**IN THE SUPREME COURT OF MISSOURI**

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|---|---|---|
| **REJ, INC.,** | ) | |
| **Plaintiff/Appellant,** | ) | |
| | ) | |
| **v.** | ) | **No. SC85711** |
| | ) | |
| **CITY OF SIKESTON,** | ) | |
| **Defendant/Respondent,** | ) | |
| | ) | |
| **And** | ) | |
| | ) | |
| **GREERS GROVE DEVELOPMENT, L.P.** | ) | |
| **Intervenor.** | ) | |

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**Appeal from the Circuit Court of Scott County**
**The Honorable Steve Mitchell, Associate Circuit Judge**

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# REPLY BRIEF OF APPELLANT REJ, INC.

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## STATEMENT OF FACTS

The City's "Statement of Facts" distorts the record in an effort to make an argument that REJ never stated a Sunshine Law claim. The City asserts that "one of the City's Interrogatories to REJ inquired as to claims by REJ that the Sunshine Law had been violated. REJ objected to this interrogatory (No. 11) on the ground that it is 'overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.'" Respondent's Brief at 9. This statement is echoed in the City's argument, in which the City claims:

> REJ's contention that it should now be allowed to amend its petition to request a remedy under the Sunshine Law becomes more tenuous in view of the position it has taken with regard to discovery. . . . By Interrogatory No. 11, the City inquired as to any contention that the Sunshine Law was violated. The plaintiff objected to that question on the grounds that "it is over-broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence."

Respondent's Brief at 39 (emphasis in original). The City argues that REJ's petition did not state a claim for relief under the Sunshine Law because "we not only have no request for relief in the original petition for remedies under the Sunshine Law, but we also have a set of objections to interrogatories in which REJ takes the position that an inquiry into Sunshine Law issues is overly-broad, unduly burdensome and not calculated to lead to the discovery of admissible evidence." Respondent's Brief at 29. The City therefore argues throughout its brief that REJ did not allege a Sunshine Law claim because REJ

objected to the City's interrogatory into whether REJ believed the City violated the Sunshine Law in enacting the ordinances at issue.

This is unconscionable. Notably, the City's willingness to quote REJ's response to the interrogatory is not matched by any willingness to quote, or even accurately describe, its own interrogatory. The City propounded the following question in Interrogatory Number 11:

> If you contend that the Defendant violated any provision of the Sunshine Law ***in addition to those alleged in Paragraph 21***, please state with specificity those violations.

Supp. L.F. 20 (emphasis added). The interrogatory explicitly asked REJ to disclose its knowledge of the City's Sunshine Law violations in addition to the violations that were set forth in the petition. The interrogatory sought information on any *additional* Sunshine Law violations unrelated to the City's passage of the ordinances at issue, violations that were known only to the City and not REJ. REJ properly objected to that interrogatory overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Supp. L.F. 20.

REJ's objection to the City's interrogatory 11 does not, as the City claims, demonstrate that REJ has taken "inconsistent" positions with respect to its Sunshine Law allegations. Respondent's Brief at 40. The objection merely demonstrates that REJ objected to a plainly objectionable interrogatory. The interrogatory itself, however, shows the City's "inconsistency" in explicitly recognizing the existence of REJ's

Sunshine Law claim in interrogatories to REJ, and then later arguing that the Sunshine Law claim was never alleged.

The City also refers to a lawsuit filed by Joel Montgomery against the Scott County Health Department. Respondent's Brief at 11-12. Mr. Montgomery's lawsuit involved unrelated claims by a different plaintiff against different defendants. The City was not a party in the *Montgomery* lawsuit. The *Montgomery* case, therefore, has no relevance to whether REJ asserted a Sunshine Law claim in its original petition in this case, or whether the trial court erroneously dismissed REJ's petition and erroneously denied REJ leave to file an amended petition.

## ARGUMENT

**I. THE TRIAL COURT ERRED IN DISMISSING REJ'S PETITION BECAUSE REJ'S CLAIMS WERE NOT MOOT, IN THAT REJ'S PETITION PRAYED FOR A VARIETY OF REMEDIES FOR THE CITY'S SUNSHINE LAW VIOLATIONS ARISING FROM ILLEGAL ACTS IN CONNECTION WITH THE PASSAGE OF ORDINANCE 5405, INCLUDING A DECLARATION THAT THE ORDINANCE WAS VOID AND UNENFORCEABLE, AN INJUNCTION PREVENTING ITS ENFORCEMENT, AND COSTS AND ATTORNEYS FEES, AND REJ'S REQUEST FOR THOSE REMEDIES CONSTITUTED A CONTINUING JUSTICIABLE CONTROVERSY.**

The City begins its argument by misstating the applicable standard of review. Citing *Colombo v. Buford*, 935 S.W.2d 690 (Mo. App. 1997), the City claims that review of the trial court's dismissal of REJ's petition is governed by *Murphy v. Carron*, which recites the well-settled standard of review for court-tried cases. Unlike this case, however, *Colombo* involved an appeal from the trial court's judgment granting a motion for directed verdict at the close of the plaintiffs' evidence. The court of appeals correctly noted that a motion for directed verdict in a court-tried case is actually a motion for judgment on the merits, and therefore the trial court must "determine credibility of the witnesses and weigh the evidence, so that the appeal from the ruling on the motion is from a final determination of the issues in question." *Colombo*, 935 S.W.2d at 694; *see also Kamil, Decker & Co., P.C. v. SMC Properties, Inc.*, 998 S.W.2d 818, 819 (Mo. App. 1999) (a motion for directed verdict in a court-tried case is improperly denominated,

because "in a court-tried case there is no verdict. . . . The motion is a motion for judgment on the grounds that upon the facts and the law plaintiff is not entitled to relief").

The obvious flaw in the City's argument is that this is not an appeal from a court-tried case. In determining the City's motion to dismiss REJ's petition, the trial court was not asked to weigh the evidence or determine credibility of witnesses because REJ was never permitted to present any evidence in support of its claims.

This is an appeal from the trial court's judgment *dismissing* REJ's petition, based on the court's determination that REJ failed to allege a claim for relief under the Sunshine Law. On review of such a judgment "the appellate court is confined to the face of the petition," and "shall accept as true all facts well pleaded in the petition and shall construe the petition liberally, giving the pleader the benefit of all reasonable inferences fairly deducible from those pleaded facts." *Goodwin v. Goodwin*, 583 S.W.2d 559 (Mo. App. 1979); *Ste. Genevieve School Dist. R II v. Bd. of Aldermen*, 66 S.W.3d 6, 11 (Mo. banc 2002).

In addition to its failure to recognize the standard governing the very relief it sought in the trial court, the City's brief is remarkable for its failure to address REJ's arguments on appeal – that REJ alleged a Sunshine Law claim in its petition, and that its Sunshine Law claims asserted in its First Amended Petition were not time-barred. The City quotes but fails to heed the requirement that "a pleading must be judged by what it alleges or fails to allege." Respondent's Brief at 29. The City ignores REJ's specific Sunshine Law allegations in its petition, ignores REJ's claims for relief under that law,

and claims that REJ requested only declaratory and injunctive relief – a request that was mooted by the City's repeal of Ordinance 5405. Respondent's Brief at 19-24.

Notwithstanding the City's attempt to sidestep the issues raised on appeal, the fact remains that REJ explicitly alleged in Count I of its petition that "the City of Sikeston violated the Sunshine Law" by failing to give notice of any meeting for the purpose of amending Ordinance 5405; failing to keep minutes of any meeting for the purpose of amending the ordinance; failing to keep a record of any votes taken for the purpose of amending the ordinance; and failing to keep a record of any votes taken for the purpose of passing the ordinance. L.F. 10. REJ's prayer was not confined to declaratory and injunctive relief; it also sought costs and attorneys fees, relief specifically authorized under the Sunshine Law. L.F. 11; § 610.027.3 RSMo. Nowhere in its brief does the City attempt to explain how explicit allegations describing the City's illegal conduct and explicit request for relief under the Sunshine Law was somehow insufficient to state a Sunshine Law claim.

The City cites a number of cases that have nothing to do with whether REJ alleged a claim for relief under the Sunshine Law. *Automobile Club of Missouri v. City of St. Louis,* for example, involved a challenge to city ordinances permitting the installation of parking meters, and the collection of fines. 334 S.W.2d 355, 357 (Mo. 1960). In *Automobile Club*, before the plaintiff's petition was filed, four of the eight ordinances challenged had either expired or been repealed. *Id.* at 357. This Court properly held that the question of the validity of the repealed and expired ordinances was moot. *Id.* at 356. In *St. Louis County v. Village of Peerless Park*, the plaintiff County challenged the

defendant's annexation of parcels of land. 726 S.W.2d 405 (Mo. App. 1987). During the pendency of the appeal, the legislature amended the statute on which the County's challenge was based. *Id.* at 408-09. The court of appeals correctly noted that "where an amendment changes the statute on which the litigants rely to define their rights in such a way that the appeal in effect presents only hypothetical questions, this court may dismiss the appeal as moot." *Id.* at 409. Unlike this case, neither *Automobile Club* nor *Peerless Park* involved the dismissal of a petition for failure to state a claim, or a claim for relief that clearly survived the repeal of the ordinances at issue, or a claim for relief under the Sunshine Law.

*Robinson v. City of Raytown* is not, as the City claims, "extremely similar" to this case, nor does it aid the City's argument. Respondent's Brief at 21. The plaintiffs in *Robinson* filed a four-count petition claiming that the defendant city enacted a rezoning ordinance in violation of the federal Civil Rights Act, 42 U.S.C. § 1983, and Missouri statutes. *Robinson,* 606 S.W.2d 460, 462 (Mo. App. 1980). Count I sought a judgment declaring the ordinance void and unenforceable. Counts II and III sought actual and punitive damages, respectively, based on the plaintiffs' claim that the enactment of the ordinance constituted a deprivation of procedural due process and equal protection in violation of the Fourteenth Amendment. Count IV sought attorneys fees under 42 U.S.C. section 1988. *Id.* The trial court dismissed Counts II through IV and, after trial, entered judgment in the plaintiffs' favor on Count I, declaring that the ordinance was invalid (although on grounds other than the alleged violation of section 1983). *Id.* at 462. The defendant city appealed the declaratory judgment, and the plaintiffs cross-appealed the

dismissal of Counts II through IV. *Id.* During oral argument on appeal, counsel for the city admitted that the ordinance was, in fact, void and unenforceable because it was never validly enacted. *Id.* at 463-64. The court of appeals correctly held that the city's appeal from the trial court's judgment declaring the ordinance void was rendered moot by the city's own admission. *Id.* The court further held that the trial court properly dismissed Counts II through IV of the plaintiffs' petition, because the plaintiffs failed to plead that the City took any steps to enforce its illegal ordinance. *Id.* at 455. Based in part on precedent from the United States Supreme Court holding that, under section 1983, the defendant city could not be held liable unless "execution of the government's policy or custom . . . inflicts the injury," the court of appeals held that the plaintiffs failed to state a claim for relief under section 1983 in Counts II and III. *Id.* at 465-66, *citing Monell v. Dept. of Soc. Serv. of New York*, 436 U.S. 658 (1978). Because the plaintiffs failed to state a claim under section 1983 and were not "prevailing parties" under section 1988, they were not entitled to attorneys fees under section 1988. *Id.* at 466-67.

Contrary to the City's claim in its brief in this case, the court of appeals in *Robinson* did not reverse the judgment in the plaintiff's favor. Respondent's Brief at 21. The court, in fact, held that "the declaratory judgment rendered by the trial court on Count I of plaintiffs' petition is *affirmed*." *Id.* at 464 (emphasis added). The court in *Robinson* did not, as the City suggests, determine that the plaintiffs' challenge to the ordinance was mooted by a repeal of the ordinance. Respondent's Brief at 21. The court instead stated that the defendant *city's* appeal was mooted by its own admission that the ordinance was illegally enacted. Unlike the plaintiffs in *Robinson*, REJ ***did*** allege facts

showing that the City violated the Sunshine Law, facts that would have entitled it to attorneys fees under the Sunshine Law. § 610.027.3 RSMo. The *Robinson* court's dismissal of the plaintiff's petition for failure to state a claim under sections 1983 and 1988 therefore is not relevant here.

The City argues that REJ's appeal fails because "REJ has cited no law which would require the use of the phrase *void ab initio* to successfully repeal an ordinance." Respondent's Brief at 22. To the extent that, through this argument, the City now admits that its repeal of Ordinance 5405 was void *ab initio* without such an express declaration, REJ is happy to accept the City's admission. Otherwise, the obvious problem with the City's vacuous argument is that REJ never contended in its brief that every repeal of every ordinance must be accomplished through a statement that the ordinance was void *ab initio*. Instead, REJ argued that, after the City illegally rezoned the property through Ordinance 5405, it entered into a land sale that was predicated on the validity and enforceability of that ordinance. Appellant's Brief at 21-22. The land sale, which operates to deprive REJ of property rights, should be a nullity, and will be a nullity if the ordinance is declared void *ab initio*. Absent such a declaration, however, the City will be permitted to illegally accomplish precisely what it set out to do – the commercial development of property that has never been properly zoned for such development.

Finally, it is amusing that the City would raise the specter of establishing "a public policy that would preclude any legislative body from correcting defects in its own proceedings." Respondent's Brief at 23. Public policy and the black letter of the law require legislative bodies not to conduct secret proceedings. Legislative bodies are

forbidden to expunge illegal acts under the cover of darkness. This appeal presents the issue of whether the City should be permitted to benefit from and avoid liability for its illegal conduct. The danger posed to Missouri public policy is presented by the City's conduct, not by REJ's appeal.

The trial court erred in dismissing REJ's petition. Its judgment should be reversed.

## II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE A FIRST AMENDED PETITION BECAUSE JUSTICE REQUIRED THE COURT TO GRANT REJ LEAVE TO AMEND ITS PLEADINGS, IN THAT REJ'S FIRST AMENDED PETITION ASSERTED THE SAME CAUSES OF ACTION ALLEGED IN ITS ORIGINAL PETITION, AND REJ FURTHER SUPPORTED ITS CLAIMS BY ALLEGING NEW FACTS AND INFORMATION LEARNED DURING DISCOVERY.

As in Point I, in Point II the City dances around REJ's argument that explicit allegations describing the City's Sunshine Law violations and explicit prayer for relief provided by the Sunshine Law state a Sunshine Law claim. Instead, the City simply states that it "disagrees" with REJ's argument that its original petition pleaded a claim for relief under the Sunshine Law, and then launches into a dissertation on when pleadings may be amended and the time limitation applicable to Sunshine Law claims. The City's inability to address REJ's argument squarely speaks volumes about the bankruptcy of the City's position.

The City's argument that REJ's Sunshine Law claims are barred by the Statute of Limitations requires little discussion. As discussed in Point I and in REJ's opening brief, REJ's original petition explicitly alleged violations of the Sunshine Law. L.F. 10-11. The original petition was filed August 13, 2001, well within the one-year limitations period for Sunshine Law claims. L.F. 1. Because REJ's original petition was timely filed, any subsequent amended pleading would be considered timely pursuant to the relation back doctrine. *See* Rule 55.33(c). The City's claim that REJ's proposed

amended petition was time-barred because no Sunshine Law claim was originally pleaded is insupportable.

The City quotes the following from *J.H. King v. S.D. Guy*, 297 S.W.2d 617, 624 (Mo. App. 1956), as support for its argument that REJ did not assert a Sunshine Law claim in its original petition: "Pleadings are not to be used to conceal issues or to ambush the adverse party, and the court should not be charged with assuming that the pleader intended to conceal one cause of action within another." Respondent's Brief at 30. The City states that the purpose of pleadings is to "inform the parties and the court of the claim made," and that that pleadings "should not be drawn so as to mislead." Respondent's Brief at 29. The City thus apparently contends that REJ "concealed" its Sunshine Law claims in its original petition, that REJ's petition did not inform the City of any Sunshine Law claim, and that REJ's Sunshine Law claim in its proposed First Amended Petition was an attempt to "ambush" the City. This contention is ridiculous in view of the City's Interrogatory 11, which the City alludes to throughout its brief: "If you contend that the Defendant violated any provision of the Sunshine Law in addition to those alleged in Paragraph 21, please state with specificity those violations." Supp. L.F. 20. The City clearly was aware of REJ's Sunshine Law claim from the inception of this lawsuit.

The City argues that REJ's objection to the City's interrogatory 11 somehow precludes REJ's right to amend. This argument is groundless. As noted *supra*, the interrogatory only asked REJ to identify the City's Sunshine Law violations *in addition to* the violations alleged in the petition. Supp. L.F. 20. Any violations that were not

alleged in the original petition were known only to the City, and not to REJ. Furthermore, any violations – again known only by the City – committed in connection with activities unrelated to the City's passage of the zoning ordinances at issue were irrelevant to the issues raised in REJ's lawsuit. REJ, therefore, properly objected to the interrogatory as over broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

The City mentions that "a motion relative to the objections [to interrogatories] was argued by telephone conference for which no record was made," and that no order on the parties' objections was ever entered. Respondent's Brief at 39. The City does not expound on how a hearing on discovery objections might have any relevance to whether the trial court abused its discretion in denying REJ leave to amend. If the City wanted a written ruling on REJ's objections to Interrogatory 11, the City, as the moving party, bore the responsibility of obtaining that order. The fact that the City's attorney failed to do so has no bearing on REJ's right to amend.

Unbelievably, the City attempts to argue that, assuming REJ's allegations regarding the City's conduct are true, REJ still has no right to relief and the City has no liability. Respondent's Brief at 32-34. The City thus argues that its mayor could, with impunity, conceal information from the Planning and Zoning Commission that was relevant to its determination. The City apparently contends that the mayor was entitled to ignore the wishes and best interests of Sikeston's citizens to pass an ordinance that would further his own pecuniary gain. The city council allegedly had the right to pass an ordinance that zoned property to a non-existent commercial designation. The City

appears to claim that the city council could enact and amend this ordinance without a hearing, and without minutes or a record of votes taken for the purpose of amending or passing the ordinance, in direct violation of the Sunshine Law. And, after being confronted with a lawsuit challenging its illegal conduct, the City asserts that it could wipe the slate clean and avoid all liability for its conduct simply by passing another ordinance. The arrogance of the City's position is amazing.

Contrary to the City's suggestion in its brief, REJ has not argued that the City is bound to follow the recommendations of the Planning and Zoning Commission in enacting ordinances. Respondent's Brief at 32. REJ is well aware that the City has the power to "enact and ordain any and all ordinances not repugnant to the constitution and laws of this state." § 79.110 RSMo. This includes the power to enact ordinances amending prior ordinances; it is well settled that the authority to enact ordinances includes the authority to amend them. *Lodge of the Ozarks, Inc. v. City of Branson*, 796 S.W.2d 646, 655 (Mo. App. 1990); 6 E. McQuillin, The Law of Municipal Corporations § 21.02 (3d. Ed. 1998). The City's inherent power to amend an ordinance is, however, subject to restrictions in the constitution and laws of this state. The City cannot enact or amend ordinances in violation of the Sunshine Law.

The City claims that *City of Monett v. Buchanan*, 411 S.W.2d 108 (Mo. 1967), and *Strandberg v. Kansas City*, 415 S.W.2d 737 (Mo. banc 1967), support its argument. Respondent's Brief at 32-33. The City is wrong. *Monett* and *Strandberg* recite the settled rule that a city's exercise of its zoning powers is a legislative function with which courts typically will not interfere. *Strandberg*, 415 S.W.2d at 742; *Monett*, 411 S.W.2d at

114. This Court in *Monett* specifically noted that the city's conduct may not be unreasonable or arbitrary. *Monett*, 411 S.W.2d at 114. Neither *Strandberg* nor *Monett* stand for the proposition that the City may ignore the law when it enacts ordinances.

City officials were deposed in May of 2002, and REJ filed its Motion for Leave to Amend on August 27, 2002. L.F. 78. The City argues that by taking fourteen weeks to amend its pleadings, REJ lost the right to amend its pleadings to allege new facts learned during discovery. The Supreme Court Rules, however, do not impose such a time limitation. Furthermore, between May and August of 2003, the parties were engaging in settlement discussions in an attempt to resolve the litigation. It would have been pointless for REJ to file its Motion for Leave to Amend in the midst of such discussions. After settlement discussions broke down in August, 2003, the City moved to dismiss REJ's petition on the (invalid) grounds that REJ's claims had been mooted by the City's repeal of Ordinance 5405. REJ opposed that motion, and also asked for leave to amend its pleadings in anticipation of the trial date. In any event, taking fourteen weeks to amend pleadings can hardly be characterized as unreasonable.

Finally, the City argues that the trial court properly denied REJ leave to file an amended petition because REJ failed to name individual city council members as parties to this lawsuit. The City argues that the trial court lacked personal jurisdiction over the unnamed city council members, and therefore could not award the fines that REJ prayed for in its first amended petition. Respondent's Brief at 45-46. This contention is directly contrary to the law. The Sunshine Law provides that, "upon a finding by a preponderance of the evidence that a *public governmental body or* a member of a public

governmental body has purposely violated sections 610.010 to 610.027, the *public governmental body or* the member shall be subject to a civil fine in the amount of not more than five hundred dollars." § 610.027.3 RSMo (emphasis added). The Sunshine Law explicitly allows a court to impose fines on a legislative body as a whole, and not just individual members.

REJ's Sunshine Law claim alleged in its First Amended Petition was not time barred. REJ asserted a Sunshine Law claim in its original petition. In determining whether to grant the City's motion to dismiss REJ's original petition, the trial court was obligated to assume as true all facts alleged, and construe the allegations liberally and favorably in favor of REJ. *Ste. Genevieve School Dist. R II v. Bd. of Aldermen*, 66 S.W.3d 6, 11 (Mo. banc 2002). The trial court was bound by Rule 67.06, which directed the court to "freely grant leave to amend" on sustaining a motion to dismiss. The court was bound by Rule 55.33, which required the court to freely grant leave in the interest of justice. The trial court erroneously failed to apply Missouri law when it dismissed REJ's petition as moot and denied REJ leave to file its amended petition. The trial court's judgment should be reversed.

## CONCLUSION

For the reasons discussed in this Reply Brief and in the Substitute Brief of Appellant, the trial court's judgment dismissing REJ's petition and denying REJ leave to file its first amended petition should be reversed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Reply Brief of Appellant and a disk containing this brief were mailed on March _____, 2004 to each of the following counsel of record:

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Reply Brief of Appellant includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 4,385, exclusive of the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disk filed with the Reply Brief of Appellant was scanned for viruses and was found virus-free through the Norton anti-virus program.