IN THE SUPREME COURT OF MISSOURI

No. SC97730

THE KANSAS CITY CHIEFS FOOTBALL CLUB, INC.,
Appellant, and

JACKSON COUNTY SPORTS COMPLEX AUTHORITY
Intervenor-Appellant

v.

DIRECTOR OF REVENUE,
Respondent.

Appeal from the Administrative Hearing Commission of Missouri
Case No. 14-1973 RS, The Honorable Sreenivasa Rao (Sreenu) Dandamudi

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REPLY BRIEF OF APPELLANT THE KANSAS CITY CHIEFS FOOTBALL CLUB, INC.

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INTRODUCTION

The economic reality in this case is that renovations were made to Arrowhead Stadium, which was owned by Jackson County. Payment for those renovations came from funds owned by the County and managed by a Bond Trustee, and the contracts signed and purchases made were for the County's benefit under an express tax exemption certificate. Items purchased for those renovations thus became the County's property, and were not taxable to the Chiefs.

The Director and the Commission ignored this economic reality, as well as Missouri case law, in reaching a contrary conclusion. The Commission's decision upholding sales and use taxes against the Chiefs for items they procured on the County's behalf should be reversed.

ARGUMENT

I. The Chiefs do not own the Stadium or the Contested Items and did not pay for them.

A. The Chiefs do not own the Contested Items.

The Director agrees the County owns the Sports Complex, including Arrowhead Stadium and the training facility. (*See* L.F. 00055.) He further agrees that all the Contested Items were acquired for improvements to that same County-owned property. (*See* Resp. Br., p. 7.) The Development Agreement, which specifically states that the Project, including all the Contested Items, is owned by the County, confirms these basic truths. (Ex. 1, Development Agreement, at § 4.01.)

The Director nevertheless insists that the Chiefs bought the Contested Items for use in their for-profit business, and points to isolated language in several agreements that he says should control. But the plain fact is that the Contested Items were bought for renovations to the *County's* stadium and used in the *County's* leasing activities, facts confirmed by contractual provisions that specifically address ownership of the Project, including the Contested Items.

Interpretation of a contract is a question of law for this Court to review *de novo*. *Knob Noster R-VIII Sch. Dist. v. Dankenbring*, 220 S.W.3d 809, 816 (Mo. App. 2007). "The cardinal rule . . . is to ascertain the parties' intentions and to give

effect to that intention." *Id*. (citing *Care Ctr. of Kansas City v. Horton*, 173 S.W.3d 353, 355 (Mo. App. 2005)). To determine intent, it is necessary to consider not only the contract as a whole, "but subsidiary agreements, the relationship of the parties, the subject matter of the contract, the facts and circumstances surrounding the execution of the contract, the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the parties." *Id*. (quoting *Butler v. Mitchell-Hugeback, Inc*., 895 S.W.2d 15, 21 (Mo. banc 1995)).

The Director's reliance on random contract provisions, and his unilateral interpretations of them, cannot overcome the plain economic reality or support the Commission's decision. *See Hoffmeier v. Civil Serv. Comm'n of St. Louis Metro. Sewer Dist*., 541 S.W.3d 8, 12 (Mo. App. 2017); *Scott v. Ranch Roy-L, Inc*., 182 S.W.3d 627, 634 (Mo. App. 2005).

As one example, the Director argues that § 6.06(e) of the Development Agreement permitted the Chiefs to purchase and obtain ownership of materials, equipment, or fixtures during the Project. (Ex. 1, § 6.06(e).) But § 6.06(e) explicitly states the Chiefs could *not* do so without first obtaining the Authority's approval. (*Id*.) Furthermore, there was no evidence the Chiefs ever attempted to exercise this option, or ever requested—much less received—the Authority's approval. That should end the inquiry, because the Director has provided no

support for the idea that an unexercised option to separately pay for and own property during an exempt project makes the Chiefs liable for sales or use tax.[1]

The Director also fails to recognize that § 6.06(e) was effectively waived by subsequent contracts, including the Indenture and Tax Credit Agreement, which required not only that the Chiefs' monetary contribution be made directly to the State of Missouri (MDFB), but further required *all* assets in the County's Project Fund to be used for the Project. (Ex. 4, § 4.01.) Moreover, the Development Agreement explicitly states the option in § 6.06(e) could only exist "to the extent permitted by . . . the instruments governing the issuance of the Bonds. . . ." (Ex. 1, § 4.01.) Because it was not permitted by the Indenture, the option did not exist once the Project's financing was complete. Section 6.06(e) was thus obsolete by the time the Project was underway and the Contested Items were purchased.

The Director also claims that, because the Chiefs had exclusive use and possession of the Contested Items under the Lease, they were necessarily "owners." But exclusive use and possession of property is standard in all lessee-

[1] A similar argument was considered and squarely rejected in *Becker Electric Co., Inc. v. Director of Revenue*, where the Director argued that a subcontract requiring Becker to furnish and pay for all materials necessary to complete the project made Becker the "purchaser" of the materials. 749 S.W.2d 403, 408 (Mo. banc 1988). This Court disagreed, holding instead that the course of performance of the parties effectively waived any such obligation under the contracts. *Id.* So too here. Regardless of whether an option existed under § 6.06(e), by subsequent agreement and course of performance, all tangible personal property purchased during the Project was paid for and owned by the County.

lessor relationships. Merely having the exclusive use and possession of leased property does not confer ownership on a lessee.

The Director's reliance on a section of the Development Agreement—purportedly identifying certain renovations to be allocated out of the NBP account—is similarly misplaced. (Ex. 1, § 6.05.) That section does not require the Chiefs to pay for items using their own private funds. At most, this is permitted (but not required) by a separate provision. Read together, these provisions cannot make the Chiefs "owners" of the Contested Items in any sense.

The Commission erroneously concluded that the Chiefs took title to or owned the Contested Items simply because some of the modified standard form contracts used the term "owner" to identify one of the parties to the purchase contracts. (L.F. 00578; A18.) But no purchase order expressly states the Chiefs are the "owner" of items purchased. The term "owner" in the purchase orders immediately follows a description and location of the Project. Yet there is no question the County owns both the Sports Complex and the Project. As a matter of convenience, and consistent with the Development Agreement's delegation of management authority over the Project to the Chiefs (Ex. 1, §§ 4.01, 5.01), the purchase orders use the term "owner." But these agreements were never intended to signify the Chiefs were the actual legal owners of any items to be purchased and delivered to the Sports Complex. And the evidentiary record, as discussed further

herein, including with respect to "economic realities," is overwhelmingly to the contrary.

Under Missouri law, the "economic realities" of a case control the ownership question. *See Becker Elec. Co., Inc. v. Dir. of Revenue*, 749 S.W.2d 403, 408 (Mo. banc 1988); *Scotchman's Coin Shop, Inc. v. Admin. Hearing Comm'n*, 654 S.W.2d 873, 875 (Mo. banc 1983). Thus the Director's reliance on a few modified form purchase agreements that use the word "owner" (Tr. 129-30), cannot overcome the undisputed economic substance of the transactions, as set forth in the uncontradicted testimony and as reflected in the 1990 Lease, the 2006 Lease Amendment, the Indenture, and the Development Agreement. Rather, the intent of the parties as to title and ownership never changed, and therefore controls. *See Olin v. Dir. of Revenue*, 945 S.W.2d 442, 444 (Mo. banc 1997); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 885 (Mo. banc 2001) (finding passage of title and ownership occurs upon delivery; the key is the intent of the parties, as evidenced by all relevant facts).

The Director's contrary argument notwithstanding, application here of the *Becker Electric* definition of a "purchaser" for sales and use purposes—*i.e.*, one who (1) acquires title to, or ownership of, tangible personal property, or to whom is rendered services, (2) in exchange for a valuable consideration—actually shows why the Contested Items are non-taxable. *See Becker Elec. Co., Inc.*, 749 S.W.2d

at 407. Here the agreements among the County, the Authority, the Chiefs, and the MDFB establish that the Chiefs never owned the Contested Items, but simply procured them on behalf of the County, the actual owner of the facility and the Contested Items.[2]

The Director's argument, adopted by the Commission, asserts that the County does not own the Contested Items because the Lease, Lease Amendment, and Development Agreement never *expressly* state that the County owns them, and because there is no separate "personal property lease" between the Authority and the Chiefs for use of the Contested Items. (*See* Resp. Br., pp. 32-33; L.F. 00576.) Again, these arguments ignore the agreements' plain language.

First, the Lease explains that all personal property, including "supplies, fixtures, equipment, appliances, furniture, furnishings, utensils, signs, lockers or other articles" furnished by the Landlord (Authority) on the Leased Premises, including "*any replacements for any such items*," are owned by the County. (Ex. 2, § 4.01.) Both the Lease and Lease Amendment thus specifically contemplate the Chiefs' use of all real and personal property furnished by the Authority (as

[2] In footnote 11 of Respondent's Brief, the Director states that the Chiefs admitted they did not purchase the Contested Items on the Authority's behalf. The Chiefs never made this admission. Appellant's Brief merely says items were procured "on behalf of" the County; it never states or implies that these same items were not also purchased for the Authority. The Authority is the County's agent for purposes of managing the Sports Complex under the Leases, so purchasing for the Authority is the same as purchasing for the County.

Landlord) and County on the Leased Premises during the lease term, contrary to the Director's claim. (Ex. 2, § 4.01; Ex. 3, § 4.1.)

Likewise, the whole purpose of the Development Agreement was to expand, renovate, and improve the *entire* Leased Premises, including Arrowhead Stadium, the practice facility, administrative offices, and other County-owned Sports Complex facilities. (Ex. 1, § Ex. A.) Accordingly, the Development Agreement not only *contemplates* the Chiefs would procure services, fixtures, and tangible personal property for the County-owned Project—it *lists* those items as required Project elements. (*Id*. at § Ex. D.) The Development Agreement provides in clear and unmistakable terms that the "County shall own the Project for public purposes." (*Id*. at § 4.01.) Title *and* ownership of all real or personal property improvements, including the Contested Items, thus inured to the County under the Development Agreement and the Chiefs' lease.

If a fair reading of the contracts were not enough, unequivocal testimony before the Commission established that the County has title and ownership of tangible personal property purchased during the Project, including the Contested Items, and that all parties have treated them as the County's property since their purchase. (Ex. 30, Webster Depo. at 51:25-53:24, 57:6-58:10; Tr. 51:19-23, 59:24-60:3). The Director did not object to this testimony or introduce any to the

contrary. The Commission's decision erroneously ignored this uncontradicted evidence.

The Director also continues to stand by the Commission's odd conclusion that, simply because the Chiefs lease certain Sports Complex facilities, they could not have been representing the Authority or the County in procuring materials for the Project. (Resp. Br., p. 26, n.8.) But the Director cannot point to any support for the Commission's conclusion on this point. Rather, the Authority delegated responsibility to the Chiefs to obtain the necessary items for the Project improvements and renovations and to manage the Project's development and construction. (Ex. 1, §§ 4.01, 5.01.) This authorization is reflected not only in the Development Agreement and the Project Exemption Certificate that the Authority gave the Chiefs, but in testimony. (Ex. 1, § 4.28; Ex. 9.) There was no evidence that the Authority had the expertise or ability needed to acquire the materials and other items for the Arrowhead improvements on its own, nor was that its role; thus it relied on the Chiefs. The Chiefs' separate status as a lessee under the 2006 Lease Amendment is irrelevant for purposes of sales and use taxes.

Finally, the Director makes much of an argument never mentioned, much less relied on, by the Commission. The Director suggests repeatedly that because the Chiefs accounted for depreciation expense related to some of the Contested Items for income tax purposes, they, and not the County, must be the owner. But

the uncontested evidence showed that the Chiefs treated their Tenant Contribution to the MDFB as a depreciation expense tied to leasehold property purchased during the Project, and that this treatment was not only appropriate, but actually required, under Internal Revenue Service rules and guidelines. (Ex. 21.)

Steve Gardner, who supervised preparation of the Chiefs' federal income tax returns, presented IRS guidelines for professional sports teams as support for the requirement that the Chiefs, as tenant, were not only required to capitalize and depreciate the amount of their contribution over time, but that the right to claim such depreciation is predicated not on ownership but on an investment that was a result of their contribution. (Tr. 132-35.) The Director failed to contest or object to any of Mr. Gardner's testimony, and his testimony thus constitutes substantial evidence supporting the Chiefs. *See Mo. Real Estate Appraisers Comm'n v. Funk*, 306 S.W.3d 101, 106 (Mo. App. 2010) (citing *Brandel v. State Tax Comm'n of Mo.*, 716 S.W.2d 886, 887 (Mo. App. 1986)) (permitting plaintiff to testify as tax expert regarding the effect a change in the tax assessment rate would have in altering the tax levy on property).

In addition to the Director's evidentiary problem on this point, he presents no legal authority suggesting the IRS is somehow wrong, or that a tenant taking a depreciation expense somehow becomes the owner of a sports stadium or its

contents.[3] The Director's lack of legal authority is unsurprising: the IRS has long taken the position that a corporate taxpayer may appropriately treat a publicly-owned asset to which the taxpayer has contributed and which the taxpayer regularly uses in its business as a depreciable capital expenditure of that corporation, "even though the corporation has no legal title thereto." *See, e.g.*, Rev. Rul. 58-373, 1958 WL 10426 (IRS 1958), Reply Appendix 1. Because Missouri law follows the Internal Revenue Code, the Chiefs were required to take depreciation for Missouri tax purposes under R.S. Mo. § 143.431.

Finally, there is no evidence whatever in the record that the *County* believes the Chiefs own the Contested Items. No evidence suggests the County assessed annual property taxes on the Contested Items, or that the Chiefs paid them.

The Chiefs never took title to or owned any of the Contested Items, and the purchase of the Contested Items for use in a County-owned project cannot give rise to a taxable event. The Commission's decision should be reversed on this ground alone.

B. County funds paid for the Contested Items.

The Director mistakenly asserts that the challenged transactions are subject to sales or use tax because the Chiefs used their own funds to buy them. But there

[3] The Director specifically chose not to assess sales or use tax with respect to similar items purchased during the Project and also used as bases for depreciation expense, such as stadium seats and food service equipment. (Ex. 20, Internal DOR e-mails, at p. 2.)

is no question that every payment for the Contested Items ultimately came from the trust funds managed and administered by the Bond Trustee. The Commission's decision must be reversed for this reason, too, because *Becker Electric*, which holds that an exempt entity paying for tangible personal property with its funds becomes the purchaser for purposes of sales and use tax, controls on this point. 749 S.W.2d at 407-08.

Under Section 404(a) of the Trust Indenture, all disbursements required the Authority's approval. Once approved and submitted, only the Trustee could make payments from the Project Fund. Just as in *Becker Electric*, the Chiefs were not the purchaser of any Contested Items. The Trustee paid John Marshall, Sony, Roscor, Star Sign, Harmon Sign, and Daktronics *directly and entirely* from the Project Fund. (Ex. 25, Ragsdale Depo. at 86-87.) The Chiefs were not the "purchaser" of those items under sales or use tax laws because the Trustee used County funds to make the payments. *See Olin*, 945 S.W.2d at 443; *Becker Elec. Co., Inc.*, 749 S.W.2d at 406.

The same is true for those Contested Items for which the Chiefs advanced payments to the vendors—Artworks Foundry and Bruce Wolfe (Lamar Hunt Statue), and a small fraction of the payments to Encompas (office furniture)—because the undisputed evidence shows that the Trustee reimbursed all such

advances from the Project Fund. (Ex. 25, Ragsdale Depo. at 57; *see also* Ex. 1, § 6.06(c) (providing that the Tenant can seek reimbursement).)[4]

Had the Authority or County directly contracted for the Contested Items, the transactions unquestionably would have been tax-exempt. *See* R.S. Mo. §§ 144.030.1, 144.030.2(40). The tax-exempt entities' delegation of purchasing responsibility to the Chiefs (using the validly issued Project Exemption Certificate) cannot change the net result, *i.e.*, a tax exemption for the purchases "consistent with the reasonable expectations of the General Assembly." *Becker Electric Co., Inc.*, 749 S.W.2d at 408. Because the Chiefs did not purchase the Contested Items with their own money, they cannot be subject to sales or use taxes, and the decision below should be reversed on this separate ground.

The Director's view that the Contested Items were purchased with the Chiefs' private funds has no factual or legal support. The Indenture states clearly that *all* money placed in the Project Fund, including any of its sub-accounts, became indentured "funds of the County" impressed with a trust for the benefit of the bond holders. (Ex. 4, § 401.) Further, the Chiefs never deposited money directly into the Project Fund, the Director's contrary contention notwithstanding. (Resp. Br., pp. 10-11.) The Chiefs contributed money to the MDFB (a state

[4] Perhaps to confuse the issues, the Director contends certain items not even at issue in this appeal were paid from the Project Fund (*e.g.*, helmet wax, gifts, and cheerleader uniforms). (Resp. Br., pp. 11-12.) Not only is the point irrelevant, but the cited testimony does not even support it.

agency), which deposited that contribution into the state's infrastructure development fund (Resp. Br., p. 10; Ex. 22; Ex. 5, § 3.01), at which point the money was co-mingled with other state funds and ceased to be the "Chiefs' money" or "private money" under any possible interpretation. *See* R.S. Mo. § 100.263. This arrangement was preapproved by the Director. (Ex. 5, p. 1.) And the funds were commingled again when the MDFB transferred the Tax Credits to be sold by the County to the trust's Project Fund. (Ex. 22.)

Once funds were placed in the Project Fund, regardless of source or method, they became "funds of the County." (Ex. 4, § 401.) The County's uncontested testimony supports this conclusion. (Tr. 48:5-15, 57:16-58:4, 71:7-72:10.) Because the Contested Items were purchased with County funds, they cannot be subject to sales or use tax.

II. Alternatively, the Contested Items were procured for the County's stadium renovation project under a valid tax exemption certificate that complied in all respects with R.S. Mo. § 144.062, and in transactions that fall within the Authority's and County's tax-exempt functions and activities.

A. Project items were procured under a valid exemption certificate.

The Director's argument that he can assess sales or use tax here simply because the Chiefs used the Contested Items in a "for-profit business of operating a

professional football team" (Resp. Br., p. 34) is entirely unsupported. Both the Missouri legislature and this Court have made plain that, if the underlying transactions were not taxable or were tax-exempt in the first place, the mere use of the Contested Items under the Chiefs' lease with the Authority cannot make them taxable. *See* R.S. Mo. § 144.020.1(8) ("Tangible personal property which is exempt from the sales or use tax under section 144.030 upon a sale thereof is likewise exempt from the sales or use tax upon the lease or rental thereof,"); *Olin*, 945 S.W.2d at 444 (holding transactions not taxable even though property purchased was subsequently used by taxpayer in performing management and operations contract for exempt entity); *Becker Elec. Co., Inc.*, 749 S.W.2d at 407-08 (holding transactions not taxable even though property purchased was subsequently used by taxpayer in performing its construction contract with the exempt entity); *Sports Unlimited, Inc. v. Dir. of Revenue*, 962 S.W.2d 885, 886-87 (Mo. banc 1998) (holding transactions exempt from tax under § 144.062.1 even though property purchased was subsequently used by taxpayer in performing construction contract with the exempt entity); *McDonnell Douglas Corp. v. Dir. of Revenue*, 945 S.W.2d 437, 440 (Mo. banc 1997) (holding property purchased was for resale and exempt from tax even though subsequently used by taxpayer in performing management and operations contract for exempt entity). The Director

simply ignores the pertinent facts—the County owns the Sports Complex, and the County used the Contested Items in its lease to the Chiefs.

This Court already rejected an argument identical to the Director's position in *Sports Unlimited*. There, too, the Director argued that a party in the same position as the Chiefs, not the exempt entities, was the actual purchaser. 962 S.W.2d at 887. This Court disagreed, finding that the party "acted as an intermediary that, upon receipt of the supplier's bill, would, in turn, bill the exempt entity" or its general contractor. *Id*. at 886-87. This Court held such purchases exempt under the project exemption statute. *Id*. at 887 ("From the record in this case, it is uncontested that the materials for each construction project were ultimately billed to the exempt entity and the exempt entity paid the bills.").

Attempting to avoid the same result, the Director here suggests the Chiefs were not acting as a contractor on behalf of the Authority, claiming that the only evidence the Chiefs cite in support is the Authority's issuance of the exemption certificate. (Resp. Br., p. 36.) Although the exemption certificate is alone sufficient on this point, the Director overlooks Section 4.01 of the Development Agreement, which separately provides that "Tenant shall manage and oversee the planning, design, development, construction, completion and making operational of the Project . . . ." (Ex. 1, § 4.01.)

In the face of this clear language, the Director posits two creative arguments. First, he asserts that R.S. Mo. § 144.062, which exempts from sales and use tax all purchases "of tangible personal property and materials for the purposes of constructing, repairing or remodeling facilities" on behalf of the County or Authority, so long as the purchases "are related to the entities' exempt functions and activities," applies only to true "contractors." Second, he asserts that that statute applies only to construction materials actually consumed in real property improvements. Neither argument passes muster.

The Director's construction of § 144.062 improperly limits or imposes requirements on the exemptions that are not reflected in the statute, and violates other critical tenets of statutory construction. *See Wilson v. McNeal*, 575 S.W.2d 802, 810 (Mo. App. 1978) (interpretive body may not "engraft upon the statute" provisions not explicit in the statute), *superseded in part by statute on other grounds as recognized by Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414 (Mo. banc 2001). For example, when interpreting a statute, the entire statute is to be considered, not parts read in isolation. *Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 638 (Mo. banc 2015). And it is presumed "the legislature did not insert idle verbiage or superfluous language." *Id*. (citing *Hyde Park Housing Partnership v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993)).

Yet even to make the argument that the statute is limited to contractors, the Director has to omit express statutory language. Far from being limited to "construction contractors," the exemption broadly applies to purchases made by "any entity" that contracts to perform services on a project for the exempt entity. This Court held as much in *Sports Unlimited*, when it stated that "[o]peration of the statute focuses solely on the exempt entity. . . . The party from which the purchases are made and to which the payments are made—whether an original supplier, or a contractor *or other intermediary*—is irrelevant." 962 S.W.2d at 887 (emphasis added). Indeed, the Director's own regulations contradict his current argument:

> To claim the exemption [in § 144.062], the exempt entity must provide a project exemption certificate to all contractors, subcontractors **or other entities.** Such contractors, subcontractors **and other entities** must provide a copy of the project exemption certificate to sellers when purchasing tangible personal property or materials for such facilities.

12 C.S.R. 10-110.955(M) (emphasis added).[5]

The Director's argument that § 144.062 applies only to construction materials and not tangible personal property fares no better. The exact language of the statute exempts "sales at retail of tangible personal property and materials for the purpose of constructing, repairing or remodeling facilities" on behalf of an exempt entity. The statute uses the term "tangible personal property" in addition to

[5] The Development Agreement clarifies that the renovation project was to occur under the management of the Chiefs. (Ex. 1, §§ 4.01, 5.01(b).)

and apart from "materials" as a separate item. It does *not* state that the tangible personal property must be "materials" to be exempt. Rather, the conjunctive phrase "tangible personal property *and* materials" shows the legislature meant to exempt both.

Similarly, the phrase "tangible personal property or materials incorporated into or consumed in the construction of the project" used later in the statute cannot be interpreted as limiting the exemption to construction materials consumed in the Project. The language of the statute makes tangible personal property exempt if it is *either* "incorporated into *.or* consumed" in the Project. (emphasis added) Thus, the legislature intended a different and broader result than the Director's narrow reading. *See E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011) (rejecting analogous argument by Director with respect to § 144.054 exemption). And once again, this Court held as much in *Sports Unlimited*, in which it found tangible property purchased on behalf of an exempt entity—property, like lockers, that could never be considered "construction materials"—subject to the exemption. 962 S.W.2d at 886.

The Director's remaining arguments are just as unsound. (Resp. Br., p. 36.) For instance, the Contested Items are not "construction machinery, equipment or tools," so the § 144.062.3 exclusion of such items cannot apply. Nor would the Chiefs' limited interpretation of the statute somehow override this exclusion and

result in a free-for-all for contractors to purchase items tax free. Here the legislature set forth specific exclusions from the exemption, and could have excluded some or all of the categories of the Contested Items from being exempt had it intended to do so.

Even if the Director's reading were correct, and the Contested Items had to be incorporated into or consumed in the Project, they were in fact incorporated here, by being combined, blended into, and made integral components of, Arrowhead. The Director's interpretation of "incorporated into" (Resp. Br., p. 37), arguing otherwise, is far too narrow.

Indeed, Contested Items, including the scoreboard, ribbon boards, built-in controls, bolted-in televisions, furniture throughout the leased premises and system furniture (cubicles) that were attached to the office complex were all purchased for "constructing, repairing or remodeling facilities" as provided in § 144.062(1). They are thus exempt. Statutes must be given a "common sense and practical interpretation," and both the plain language of § 144.062 and common sense dictate that the exemption applies to all Contested Items. *Concord Pub. House, Inc. v. Dir. of Revenue*, 916 S.W.2d 186, 194 (Mo. banc 1996) (citing *Dravo Corp. v. Spradling*, 515 S.W.2d 512, 516 (Mo. 1974)).

B. The Contested Item transactions fall within the Authority's and County's tax-exempt functions and activities, making use of the Tax Exemption Certificate proper.

The Director may not collect sales and use tax from the Chiefs unless the use of the tax exemption certificate was "improper." *See* R.S. Mo. §§ 144.062.6, 144.210.1. There are only two possible ways for use of the Authority's Project Exemption Certificate to have been improper under § 144.062: either purchases of the Contested Items were outside the Authority's exempt functions and activities, or the Authority lacked power to issue the Certificate to the Chiefs to purchase the Contested Items on the Authority's behalf. Neither condition applies. It was uncontested that the Authority and the County specifically authorized and approved all transactions at issue during the Project. The Director failed to introduce evidence of impropriety at the hearing, and the Director's silence in his brief concedes as much.

There is also no dispute that, if the Authority or the County had directly purchased the Contested Items themselves, they would have been exempt under R.S. Mo. §§ 144.030.1 and 144.030.2(40). As in *Sports Unlimited*, the Chiefs were simply performing obligations and duties delegated by the Authority and the County in the Development Agreement. Most invoices for the Contested Items were submitted to and directly paid by the Trustee from the Project Fund.

Although a few payments were advanced by the Chiefs, those were submitted for reimbursement shortly afterward. As this Court made clear in *Sports Unlimited*, the project exemption statute applies to exempt either type of transaction from sales and use tax because the purchases were made for a project owned by an exempt entity. The statute contains no "direct billing" requirement. *Id*. at 886 n.1.

The transactions at issue here readily fall within the Authority's tax-exempt functions and activities. *See* R.S. Mo. § 64.940.1(1). The Commission erred in concluding otherwise, and its decision should be reversed for this separate reason.

III. The Contested Items were paid for out of the County's project funds, managed by the County and the Bond Trustee, and therefore cannot constitutionally be taxed.

Article III § 39(10) of the Missouri Constitution prohibits the Director from imposing sales or use tax on "the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision." The Director's assessments of sales and use tax, as upheld by the Commission, are improper here because the Contested Items were purchased using the Project Fund, which was owned by the County and administered and disbursed by a Bond Trustee for payment of the Project costs. The Contested Item transactions are also specifically exempt from sales tax by reference in R.S. Mo. §§ 144.030.1 and 144.030.2[39]. Likewise, the Director's own regulations provide that all purchases of tangible

personal property or taxable services by the County are exempt from sales and use tax. *See* 12 C.S.R. 10-110.955.

All payments from the Bond Trustee are necessarily non-taxable. The Director's contrary suggestion—that all the Contested Items should be taxable because they were purchased with funds from the NBP subaccount—is incorrect. The exclusion from tax provided in Article III § 39(10) of the Missouri Constitution, and the exemption in R.S. Mo. § 144.030.1, apply *regardless* of whether the Contested Items were paid for out of a particular subaccount because *all* money administered by the Bond Trustee was part of the overall County-owned Project Fund. The Chiefs did not control the Project Fund, and had no say in how its subaccounts were set up, or how its funds were disbursed. All Project Fund assets, *including any of its subaccounts*, became indentured "funds of the County" impressed with a trust for the benefit of the bond holders. (Ex. 4, § 401(a)(4); Tr. 17, 48.) Once the money, *regardless of source*, was deposited in the Project Fund, it became County property.[6]

[6] The Director argues that a provision in the Development Agreement allowed for the possibility of a refund if all sums in the Project Fund were not spent on the renovation. (Resp. Br., p. 41.) First, that event never occurred because the NBP account was depleted. (*See* Tr. 76, 108.) Second, despite this provision in the Development Agreement, the Indenture, which placed the Project Fund into a trust for the benefit of bond holders, contained no such language. (*See* Ex. 4, §§ 404(a), 1101.) As a result, the Development Agreement clause could not have given the Chiefs any control over the funds, and the Director's argument is misplaced.

The Director does not deny that the Chiefs themselves never directly deposited any private money into the Project Fund. Nor does he dispute that the Chiefs' contributions were instead paid to a state agency (the MDFB) under the Tax Credit Agreements, or that the Director approved those Tax Credit Agreements. (*See, e.g.*, Ex. 5, Tax Credit Agreement, p. 1 and § 3.1.) Under the agreements, the MDFB deposited the contributions into the infrastructure development fund that the state agency administered and separately maintained on its "books and records." (Ex. 5, Tax Credit Agreement § 4.1.) The funds were state funds at that point and there is no evidence or argument that the Chiefs could have had access to them at that point. After deducting a fee, the MDFB issued the Tax Credits and transferred the balance of the infrastructure development fund to the Bond Trustee to be placed in the Project Fund. (*Id.*) The funds became County funds at that point and there is no evidence or argument that the Chiefs could have unilaterally accessed the County funds.

The funds deposited with the trustee were commingled with the Tax Credit Proceeds generated from the County's Tax Credit sales. The Director introduced no evidence that the Chiefs acquired any of the Tax Credits. There was no evidence that the Chiefs were an account holder of the MDFB's infrastructure development fund or the Project Fund that the Trustee administered. The Chiefs had no independent access to the Project Fund and could not seek payments for

any items purchased for the Project unless a Disbursement Request was approved by the Authority.

The Director also claims that the Chiefs ignored the Commission's interpretation of the Missouri Tax Credit Statute. (Resp. Br., p. 41). Relying on R.S. Mo. § 100.286, the Commission thought the Tax Credits never became County funds because that statute generally permits a taxpayer to assign, sell, or transfer credits for a period of five years. (L.F. 00578; A18.) But the Chiefs specifically addressed this statute and the Commission's erroneous reliance on it by noting that the MDFB transferred the tax credits directly to the Bond Trustee. The credits were not given to the Chiefs. (App. Br., p. 44.) And the Chiefs in any event never benefited from the tax credits, and in fact were prohibited by agreement from doing so. (Ex. 5, § 3.7.) The Tax Credits were part of the *Landlord's* contribution under the Development Agreement. (Ex. 1, § 6.05.)

Because the Chiefs did not acquire any of the credits when the County sold them, and because the team could not unilaterally access the Project Fund, they could not benefit from the Tax Credit Proceeds any more than they could have directly accessed their earlier Tenant Contribution. The Chiefs voluntarily surrendered any rights to their monetary contributions and the MDFB Tax Credits when they signed the Tax Credit Agreements that the Director approved. (*Id*.) Only the Bond Trustee had authority under the Indenture to make payments from the

Project Fund. All transactions here were billed to the Project Fund through disbursement requests submitted by the Chiefs. The Authority and County approved all of the transactions, and all payments for all Contested Items were paid for with County funds.

The Missouri Constitution thus precluded the Director from imposing sales or use tax on the Contested Items, and the Commission's decision should be reversed on this separate ground.

IV. In the alternative, the Chiefs established that certain of the Contested Items were non-taxable fixtures.

A. The Chiefs' "fixtures" argument is not waived.

The Director argues that the Chiefs' fixtures argument cannot be considered because it was waived. (Resp. Br., p. 43.) The Director is wrong.

First, the Chiefs introduced testimony reflecting that certain of the Contested Items were fixtures because they were firmly affixed to the Arrowhead Stadium structure and grounds. (*See*, *e.g.*, Tr. 89-93, 95-98, 113-22.) The Director did not object to the admissibility of the testimony and cannot now complain for this reason alone that the testimony did not preserve the fixtures argument.

Second, the Chiefs offered Exhibit 20 as part of their evidence to support the claim that the Director acknowledged certain of the items for the Stadium renovations were non-taxable. The Director objected to the Exhibit, and the Chiefs'

counsel argued that the exhibit was both evidence of the fixture argument as well as an admission that the Director considers fixtures are not taxable. The Commissioner admitted Exhibit 20 over the Director's objection, but the Director has not preserved that objection in this appeal.

Third, the fixture argument is merely a component of the Chief's argument in support of a single claim—that the Contested Items (or at least a portion of them) are non-taxable. There is no waiver of an argument made in support of a consistently pursued claim. Here, the evidence was preserved and was developed through the testimony.

Finally, the Director does not and cannot refute that the Chiefs' briefing to the Commissioner presented these same arguments, as did their express arguments at the matter's hearing. (*See, e.g.*, Tr. 141; App. Br., pp. 24, 46 and ns.9, 15.)[7]

The Chiefs have not waived this component of their argument.

[7] As noted in the Chiefs' opening brief, the Commission did not include the Chiefs' post-hearing submissions in the legal file the Commission certified to this Court. But in addition to the transcript's references to the argument, as cited in the Chiefs' opening brief, the Chiefs' fixtures arguments were made at, *inter alia*, pages 13-15 of the Chiefs' January 26, 2018 Post-Hearing Legal Brief at pp. 14-15, and the Chiefs' March 2, 2018 Post-Hearing Response Brief at pp. 14-15 and n.6. Although those documents do not appear necessary for this Court to determine that the Chiefs have properly preserved this point, if the Court decides otherwise, the Chiefs respectfully request that the Court direct the Commission under Rule 100.02(h) to certify those additional portions of the administrative record.

B. Certain of the Contested Items are non-taxable fixtures.

A number of the Contested Items were firmly affixed to Arrowhead Stadium and the grounds around it. Because these items were fixtures attached to the real estate and structures, they were never subject to sales or use taxes in the first instance.

The Director improperly assessed taxes on fixtures, including the new scoreboard-related equipment, the Lamar Hunt Statue, the Hall of Honor exhibits, and the wayfinding and other signage in the stadium, all of which were affixed to structures. (*See, e.g.*, Tr. 89-98, 113-22.) Likewise, the Sony televisions were bolted to the structures in the concourses and installed with brackets in other areas. (*See id.*) Contrary to the Director's argument, the Contested Items are the types of items permitted to be purchased by the holder of a project exemption certificate because they were "consumed in real property improvements." Improvements to real property are not taxable. (Ex. 20.) The Project entailed construction, repair, and remodeling of Arrowhead Stadium and other portions of the Sports Complex, which is real property, and all the Contested Items were purchased for that Project's construction, repair, and remodeling.

The Director's own regulations in effect during the assessment periods establish that certain of the Contested Items (including the items procured from Sony, Roscor, Daktronics, Harmon Sign, Bruce Wolfe, and Artworks Foundry, as

well as some of the items such as built-in cabinets or furniture obtained from Encompas and John Marshall) are fixtures not subject to sales or use tax. Before March 2011, while the Project improvements and renovations were taking place, the Director's regulation 12 C.S.R. 10-3.330 provided that "fixtures and improvements to realty" are not subject to tax:

> (1) Sales tax does not apply to the sale of realty or an interest in realty. Nor does it apply to fixtures or improvements to realty where title does not pass until after the property has been attached to and become commingled with and part of the realty**.**
>
> (2) Example: A cabinet maker is not subject to sales tax for the moneys received under a contract where s/he constructs and installs kitchen cabinets in a home under construction.

(A54) (emphasis added.)[8]

[8] Although 12 C.S.R. 10-3.330 has since been repealed, it was in effect during the times in question, and therefore must be considered when deciding this case. *See generally Mobil Oil Corp. v. Dir. of Revenue*, 513 S.W.2d 319, 320 (Mo. 1974). In addition, the Director's argument that the regulation only applies to sales tax is incorrect. Property is only subject to use tax to the extent the property would have been subject to sales tax if purchased locally. *See Fall Creek Constr. Co. v. Dir. of Revenue*, 109 S.W.3d 165, 169 (Mo. banc 2003). The use tax complements the sales tax and is designed to keep in-state merchants competitive with sellers in other states. *Id*. at 169. Said differently, the purpose of the use tax is to "complement, supplement, and protect the sales tax." *Dir. of Revenue v. Superior Aircraft Leasing Co.*, 734 S.W.2d 504, 506 (Mo. banc 1987). This is based on the plain language of the use tax statute, which levies use tax at "an amount equivalent to the percentage imposed on the sales price in the sales tax law. . . ." R.S. Mo. § 144.610.1. Property not subject to Missouri sales tax therefore cannot be subject to Missouri use tax. Although 12 C.S.R. 10-3.330 provided a sales tax exemption, based on Missouri law, any sales tax exemption also operates as a *de facto* use tax exemption.

Buyers and sellers may control through their contracts when title to property passes. *See House of Lloyd, Inc. v. Dir. of Revenue*, 824 S.W.2d 914, 923 (Mo. banc 1992), *abrogated in part on other grounds by Sipco, Inc. v. Dir. of Revenue*, 875 S.W.2d 539 (Mo. banc 1994); *Christenson v. Burba*, 714 S.W.2d 183, 195 (Mo. App. 1986); U.C.C. §§ 400.2-401(2). The Chiefs never had dominion or control over the Contested Items affixed to the Project's realty. Upon ordering, the Contested Items were delivered to the Stadium and affixed by the vendors or subcontractors. The Chiefs themselves did not take possession of or install the items.

The Lease, Amended Lease, and Development Agreement plainly reflect that title to *and* ownership of the Contested Items passed upon permanent and complete installation. The undisputed testimony also confirms that the County is the owner. (*See* App. Br., p. 12.) As this Court recognized in *Schaffner*,[9] the concepts of "title" and "ownership" are distinct. *See also Olin*, 945 S.W.2d at 444 (finding no taxable transaction where taxpayer did not acquire title or ownership to personal property purchased in the performance of a government contract). Passage of title is determined by the Uniform Commercial Code, §§ 400.2-401(2), but that provision specifically allows parties to otherwise agree when title passes. Because the County, Authority, and Chiefs controlled the transfer of title and ownership by

[9] *State ex rel. Thompson-Stearns-Roger v. Schaffner*, 489 S.W.2d 207, 215 (Mo. 1973), *overruled in limited part by Olin Corp.*, 945 S.W.2d at 422.

contractual provisions, title and ownership passed after the Contested Items became affixed to, and thus were made a part of, the real property.

Under the applicable version of 12 C.S.R. 10-3.330, the Director could not assess sales or use taxes on those Contested Items that were fixtures. The Commission's Decision thus should be reversed at a minimum with respect to the Contested Items incorporated into or affixed to the Sports Complex facilities.

CONCLUSION

This Court should reverse the Administrative Hearing Commission's ruling in its entirety and hold that the Chiefs are not liable for the Director's sales and use tax assessments. Alternatively, the Commission's Decision at a minimum should be reversed with respect to the Contested Items incorporated into or affixed to the Sports Complex facilities.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(B)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) in that according to the word count function of Microsoft Word by which it was prepared, contains 7,363 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block, and the accompanying Reply Appendix.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of July, 2019, the foregoing brief and its accompanying Reply Appendix were filed electronically with the Clerk of the Court, and served electronically by the Court's electronic filing system on the following:

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