court held that the relief requested in SLAR's petition "requires the participation of the individual landowners, all three, who are also members of the Association," without saying why. SLAR seeks only equitable relief – a declaration that the Ferguson Ordinance is invalid. (L.F.14-15; Tr. 55). It does not seek any remedy specific to any property owner and the participation of individual members is not required. See Ferguson Police Officers' Ass'n v. City of Ferguson, supra. We cannot

discern why the trial court believed that each individual member who could have filed individually would be required as a party in order to obtain a declaratory judgment.

CONCLUSION

SLAR has standing to challenge Ferguson's Ordinance in a representational capacity for its members. Missouri law requires only that a member of a plaintiff association have standing individually to challenge, that the challenge be germane to the purposes of the association, and that the relief sought not require an individual's participation. Three members of SLAR who are also residential landlords in Ferguson and therefore directly impacted by the obligations of the Ordinance testified at trial, and satisfied the first test. The evidence showed that the challenge was consistent with the purposes of the association, reflected in its bylaws and vision statement, in its history of challenging ordinances that impact property rights, and in its approval of the lawsuit by the administrative layers within SLAR, including its board of directors. The trial court's narrow interpretation of "germaneness" is inconsistent with longstanding case law that establishes that the lawsuit must only be pertinent to the organization's purposes, not necessarily central. And the relief sought is purely equitable and does not require the participation of individual litigants. The case should be remanded to the trial court for decision on the merits, based on the trial held in December, 2008.

RULE 84.06(c) CERTIFICATION

The undersigned certified that this brief:

1. Includes the information required in Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b); and

3. Contains 6,555 words.

DEVEREUX MURPHY LLC

_____

Stephen C. Murphy #23887
Joseph J. Devereux, III, #62016
190 Carondelet Plaza, Suite 1100
St. Louis, Missouri 63105
Tel: (314) 721-1516
Fax: (314) 721-4434

Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ___ day of May, 2011, a true and correct copy of the above-noted Brief of Appellant and CD was mailed to the following:

Ms. Stephanie E. Karr
Curtis, Heinz, Garrett & O'Keefe, P.C.
130 S. Bemiston Ave., Suite 200
St. Louis, Missouri 63105