Appeal No. SC93195

In The

MISSOURI SUPREME COURT

CITY OF KANSAS CITY, MISSOURI

Plaintiff/Respondent

vs.

KAREN CHASTAIN, et al.

Defendants/Appellants

Appeal from the Circuit Court of
Jackson County, Missouri
Case No. 1116-CV29139

SUBSTITUTE APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This action arose from a declaratory judgment action filed by the City of Kansas City, Missouri against Defendants/Appellants seeking a declaration that the City of Kansas City, Missouri was justified in refusing to place a certain proposed ordinance before the voters. The matter was tried to the Circuit Court of Jackson County, Missouri and resulted in a judgment in favor of the City of Kansas City, Missouri, which was entered on March 9, 2012. Defendants/Appellants filed their Notice of Appeal with the Western District of Missouri on March 19, 2012. On January 15, 2013 the Court of Appeals for the Western District of Missouri issued an opinion affirming the ruling of the trial court. Application for transfer was made to the Western District of Missouri on January 30, 2013. That application was denied on March 5, 2013. Application for transfer was made to the Supreme Court on March 12, 2013. That application was sustained on May 28, 2013. This Court has jurisdiction pursuant to the Missouri Constitution, Article V, Sections 3 10.

STATEMENT OF FACTS

Defendants/Appellants Karen D. Chastain, Kim Williamson, Richard Tolbert, Lamar Mickens, and Cynthia L. Mickens are members of a Committee of Petitioners. (LF, p. 7, ¶ 2-6, p. 22, ¶ 2-6). On July 7, 2011, the Committee of Petitioners filed with the City Clerk for the City of Kansas City, Missouri signed initiative petition papers seeking the adoption of an ordinance. (Joint Stipulation of Facts, ¶ A(1), LF, p. 122). On July 19, 2011, the City Clerk issued a Notice of Insufficiency to the Committee with respect to the initial petition. (Joint Stipulation of Facts, ¶ A(2), LF, p. 122). On July 26, 2011, supplementary petition papers were filed. (Joint Stipulation of Facts, ¶ A(3), LF, p. 122).

The proposed ordinance provides for the "construction of a 22-mile new light rail line, a 19 mile commuter rail line, an 8.5 mile streetcar line from the Kansas City Zoo to Union Station, a shuttle bus and bikeway feeder network connecting all rail stations." (LF, p. 137; Plaintiff's Exhibit 104, A32-33). In addition, the proposed ordinance would "establish[] a one-fourth percent capital improvements sales tax for 25 years and a one-eighth percent transportation sales tax for 25 years. The proposed ordinance expressly states that the tax proceeds will be used 'to help fund' the improvements for the mandated light rail system, and that the tax proceeds will be used to 'finance bonds and secure federal matching funds.'" (LF, p. 137; Plaintiff's Exhibit 104, A30-34).

On August 1, 2011, the City Clerk issued a Certificate of Sufficiency. (Joint Stipulation of Facts, ¶ A(4), LF, p. 122). Exhibit 106 is a true and correct copy of one of the petition papers that contains a true and correct statement of the proposed ordinance language. (Plaintiff's Exhibit 106). On August 4, 2011, the ordinance proposed by the Committee was introduced as Ordinance 110607 at the Council's Legislative Session, and referred to the Council's Transportation and Infrastructure Committee. (Joint Stipulation of Facts, ¶ A(6), LF, p. 122). Exhibit 104 is a true and correct copy of Ordinance 110607. (Plaintiff's Exhibit 104, A30-34).

On September 29, 2011, the full City Council voted not to pass the proposed ordinance. (Joint Stipulation of Facts, ¶ A(8), LF, p. 123). On September 29, 2011, the City Council passed Committee Substitute for Resolution No. 110727, as amended, setting forth the reasons why the Council was not supportive of the proposed ordinance. (Joint Stipulation of Facts, ¶ A(9), LF, p. 123). Exhibit 105 is a true and correct copy of Committee Substitute for Resolution No. 110727. (Plaintiff's Exhibit 105). On September 30, 2011, a request that the proposed ordinance be submitted to the voters was filed with the City Clerk. (Joint Stipulation of Facts, ¶ A(11), LF, p. 123).

Plaintiff/Respondent City of Kansas City, Missouri filed its Petition for Declaratory Judgment in the Circuit Court of Jackson County, Missouri against the Defendants/Appellants as the members of the Committee of Petitioners on October

6, 2011. (LF, p. 1, 6-7). The Petition sought a declaratory judgment that the City was justified in refusing to place the proposed ordinance before the voters. (LF, p. 14, 16). The Petition alleged that the proposed ordinance violates Article III, Section 51 of the Missouri Constitution and the Department of Transportation Act of 1966. (LF, p. 14, 16).

Defendants filed their Answer to Petition for Declaratory Judgment and Counterclaim for Injunctive Relief on November 3, 2011. (LF, p. 2, 22). The Petition did not allege that the City lacked an adequate remedy at law, (LF, p. 6-17), and Defendants' Answer included the affirmative defense that the Petition failed to state a claim upon which relief may be afforded. (LF, p. 30, ¶ 2).

The Defendants' Counterclaim sought an order of mandamus directing the City to comply with Section 703 of the Charter of the City of Kansas City, Missouri and place the proposed ordinance on the ballot. (LF, p. 32). The City filed its Motion to Dismiss Defendants' Counterclaim on December 5, 2011. (LF, p. 3, 77). The trial court entered its Order Granting Plaintiff's Motion to Dismiss Counterclaim Action for Mandamus on February 7, 2012. (LF, p. 4, 119, A5-8).

The matter was tried to the Court on February 17, 2012. (Trans., p. 1). The parties filed a Joint Stipulation of Facts that same day. (LF, p. 122). In addition to the stipulation regarding certain facts and exhibits, the Joint Stipulation of Facts provided:

B. Defendants have waived foundational objections and the necessity to adduce testimony in support of the following facts or exhibits but preserve the right to object to their admissibility on other grounds.

1. The Defendants stipulate that Swope Park, Kansas City Zoo and Penn Valley Park and Liberty Memorial are park property as defined in Section 1001(c) of the City Charter of the City of Kansas City, Missouri.

2. Defendants stipulate that the City of Kansas City, Missouri Board of Parks and Recreation Commissioners has not determined that the referenced park properties are no longer necessary or appropriate for park uses, nor has that question been presented to the voters.

3. Exhibit F to Plaintiff's petition entitled "Information Sheet for 2011 Transit Initiative" is a true and correct copy of an information sheet that was distributed during the petition signature gathering process.

(LF, p. 123). During the hearing on February 17, 2012, the parties stipulated "that the procedural requirements to have the proposed ordinance before the council and to be in a position to be submitted to the voters were all met." (Trans., p. 3, l. 23 thru p. 4, l. 4; see also Trans., p. 11, l. 3-5) ("Your Honor, we do agree that the

procedural steps for the initial process were followed."). At the hearing, the City did not present any evidence that it lacked an adequate remedy at law. (Trans., p. 1-20). The Trial Court did not grant an amendment of the pleadings at the evidentiary hearing. (Trans., p. 1-20).

The trial court entered its Final Judgment for Plaintiffs [sic] on March 9, 2012. (LF, p. 5, 137, A1-4). The court held that the proposed "ordinance is found to be facially unconstitutional under Article III Section 51 of the Missouri Constitution." (LF, p. 139). The trial court ruled that "[t]he City is therefore not obligated to place the facially unconstitutional ordinance before the voters, and is legally justified in refusing to place said ordinance before the voters." (LF, p. 139, A3). Defendants filed their Notice of Appeal to the Western District of Missouri Court of Appeals on March 19, 2012. (LF, p. 5, 141).

POINTS RELIED ON

I. The trial court erred in declaring the proposed ordinance a facially unconstitutional appropriation ordinance as it found that the measure provides for insufficient revenues, insufficiency cannot be determined from the face of the proposed ordinance, and insufficiency should never constitute grounds for pre-election review as a matter of public policy.

Committee for a Healthy Future, Inc. v. Carnahan, 201 S.W.3d 503 (Mo.banc 2006)

Knight v. Carnahan, 282 S.W.3d 9 (W.D. Mo. 2009)

State ex rel. Card v. Kaufman, 517 S.W.2d 78 (Mo. 1974)

II. The trial court erred in declaring the proposed ordinance a facially unconstitutional appropriation ordinance as the proposed ordinance does not appropriate any money that is not created and provided for through sales tax and federal matching funds.

Committee for a Healthy Future, Inc. v. Carnahan, 201 S.W.3d 503 (Mo.banc 2006)

Missouri Constitution, Article III, Section 51

49 U.S.C. § 5307

III. The trial court erred in entering judgment in favor of the City and denying the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, because the City has an adequate remedy at law through its ability to repeal voter initiated ordinances and, furthermore, the City failed to plead or prove that it did not have an adequate remedy at law.

State ex rel. Chastain v. City of Kansas City, 289 S.W.3d 759 (W.D. Mo. 2009)

Charter of the City of Kansas City, Missouri, § 704

Foster v. State, 352 S.W.3d 357 (Mo.banc 2011).

IV. The trial court erred in dismissing Defendants' Counterclaim for Mandamus and declaring that the City is not obligated to place the proposed ordinance before the voters, because the City had a ministerial duty to place the proposed ordinance on the ballot, in that the parties stipulated that the procedural requirements to have the proposed ordinance before the council and to be in a position to be submitted to the voters were all met and the proposed ordinance is not facially unconstitutional.

Charter of the City of Kansas City, Missouri, § 703

Bergman v. Mills, 988 S.W.2d 84 (W.D. Mo. 1999)

State ex rel. Lane v. Chambers, 353 S.W.2d 835 (Mo.App. 1962)

V. The trial court erred in admitting Plaintiff's Exhibits 102, 103, and 110, because such exhibits are incompetent and irrelevant to the issue of whether the proposed ordinance is facially unconstitutional, in that pre-election review is limited to determining whether the proposed ordinance is facially unconstitutional and City Charter provisions addressing the Board of Parks and Recreation Commissioners and the use of lands dedicated to parks and boulevards as well as evidence of other potential sources of revenue regarding the proposed transportation systems do not address the facial constitutionality of the proposed ordinance.

Mitchell v. Kardesch, 313 S.W.3d 667 (Mo.banc 2010)

Markley v. Edmiston, 922 S.W.2d 87 (W.D. Mo. 1996)

Knight v. Carnahan, 282 S.W.3d 9 (W.D. Mo. 2009)

ARGUMENT

I. The trial court erred in declaring the proposed ordinance a facially unconstitutional appropriation ordinance as it found that the measure provides for insufficient revenues, insufficiency cannot be determined from the face of the proposed ordinance, and insufficiency should never constitute grounds for pre-election review as a matter of public policy.

A. Standard of Review

In addressing the standard of review related to a trial court's ruling regarding an initiative petition, the Supreme Court of Missouri has written:

> "Nothing in our constitution so closely models participatory democracy in its pure form. Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people. The people, from whom all constitutional authority is derived, have reserved the 'power to propose and enact or reject laws and amendments to the Constitution.' Mo. Const. art. III, [sec.] 49. When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course. Constitutional and statutory provisions relative to initiative are liberally construed to make effective the people's reservation of that power. . . . ."

Committee for a Healthy Future, Inc. v. Carnahan, 201 S.W.3d 503, 507 (Mo.banc 2006) (quoting *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo.banc 1990)).

The Court:

> reviews a declaratory judgment under the standard applicable to other court-tried cases. We affirm the trial court's judgment regarding issues of fact unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. We review questions of law de novo.

Andersen v. Board of Regents of Missouri Western State College, 58 S.W.3d 581, 585 (W.D. Mo. 2001) (footnotes omitted). As the core issue in this case is whether or not the initiative petition at issue is facially unconstitutional, it is also important to be cognizant of the fact that the Court must "attempt to harmonize all of an initiative petition's provisions with the constitution." *Committee for a Healthy Future, Inc*., 201 S.W.3d at 510.

This Court has also recently stated that "[i]n a court-tried case, this Court will sustain the circuit court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. [citations omitted] This Court will construe liberally constitutional and statutory provisions governing the ballot initiative process to ensure the

preservation of the people's power. [citations omitted] *Brown v. Carnahan*, 370 S.W.3d 637, 645 (Mo. 2012).

B. The Proposed Ordinance Is Not Facially Unconstitutional

The parties have stipulated that the procedural requirements to place the matter on the ballot were met. (Trans., p. 3, l. 23 thru p. 4, l. 4).

The only remaining issue regarding the form of the initiative is the allegation of facial unconstitutionality.

The City has not carried the heavy burden imposed on them required to justify a pre-election interference in the initiative petition process:

> Courts are reluctant to intervene in the initiative process. "[We] do not sit in judgment on the wisdom or folly of proposals. Neither will courts give advisory opinions as to whether a particular proposal would, if adopted, violate some superseding fundamental law...." [Citation omitted]. Thus, we do not review the substance of a proposed measure prior to its passage by the voters: "[o]ur single function is to ask whether the constitutional requirements and limits of power, as expressed in the provisions relating to the procedure and form of initiative petitions, have been regarded." [Citation omitted].
>
> However, precedent does grant us some discretion to review allegations that an initiative is *facially* unconstitutional. [Citation omitted].

> This exception comes into play where the constitutional violation in a proposed measure is so obvious as to constitute a matter of form. [Citation omitted]. Because we "attempt to harmonize all provisions of the initiative's proposal with the constitution," [citation omitted], Appellants bore a heavy burden to present a viable challenge to the measure's constitutionality, much less to assert a claim so facially apparent that it comprised a matter of form.

Knight, 282 S.W.3d at 21-22 (emphasis added).

In *Knight*, the Court emphasized that it was not the role of the trial court, with regard to a matter that has not been approved by the voters, to determine if the proposal would "violate some superseding fundamental law" and that the only viable areas of inquiry are issues relating to the procedure and form of petitions with this inquiry, including a review for *facial* unconstitutionality that is "so obvious as to constitute a matter of form." *Id*. (emphasis added). In the present case, the anticipated cost of the system and revenue generated by the proposal are not found in the ordinance, and the ordinance does provide for significant sales tax revenues. Plaintiffs' Exhibits 104 and 106. The argument advanced by the City and adopted by the Court, therefore, is that the revenues were *insufficient* to pay for the costs of construction. This determination was made without analysis of the revenues that would be generated by user fees or from any source other than the sales tax revenue.

Pre-election review has been used to strike down petitions on the basis that they constitute appropriation ordinances. In *State ex rel. Card v. Kaufman*, 517 S.W.2d 78 (Mo. 1974), the Supreme Court of Missouri reviewed a proposed charter amendment that would have mandated salaries for employees of the university's fire department equal that of city employees. The Court struck the petition down as an appropriation ordinance and noted that "[t]here is no pretense that it creates or provides new revenues with which to fund the additional cost to the city." *State ex rel. Card*, 517 S.W.2d at 80. The Court went on to analyze two prior cases where the initiative process was deemed to be an appropriation measure and struck down and noted that "[i]n both cases there was no provision in the proposed ordinance for new revenues to pay the additional costs involved." *Id.* After a diligent search, the undersigned has not located any case relating to initiative petitions since 1974 that has struck down a petition, pre-election, based on a finding that it was an unconstitutional appropriation ordinance.

The two cases found that addressed the issue determined that the initiative petitions did not violate the appropriation clause. *Buchanan v. Kirkpatrick*, 615 S.W.2d 6 (Mo. 1981) (Hancock Amendment) (the court found that a provision requiring state funding proportions of required county and city activities or services be maintained did not violate Article III, Section 51); *Committee for a Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503 (Mo.banc 2006) (a provision

that moneys raised from gambling revenues be solely uses for specified purposes did not violate appropriation clause when Court acknowledged that it must "attempt to harmonize all provisions of the initiative's proposal with the constitution.") (citation omitted).

The City is asking this Court, then, to go beyond the established case law that provides that measures with affirmative obligations *unsupported by new revenues* are unconstitutional and rule that a measure with *allegedly insufficient revenues* is unconstitutional. This is a dangerous precedent for the Court to set. How insufficient must the revenues be for the matter to be unconstitutional? Is a one dollar shortfall fatal? How about a ten thousand dollar shortfall on a million dollar project? There is, in short, no ability to create a bright line rule.

It is not difficult to predict that if the Court rules that insufficient funding is a constitutional defect, partisans will be requesting evidentiary hearings on the cost and revenue projections for various projects. If the Court is inclined to rule that allegedly insufficient revenues constitutes a facial defect, then the conclusion that the revenues are insufficient must be *capable of being calculated* from the face of the proposed ordinance. Considering any evidence beyond the face of the ordinance opens up a Pandora's Box of insufficient revenue challenges and violates the narrow pre-election review afforded in advance of an election.

The ordinance at issue can be found at Exhibit 104 herein. The Petition language circulated can be found at Exhibit 106 herein. They provide that a combined 3/8 cent sales tax will be levied. There is specific language imposing a 1/4 cent capital improvement sales tax and a 1/8 cent transportation sales tax. The ordinance provides that those sales tax revenues will continue for a period of twenty-five years. It is not possible to determine how much revenue this sales tax will generate. Any number of positive or negative changes in the city's economy could greatly impact the amount of revenue being collected. The ordinance, likewise, sets forth a general route that is desired by the drafters. There is nothing in the proposed ordinance that indicates how much it will cost to construct this route. The ordinance also does not attempt to set out user fees and determine how they will impact the light rail project's budget. These revenues, however, would be available for that purpose. Given all of these issues, how is it possible to determine that the revenues produced will be insufficient to pay for the improvements to the system? Appellants argue that it is not possible.

The City, the trial court, and the Western District Court of Appeals founded their argument on two sections of the initiative petition that they felt showed there was a facial admission that the revenues would be insufficient to pay for the project. The proposed ballot language says that the sales tax will be levied to "help fund" certain capital improvements. The proposed ballot language also states that

the city shall "also use the tax proceeds to finance bonds and secure federal matching funds." If this Court is also going to rule that the proposed ordinance is facially unconstitutional, it will likely be based on these two excerpts from the proposed ordinance. The logic only holds, however, when those words are viewed as excerpts and not read in harmony with the entire measure. When they are read with an intent to harmonize with the Constitution which is, in turn, liberally construed, they support the conclusion that the drafters intended to give the city a framework for a multi-modal transportation system focused on light rail and as many funding sources and flexibility as possible.

The language "to help fund" is not a facial admission that insufficient revenues will be generated by the sales tax as 1) the provision can also be interpreted to mean that the sales tax will be used to construct as much of the route as possible and 2) it was part of an expressed instruction to use the sales tax revenue to obtain federal matching funds. These constructions mean that there is no facial admission that the sales tax revenues will be insufficient. The first possible construction that would not violate the appropriation clause is that the language "help fund" is intended to account for the possibility that the entire system cannot be constructed with the dedicated sales tax revenues and to instruct the city to construct as much as can be funded. Under this interpretation, the proposal is merely a dedication of sales tax for a specific purpose. Absent a

mandate to construct the entire route (with is negated by the language "help fund") there is no unfunded appropriation. The second construction will be more fully addressed in Section II.

II. The trial court erred in declaring the proposed ordinance a facially unconstitutional appropriation ordinance as the proposed ordinance does not appropriate any money that is not created and provided for through sales tax and federal matching funds.

A. Standard of Review

Appellant incorporates by reference the Standard of Review set forth at I(A).

B. The Proposed Ordinance Creates and Provides for the Necessary Revenues

The Missouri Constitution, Article III, Section 51 provides, in relevant part, that "[t]he initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution."

The proposed ordinance does not contain a mandate for any set level of expenditures. There is, simply put, no quantifiable appropriation. There is no mandate that requires the City to expend any pre-determined amount of money contained in the ordinance.

If the Court is convinced that it can conclude, from the face of the ordinance, that the sales tax revenues are insufficient to pay for this project and that there is a mandate to construct the entire project, then the ordinance still provides for the necessary funding. The ordinance creates and provides for revenues through the dedication of a sales tax. The proposal also creates and provides for new revenues through an instruction to use the sales tax raised to "secure federal matching funds." See Plaintiff's Exhibits 104 and 106.

As the drafters were undoubtedly aware, there is significant federal funding available that requires that there be a pledge of local tax revenue before application can be made. By way of example only, 49 U.S.C. § 5307 provides for federal funding under the Urbanized Area Formula Grants in an amount up to 80% of the capital costs of a transportation project and 50% of the operational costs of the project. 49 U.S.C. § 5307 (e). In order to qualify under 49 U.S.C. § 5307 (d), however, the intended recipient must prove that they have "the legal, *financial*, and technical capacity to carry out the program…" (emphasis added). This means that, in order to be eligible for the grant money, you must have your own financing in place to pay for the match. If the voters approved the sales tax at issue, the city of Kansas City, Missouri, would have that financial capacity to carry out the program. This means that the ordinance *creates* the financial capability to obtain federal matching funds. The ordinance also *provides for* the revenues necessary for the

project when the instruction to seek federal funding is considered. As more fully briefed in Section III, furthermore, if federal funding is denied the City can repeal the measure with a single vote as economically unfeasible. How, under these circumstances, is it permissible to allow the City to deny the citizens of Kansas City the opportunity to dedicate sales tax revenues for this transportation project?

If this Court rules that the petitioners cannot propose legislation that is anticipated to involve an application for federal matching funds then a broad range of potential projects will be stricken from the legislation that is available by initiative. This Court should be mindful of its prior wisdom. "Nothing in our constitution so closely models participatory democracy in its pure form. Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people. The people, from whom all constitutional authority is derived, have reserved the "power to propose and enact or reject laws and amendments to the Constitution." [Mo. Const., Art. III, sec. 49]. *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990). The citizens of Kansas City, Missouri have likewise reserved the right to legislate by initiative. Importantly, they have not exempted from that legislative power projects that involve financing with federal matching funds. This Court should not impose such a limitation on the electorate through interpretation of Article III, Section 51.

III. The trial court erred in entering judgment in favor of the City and denying the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, because the City has an adequate remedy at law through its ability to repeal voter initiated ordinances and, furthermore, the City failed to plead or prove that it did not have an adequate remedy at law.

A. Standard of Review

Dismissal for lack of subject-matter jurisdiction is proper whenever it appears, by suggestion of the parties or otherwise, that the court is without jurisdiction. The quantum of proof is not high; it must appear by the preponderance of the evidence that the court is without jurisdiction. Generally, the decision to dismiss for lack for subject-matter jurisdiction is a question of fact left to the sound discretion of the trial court, and it will not be reversed on appeal absent an abuse of that discretion. However, where, as here, the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed de novo.

Missouri Soybean v. Missouri Clean Water, 102 S.W.3d 10, 22 (Mo. 2003) (citations omitted). Furuthermore, as it pertains to the review of the adequacy of the pleadings, the Court, "reviews the petition 'in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.' In so doing, a plaintiff's averments are taken as true and all reasonable inferences are liberally construed in favor of the plaintiff. [The] Court will not consider matters outside the pleadings." *Devitre v. the Orthopedic Ctr. of Saint Louis LLC*, 349 S.W.3d 327, 331 (Mo. 2011).

B. City Has an Adequate Remedy At Law

This Court has already affirmed that the citizens of Kansas City, Missouri, expressly reserved the power to repeal voter initiated ordinances to the City Council. *State ex rel. Chastain v. City of Kansas City*, 289 S.W.3d 759, 761 (W.D. Mo. 2009). That case recites that in 2006 a group of citizens initiated a petition to dedicate a 3/8 cent sales tax to the construction of a light rail system from the Kansas City Zoo to the airport. *Id.* The City Council rejected the proposed ordinance, and the committee caused the ordinance to be submitted to the voters. *Id.* The voters approved the ordinance, but it was subsequently repealed by the City Council. *Id.* The committee challenged the right of the City Council to repeal the ordinance and this Court upheld that right, noting that that the Charter provides that "[n]o ordinance adopted at the polls under the initiative shall be amended or

repealed by the Council within one year of such adoption except by the affirmative vote of nine (9) members thereof. Thereafter such ordinance may be amended or repealed as any other ordinance." *Id.* quoting Charter of the City of Kansas City, Missouri, § 704.

Section 704 is still in effect and this Charter provision gives the City an adequate remedy at law in the event the voters approve the ordinance again and the City determines that the project is not feasible. What the City of Kansas City did, instead, is refuse to follow Charter provisions requiring that the matter be placed on the ballot and sought validation of this action from the courts through a declaratory judgment action.

If the measure is adopted by the voters, a super-majority of the Council can immediately repeal it. After a year, the repeal will only require a simple majority. Implied in the power to repeal, furthermore, is the power to amend. Using that power, the Council would have a number of options available to them if it was determined that revenue was insufficient to complete the construction contemplated by the ordinance. The Council could project the sales tax revenues generated and determine how much of the system could be constructed. They *could choose* to budget and appropriate sufficient revenues to cover any shortfall. They could seek other funding mechanisms to help provide for the construction costs (including seeking federal grants as explicitly instructed to do pursuant to the

proposed ordinance) and, if funding was not available, they could repeal or amend. They could also repeal the measure in its entirety without justification or cause.

The Charter of the City of Kansas City, Missouri, is a law passed by the voters of the City. The Charter sets out specific procedures, duties and remedies with regard to initiative petitions. This law gives the Council a remedy to attempt to cure any deficiencies that exist in the initiative and, failing that, the power to repeal it in its entirety. The City and Council have no need to resort to the Courts under these circumstances to seek a ratification of their refusal to follow the Charter. They have already repealed a light rail measure approved by the voters. *State ex rel. Chastain v. City of Kansas City*, 289 S.W.3d 759, 761 (W.D. Mo. 2009). They are now asking this Court to endorse their refusal to allow the democratic process to work, and provide the voters with another opportunity to dedicate sales tax revenues for improved public transportation.

Until the City has exhausted the procedures and remedies under the Charter, they should not be allowed to seek relief in the courts. This Court has previously held that the City of Kansas City, Missouri, failed to exhaust their other available remedies before resorting to the Court of Equity, and declined to extend equitable jurisdiction on that basis. In *City of Kansas City v. New York-Kansas Bldg. Associates, L.P.*, 96 S.W.3d 846 (W.D. Mo. 2002), the City of Kansas City, Missouri, sought an injunction for dangerous conditions in some buildings. The

trial court entered an order for the sale of the buildings in question, and the owners of the building appealed. The Court noted that the City had the power to prosecute criminally, abate, and demolish under established procedures. When the City failed to follow these procedures this Court held that the "City may not resort to a court of equity for an injunction when it had adopted a detailed method to deal with [the issue presented]…." *City of Kansas City v. New York-Kansas Bldg*, 96 S.W.3d at 855.

The City has, likewise, adopted a method to submit the initiative petition to the voters and, if the measure cannot be executed by the City, to repeal the matter. Having established this procedure the City should be required to follow it. With this mechanism available to the City, they should not be entitled to the equitable remedy of declaratory judgment.

C. The City Failed to Plead or Prove That it Lacked an Adequate Remedy at Law

The question of entitlement to declaratory judgment is governed by equitable principles. *Preferred Phys. Mut. Mngt. Group, Inc. v. Preferred Phys. Mut. Risk Retention Group,* 916 S.W.2d 821, 823 (W.D. Mo. 1995) ("An action pursuant to the Declaratory Judgment Act is *sui generis*, neither legal nor equitable, but its historical affinity is equitable and such actions are governed by equitable principles."). In order to state a claim for declaratory judgment, the

Plaintiff must plead and prove the facts that show that they are entitled to the relief requested. *See generally Williams v. Missouri Highway and Transportation Comm.*, 16 S.W.3d 605 (W.D. Mo. 2000) (claimant must plead and prove elements of waiver of sovereign immunity). Specifically, in order to be entitled to declaratory judgment, the Plaintiff must allege and prove that they do not have an adequate remedy at law. *See Foster v. State*, 352 S.W.3d 357, 360 (Mo. 2011) ("the party seeking the declaration must demonstrate that (1) a justiciable controversy exists and (2) the party has no adequate remedy at law.") The City of Kansas City, Missouri, did not allege in its petition that it lacked adequate remedy at law, (LF, p. 6-17), the Defendants plead an affirmative defense of failure to state a claim, (LF, p. 30, ¶ 2), the City presented no evidence showing that they did not have a adequate remedy at law, (LF, p. 122-23; Trans.), and the trial court did not grant an amendment of the pleadings at trial. (Trans., p. 1-20).

IV. The trial court erred in dismissing Defendants' Counterclaim for Mandamus and declaring that the City is not obligated to place the proposed ordinance before the voters, because the City had a ministerial duty to place the proposed ordinance on the ballot, in that the parties stipulated that the procedural requirements to have the proposed ordinance before the council and to be in a position to be submitted to the voters were all met and the proposed ordinance is not facially unconstitutional.

A. Standard of Review

'The standard of review for writs of mandamus and prohibition ... is abuse of discretion.' Mandamus will lie where a court 'has acted unlawfully or wholly outside its jurisdiction or authority or has exceeded its jurisdiction, and also where it has abused whatever discretion may have been vested in it.' 'Mandamus does not issue except in cases where the ministerial duty sought to be coerced is definite, arising under conditions admitted or proved and imposed by law.' 'A litigant ... must allege and prove that he has a clear, unequivocal specific right to a thing claimed. He must show himself possessed of a clear and legal right to the remedy.' *State ex rel. Collector of Winchester v. Jamison*, 357 S.W.3d 589, 592 (Mo. 2012) (internal citations omitted).

B. Counterclaim for Mandamus Was Proper

The City Charter of the City of Kansas City, Missouri, provides that after an initiative petition has received the requisite number of signatures and the procedural requirements of the Charter have been met that "[t]he Council *shall* thereupon submit the proposed ordinance to the electors at the next available municipal or state election held not less than thirty (30) days after such certification by the committee of petitioners for which the City can lawfully provide required notices to the election authorities without seeking a court order." Charter of the City of Kansas City, Missouri, § 703.

Assuming, for the sake of argument, that the Court is inclined to believe that the initiative petition is not facially unconstitutional, the duty of the Council and the City is clear. The Council is required to "submit the proposed ordinance to the electors at the next available municipal election for which the City can lawfully provide required notices to the election authorities…." *Id.*

In order to be entitled to a Writ of Mandamus the applicant must show "that the applicant has a clear, unequivocal, specific and positive right to have performed the act demanded. The court determines whether the right to mandamus is clearly established and presently existing by examining the [Charter provision] under which the right is claimed." *Bergman v. Mills*, 988 S.W.2d 84, 88 (W.D. Mo. 1999) (also ruling that a Writ of Mandamus against the named elected

officials was properly granted). Section 703 of the Charter clearly, unequivocally, specifically, and positively gives the Defendants the right to have the initiative petition placed on the ballot.

Under similar circumstances, interpreting state constitutional provisions empowering the amendment of city charters by initiative petition, the Court stated that "Article VI, section 20 of the Missouri Constitution directs a City Council under such circumstances to provide at once by ordinance for the submission of any amendment so proposed at the next election held in the city not less than sixty days after its passage. The constitutional provision is mandatory. It is the supreme law of this State. Under the clear provisions of Article VI, section 20 of the Constitution, the City Council had no discretion in the matter. It had only a ministerial act to perform and it was under the constitutional mandate to do it 'at once'. The City Council of Kansas City did not have the right or power to decide that it did not wish to submit to the voters the properly proposed Charter amendment…." *State ex rel. Lane v. Chambers*, 353 S.W.2d 835, 839 (Mo.App. 1962) (citations omitted).

V. The trial court erred in admitting Plaintiff's Exhibits 102, 103, and 110, because such exhibits are incompetent and irrelevant to the issue of whether the proposed ordinance is facially unconstitutional, in that pre-election review is limited to determining whether the proposed ordinance is facially unconstitutional and City Charter provisions addressing the Board of Parks and Recreation Commissioners and the use of lands dedicated to parks and boulevards as well as evidence of other potential sources of revenue regarding the proposed transportation systems do not address the facial constitutionality of the proposed ordinance.

A. Standard of Review

In this court tried case, this Court "must uphold the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or the court has erroneously declared or applied the law." *Markley v. Edmiston*, 922 S.W.2d 87, 91 (W.D. Mo. 1996) . In addition:

> In reviewing the admissibility of evidence in a court-tried case, we are mindful that the trial court is allowed wide latitude in the admission of evidence because it is presumed that it will not give weight to evidence that is incompetent. [Citation omitted]. Because of this, it is difficult to base reversible error on the erroneous admission of evidence in a court-tried case. [Citation omitted]. Except when a

> trial court relies on inadmissible evidence in arriving at its findings, such evidence is ordinarily held to be nonprejudicial. [Citation omitted]. *However, incompetent evidence on a material issue is presumed to be prejudicial unless clearly shown to be otherwise.*

Markley, 922 S.W.2d at 91 (emphasis added). The trial court's exercise of discretion in admitting evidence will not be disturbed unless it is "clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Mitchell v. Kardesch*, 313 S.W.3d 667, 675 (Mo.banc 2010).

B. Evidence Was Irrelevant

Over objection, the trial court admitted Plaintiff's Exhibits 102 (LF p. 155-157), 103 (LF p. 158-159), and 110 (LF p. 173-174). (*See* Trans., p. 6, l. 11 thru p. 8, l. 11). Exhibits 102 and 103 were sections of the City Charter addressing the Board of Parks and Recreation Commissioners and the use of lands dedicated to parks and boulevards. Such sections are completely inapplicable and irrelevant to the analysis of the facial constitutionality of the proposed ordinance. *See Knight*, 282 S.W.3d at 21 (The Court does not issue "advisory opinions as to whether a particular proposal would, if adopted, violate some superseding fundamental law....").

Exhibit 110 was an "Information Sheet" that discusses the light rail initiative. That exhibit discussed funding scenarios that the City argued showed that the sales tax did not fully fund the project. At trial, the court indicated that Exhibit 110 would be admitted for the purpose of inclusion in the record. (Trans., p. 7, l. 23 thru p. 8, l. 13). However, while not explicitly referenced in the trial court's Judgment, the trial court's holding that the proposed taxes would not fully fund the proposed projects indicates that the trial court relied upon Exhibit 110 as this information is not contained in the proposed ordinance and no other evidence was adduced on this subject. Such exhibit was admitted regarding the material issue of whether the proposed ordinance is unconstitutional.

The Western District of Missouri Court of Appeals clearly relied on Exhibit 110 in the formation of its opinion. As a rebuttal to Appellant's argument that the term "help fund" was not a facial admission of insufficient funding the Court stated that "Chastain's argument contradicts the 'Information Sheet for 2011 Transit Initiative' that Chastain provided to registered voters in the process of obtaining their signatures in the first place—an information sheet that expressly estimates that the proposed sales taxes would only fund approximately 40% of the project and that philanthropic donations and other sources of private and public moneys would be necessary to completely fund the ordinance project." *City of Kansas City v. Chastain*, WD75029, p. 7 (January 15, 2013).

C. Evidence was Incompetent

Black's Law Dictionary defines incompetent evidence as "Evidence which is not admissible under established rules of evidence. *e.g.* Fed Rules of Evidence. ***Evidence which the law does not permit to be presented at all, or in relation to the particular matter, on account of*** lack of originality or of some defect in the witness, the document, or ***the nature of the evidence itself.***" BLACK'S LAW DICTIONARY, 6th Ed.

Once the Court begins to allow for the admission of evidence such as Exhibit 110, the flood gates are opened for full-blown evidentiary hearings. Initiative proponents will be subjected to extensive pre-election discovery, feasibility study requirements, and litigation in order to determine foundational issues relating to the proposal. The Democratic Process will be subjected to delay and unnecessary expense in order to allow the court to issue an advisory opinion on issues such as whether or not the proposal has sufficient funding. The Court should issue a bright line rule that establishes that no evidence, other than the initiative itself and other evidence directly related to the issue of whether or not the procedural requirements of the enabling law have been followed, should ever be admitted in a pre-election review proceeding. *See Knight*, 282 S.W.3d at 21 ("we do not review the substance of a proposed measure prior to its passage by the voters: '[o]ur single function is to ask whether the constitutional requirements and

limits of power, as expressed in the provisions relating to the procedure and form of initiative petitions, have been regarded.'").

V. CONCLUSION

The following constitutional principles should guide the parties and the Court in the analysis of this citizen initiated petition.

"That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Missouri Constitution, Article I, Bill of Rights, Section 1.

"That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Missouri Constitution, Article I, Bill of Rights, Section 25.

"The people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly, and also reserve power to approve or reject by referendum any act of the general assembly, except as hereinafter provided." Missouri Constitution, Article III, Section 49.

In order to bring this initiative petition before the City of Kansas City, Missouri, the proponents were required to obtain signatures totaling "at least five

per cent (5%) of the total vote cast for candidates for the office of Mayor at the last preceding regular municipal election." City Charter, Section 701, Plaintiff's Exhibit 100. The signatories' motivations are unknown. Likely, many recalled the repeal of the prior initiative ordinance seeking to advance the cause of light rail in Kansas City. *See State ex rel. Chastain v. City of Kansas City*, 289 S.W.3d 759 (Mo. App. W.D. 2009). What is known is that these citizens proposed to tax themselves significantly in order to try to improve the city's public transportation system.

The City's action, ratified by the trial court and the Western District Court of Appeals, denied the citizens of Kansas City, Missouri the right to express their will at the ballot box. It specifically denied them the right to dedicate a tax to the improvement of the public transportation system and to seek federal matching funds. The proposed ordinance is not clearly and unequivocally facially unconstitutional and, therefore, this Court should err on the side of allowing the democratic process to resolve this matter.

The trial court improperly dismissed Defendants' Counterclaim and entered judgment in favor of the City. Therefore, Defendants respectfully request that the Court reverse the Final Judgment for Plaintiffs [sic] and:

1) Enter an Order directing the City of Kansas City, Missouri to submit the proposed ordinance to the appropriate election authority to be

placed at the next regularly scheduled state or municipal election for which the deadline for submission has not passed or, in the alternative,

2) Enter an Order remanding the matter to the trial court with directions that the trial court conduct further proceedings in order to establish the earliest possible date at which the election may equitably be held and directing the entry of an order compelling the City of Kansas City, Missouri to place the matter on the ballot, and

for such other and further relief as the Court deems just an proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Substitute Appellants' Brief was served this June 17, 2013, through the electronic filing system pursuant to Supreme Court Rule 103.08 on:

Ms. Sarah Baxter
City Attorney's Office
Attorney for Respondent

/s/ Jeffrey J. Carey
Jeffrey J. Carey

RULE 84.06(c) AND (g) CERTIFICATE

I certify that this Substitute Appellant's Brief complies with the limitations contained in Supreme Court Rule 84.06(b), and that the entire brief contains 7,764 words. I further certify that the electronic copy of the Substitute Appellant's Brief filed with the Court and served on the Attorney for Respondent was scanned for viruses by an anti-virus program and is virus-free according to such program.

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