IN THE SUPREME COURT OF MISSOURI

Case No. SC 84647

HOME BUILDERS ASSOCIATION OF GREATER ST. LOUIS, INC.,

Respondent and Cross Appellant,

v.

CITY OF WILDWOOD,

Appellant and Cross Respondent

Appeal from the Circuit Court of the County of St. Louis

The Honorable Kenneth M. Romines, Division No. 10

BRIEF OF RESPONDENT AND CROSS APPELLANT

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ATTORNEYS FOR RESPONDENT AND CROSS APPELLANT HOME BUILDERS ASSOCIATION

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Jurisdictional Statement

The Home Builders Association of Greater St. Louis, Inc. agrees that this Court has jurisdiction of this appeal.

Statement of Facts

The facts set forth below were submitted to the trial court in connection with HBA's Revised Motion for Summary Judgment. There was no dispute as to any material fact relevant to HBA's Motion.

1. The Parties

Plaintiff the Home Builders Association of Greater St. Louis, Inc. ("HBA") is a not-for-profit Missouri Corporation representing the interests of its constituent members who are associated with the housing industry in the St. Louis metropolitan area. L.F. 560, 576, 904. HBA's members include subdivision developers who are directly affected by municipal requirements pertaining to subdivision escrows. L.F. 576, 580-81, 617.

The City of Wildwood ("Wildwood") is a charter city located in St. Louis County, Missouri. L.F. 560, 904. Members of the HBA have undertaken and are presently undertaking subdivision projects in Wildwood, and they will continue to do so in the future. L.F. 577, 580-81, 618.

2. The Governing Statute

Sections 89.300 - .480 constitute the planning and subdivision regulations of the "Zoning and Planning" statute. Those sections are entitled "PLANNING—ALL MUNICIPALITIES." They grant a planning commission of "any municipality in this state" the power to appoint a planning commission with the powers and duties specified

therein, including the power to adopt subdivision regulations providing for construction escrows. §§ 89.310.-410 R.S.Mo (1994, as amended).[1]

Section 89.410 R.S.Mo. authorizes Missouri municipalities to require construction escrows for subdivision improvements. Prior to 1999, the statute allowed a municipality to require bond to secure the *actual* costs of construction and installation of improvements and utilities. In 1999 the Missouri legislature enacted certain amendments to § 89.410 that limit a municipality's ability to require and hold bonds or escrows for subdivision improvements. Senate Bill 20 of the 1999 Regular Session of the Missouri General Assembly was signed by the Governor on July 8, 1999 and became effective August 28, 1999 ("Senate Bill 20") L.F. 701. A copy of the relevant provisions of Senate Bill 20 are attached at App. A-01.[2]

Section 89.410.1 now provides that a municipality "**may only impose requirements and the posting of bonds regarding escrows for subdivision related regulations as provided for in subsections 2 to 4 of this section."** § 89.410 (bold language inserted by Senate Bill 20).

Section 89.410.2, as amended by Senate Bill 20, now reads, in part:

> "2. . . . . The regulations may provide that, in lieu of the completion of the work and installations previous to the final approval of a plat, the council may accept a bond **or escrow** in an amount and with surety and **other**

[1] All statutory references herein are to the Missouri Revised Statutes, 1994, as amended, unless otherwise indicated.

> **reasonable** conditions, providing for and securing the actual construction and installation of the improvements and utilities within a period specified by the council and expressed in the bond; **provided that, the release of such escrow by the city, town or village shall be as specified in this section.** . . . .

§ 89.410 (bold language inserted by Senate Bill 20).

Section 89.410.3, added by Senate Bill 20, states:

> "**3. The regulations shall provide that any escrow amount held by the city, town or village to secure actual construction and installation on each component of the improvements or utilities shall be released within thirty days of completion of each category of improvement or utility work to be installed, minus a maximum retention of five percent which shall be released upon completion of all improvements and utility work. . . .**

§ 89.410 (bold language inserted by Senate Bill 20). Senate Bill 20 imposed penalties for a city's failure to release the bond or escrow in the timeframes set forth therein. § 89.410.4. And it authorized a developer or owner aggrieved by a city's failure to observe the requirements of the statute to bring a civil action for enforcement thereof, with recovery of costs and attorneys' fees to a successful party. *Id*.

3. Wildwood's Ordinance

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[2] App. refers to the Appendix bound at the back of this Brief.

Prior to passage of Senate Bill 20, Wildwood required developers to post one construction deposit for unfinished improvements at the commencement of construction in the amount of 120% of the estimated costs of the construction, which included a ten percent inflation factor and a ten percent maintenance component. L.F. 633-34. The maintenance component of the deposit was held until the earlier of 18 months after the acceptance of the improvements for public purposes or 18 months from issuance of occupancy permits within the plat or development. L.F. 635.

On or about August 23, 1999, Wildwood adopted Ordinance 555 and amended its subdivision escrow requirements set forth in § 1005.080 thereof, purportedly to comply with the changes brought about by Senate Bill 20. L.F. 563, 648, 906; Supp. L.F. 5, 8, 13. On or about January 8, 2001, Wildwood codified its subdivision code and in the process repealed Ordinance 555 and enacted in its place Ordinance No. 675. L.F. 563, 655, 906; Supp. L.F. 5, 8, 78. The escrow regulations in Section 1005.080 remained substantively identical to those in Ordinance 555. L.F. 641-42, 648-54, 665-72. Section 1005.080 of Ordinance 675 (attached hereto at App. A-02).

Ordinance 675, and more particularly the provisions thereof codified at § 1005.080, provide that in the event the developer has not completed construction of all improvements prior to approval of the record plat, the developer must post a "construction deposit" in the amount of one hundred ten percent (110%) of the Department of Public Works' estimate of the cost of the construction, completion and installation of the required improvements." L.F. 666, § 1005.080(D)(1).) That deposit is released upon completion of all improvements in a category of improvements, except that

the City retains 5% of the deposit until completion of all improvements in a subdivision. L.F. 666-67, § 1005.080(E)(3).)

Ordinance No. 675 also requires developers to post a separate "maintenance deposit," in the form of cash or letter of credit, upon commencement of the improvements to secure the maintenance of the improvements, including undeveloped lots, streets, sidewalks, common areas and storage and drainage facilities. Ordinance 675 provides that the "maintenance deposit" shall be in the amount of ten percent (10%) of the City of Wildwood Department of Public Works' estimate of the cost of construction, completion and installation of the required improvements. L.F. 666, § 1005.080(D)(2).) The Ordinance provides that the deposit is held until the sooner of the (1) expiration of eighteen months after acceptance for public dedication of the specific improvement by the City, or (2) expiration of eighteen months after occupancy permits have been issued on 95% of all the lots in the subdivision plat(s) subject to the deposit agreement. L.F. 667-68, § 1005.080(F).

Even if a developer opts to complete all improvements prior to record plat approval, the Ordinance requires all developers to post a maintenance deposit of 10% of the cost of the overall development to obtain plat approval. L.F. 647, 665, § 1005.080(A)(1).

4. Wildwood's Enforcement of Ordinance 675

Wildwood is enforcing these provisions of Ordinance 675. The City does not dispute that it is requiring developers, including HBA members, to establish the construction and maintenance deposits required under Ordinance 675. L.F. 580-616,

617-27, 642-45, 673-78. Wildwood requires strict adherence to the requirements of Ordinance 675. Its standard deposit agreements require construction and maintenance deposits in compliance with its Ordinance, and it refuses to negotiate those agreements. L.F. 643. In accordance with its Ordinance, Wildwood consistently refuses to release any portion of the maintenance deposit upon the developer's completion of various categories of improvements. L.F. 646, 681-700.

In addition, the City is holding escrow deposits established by HBA members prior to the passage of Senate Bill 20. L.F. 673-78, 645-47, 679. Those deposits include both the 110% construction component and the 10% maintenance component required by Wildwood's ordinance prior to Senate Bill 20. L.F. 633-35.

5. HBA's Lawsuit

HBA filed a Petition and a First Amended Petition for declaratory and injunctive relief challenging the validity of Wildwood's escrow requirements, then set forth in Ordinance 555, on the grounds that the Ordinance conflicted with state statute. L.F. 8. The Amended Petition sought relief in three counts: (i) a declaration that Wildwood was unlawfully enforcing the Ordinance, (ii) a permanent injunction to prevent Wildwood from enforcing the offending provisions of the Ordinance, and (iii) a declaration that Senate Bill 20 applies to escrow funds deposited with the City prior to the effective date of the Bill. L.F. 8-18. It also sought attorneys' fees under § 89.410.4. L.F. 13-17.

Wildwood moved to dismiss HBA's First Amended Petition on the ground, among others, that the HBA lacked standing to bring the lawsuit on behalf its members. L.F.

113. The trial court sustained Wildwood's motion and dismissed the First Amended Petition for lack of standing. L.F. 122. HBA appealed. L.F. 124.

6. The Court of Appeals' Decision

The Missouri Court of Appeals for the Eastern District reversed and remanded. *Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood*, 32 S.W.3d 612 (Mo. App. 2000). L.F. 129.[3] Recognizing the basic precepts of organizational standing and the impact of the Ordinance upon HBA's members, the Court of Appeals upheld HBA's right to bring its claims on behalf of its members. L.F. 129- 138. It rejected Wildwood's argument that § 89.410.4 limits actions to enforce the statute to "owners" or "developers" aggrieved by a city's failure to follow the statute. The Court of Appeals instead relied upon § 89.410.4 in support of HBA's organizational standing, noting that HBA's developer members are statutorily specified "aggrieved" persons entitled to bring civil actions for violation of the statute. L.F. 136. This Court denied Wildwood's application for transfer.

7. Disposition of the Case Upon Remand

Upon remand, HBA amended its Petition to direct its claims to the then-enacted Ordinance 675. L.F. 139. Other than changing the Ordinance number and adding its challenge to the amount of the construction deposit, the allegations of HBA's Second Amended Petition and relief requested are identical to its First Amended Petition. L.F. 8,

[3]A copy of the Opinion is attached at App. A-11.

139. The trial court denied Wildwood's motion to dismiss the Second Amended Petition. L.F. 274.

Following discovery, the parties filed cross-motions for summary judgment. L.F. 305, 559. HBA's Revised Motion for Summary Judgment sought relief on all three counts of its Petition. L.F. 559. Following briefing and argument, the trial court issued its order granting HBA Summary Judgment and holding that the subdivision escrow requirements of Ordinance 675 conflict with § 89.410. L.F. 1134; Copy attached at App. A-21. Reviewing the limitations imposed by § 89.410, the trial court concluded that

- Wildwood is wholly without authority to require construction deposits in an amount 10% in excess of the estimated actual construction costs.
- Wildwood is wholly without authority to require the additional 10% maintenance deposit at the commencement of construction or to require any deposit over and above the construction deposit it already requires.
- Wildwood does not have authority to hold any portion of these maintenance deposits beyond thirty days after completion of the improvements in a category of improvements.

L.F. 1134-35.

The trial court therefore invalidated the offending provisions of Ordinance 675 and enjoined further enforcement of those provisions. L.F. 1137. It also determined that the amendments to § 89.410, enacted in Senate Bill 20, applied to all escrow deposits held by Wildwood in August of 1999. L.F. 1139. It ordered Wildwood to return all

escrow amounts held by the City in excess of those authorized by § 89.410. The trial court denied HBA's request for attorneys' fees. L.F. 1138.

This timely appeal followed. L.F. 1139. HBA filed a cross-appeal directed only to that portion of the judgment denying its attorneys' fees. L.F. 1153.

Points Relied Upon

I. The Trial Court Properly Granted Summary Judgment To The HBA And Invalidated The Provisions Of Wildwood's Ordinance Providing For A Construction Escrow Equal To 110% Of Construction Costs Because The State Statute Limits Permissible Construction Escrows To Actual Costs Of Construction.

City of Dellwood v. Twyford, 912 S.W.2d 58 (Mo. banc 1995*)*

Page Western, Inc. v. Community Fire Prot. Dist. of St. Louis County, 636 S.W.2d 65 (Mo. banc 1982)

State ex rel. Missouri State Bd. Of Registration for Healing Arts v. Southworth, 704 S.W.2d 219 (Mo. banc 1986)

State v. Hallenberg-Wagner Motor Co., 108 S.W.2d 398 (Mo. 1937)

II. The Trial Court Properly Granted Summary Judgment To The HBA And Invalidated The Provisions Of Wildwood's Ordinance Providing For A Separate Maintenance Deposit Because The State Statute Prohibits Any Subdivision Bonds Or Escrows In Excess Of The Actual Costs Of Construction And Mandates Release Of Those Deposits Upon Completion Of Categories Of Improvements.

BCI Corp. v. Charlebois Constr. Co., 673 S.W.2d 774 (Mo. banc 1984)

Gott v. Director of Revenue, 5 S.W.3d 155 (Mo. banc 1999)

Kilbane v. Director of Revenue, 544 S.W.2d 9 (Mo. 1976)

Page Western, Inc. v. Community Fire Prot. Dist. of St. Louis County, 636 S.W.2d 65 (Mo. banc 1982)

III. The Trial Court Properly Granted Summary Judgment To The HBA And Rejected Wildwood's Defense That The Title To Senate Bill 20 Violated Article III, § 23 Of The Missouri Constitution In That The Title "Relating To Community Improvement" Does Not Encompass Nearly All State Activities And Properly Describes The General Nature Of The Contents Thereof.

C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322 (Mo. banc 2000)

Corvera Abatement Techs. v. Air Conservation Comm'n, 973 S.W.2d 851 (Mo. 1998)

Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994)

Missouri State Medical Ass'n v. Missouri Dep't of Health, 39 S.W.3d 837 (Mo. banc 2001)

IV. The Trial Court Properly Granted Summary Judgment To The HBA And Rejected Wildwood's Defense That Senate Bill 20 Contained More Than One Subject In Violation Of Article III, § 23 Of The Missouri Constitution In That The All The Provisions Of Senate Bill 20 Fairly Relate To The Subject Of "Community Improvement."

C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322 (Mo. banc 2000)

Missouri State Medical Ass'n v. Missouri Dep't of Health, 39 S.W.3d 837 (Mo. banc 2001)

Stroh Brewery Co. v. State, 954 S.W.2d 323 (Mo. banc 1997)

V. The Trial Court Properly Granted Summary Judgment To The HBA And Rejected Wildwood's Defense That Senate Bill 20 Was Changed From Its Original Purpose In Violation Of Article III, § 23 Of The Missouri Constitution In That All The Amendments To Senate Bill 20 Were Germane To The Original Purpose Of "Community Improvement."

Akin v. Director of Revenue, 934 S.W.2d 295 (Mo. banc 1996)

Missouri State Medical Ass'n v. Missouri Dep't of Health, 39 S.W.3d 837 (Mo. banc 2001)

Stroh Brewery Co. v. State, 954 S.W.2d 323 (Mo. banc 1997)

VI. The Court Of Appeals Properly Determined That HBA Has Standing To Pursue Its Claims On Behalf Of Its Members And That Decision Is The Law Of The Case Precluding Further Review Of This Issue.

Giddens v. Kansas City S. Ry. Co., 29 S.W.3d 813 (Mo. banc 2000)

Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood, 32 S.W.3d 612 (Mo. App. 2000)

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

State ex rel. Missouri Health Care Ass'n v. Missouri Health Facilities Review Comm., 773 S.W.2d 474 (Mo. App. 1989)

VII. The Trial Court Properly Granted Summary Judgment Finding That Senate Bill 20 By Its Terms Applies To All Escrow Funds Held By Wildwood Prior To The Effective Date Of The Bill And Such Application Of Senate Bill 20 Does Not Constitute Retroactive Legislation In Violation Of Article I, Section 13 Of The Missouri Constitution.

American Family Mut. Ins. Co. v. Fehling, 970 S.W.2d 844 (Mo. App. 1998)

City of Blue Springs v. McWilliams, 74 S.W.2d 363 (Mo. banc 1934)

Pearson v. City of Washington, 439 S.W.2d 756, 760 (Mo. 1969)

Savannah R-III Sch. Dist. v. Public Sch. Ret. Sys., 950 S.W.2d 854 (Mo. 1997)

VIII. The Trial Court's Order Requiring Return Of All Illegally Held Funds Is Appropriate Equitable Relief.

Craig v. Jo B. Gardner, Inc., 586 S.W.2d 316 (Mo. banc 1979)

Schibi v. Miller, 268 S.W. 434 (Mo. App. 1925)

Thomas v. Schapeler, 92 S.W.2d 982 (Mo. App. 1936)

Thummel v. King, 570 S.W.2d 679 (Mo. banc 1978)

IX. The Trial Court Erred In Denying HBA's Claim For Attorneys' Fees Because Section 89.410.4 Allows Recovery Of Attorneys' Fees In Actions For Enforcement Of The Escrow Requirements Therein And Wildwood Made No Good Faith Effort To Comply With The Ordinance Or Reasonably Litigate This Matter.

Avanti Petroleum v. St. Louis County, 974 S.W.2d 506 (Mo. App. 1998)

Laubinger v. Laubinger, 5 S.W.3d 166 (Mo. App. 1990)

T.B.G. v. C.A.G., 772 S.W.2d 653 (Mo. banc 1989)

Thomas v. Thomas, 989 S.W.2d 629 (Mo. App. 1999)

Argument

Summary

No City in this State may enact an ordinance that permits what state law has prohibited. Missouri statutes place clear limits upon the amount and duration of municipal subdivision escrow requirements. Wildwood's Ordinance exceeds those limits. Based upon undisputed facts, the trial court properly determined that Wildwood's escrow requirements conflict with the enabling statute.

Section 89.410 flatly prohibits any subdivision escrows, however denominated, in excess of the actual costs of construction. The statute was specifically amended in 1999 to compel release of all subdivision escrows upon completion of improvements. Wildwood's Ordinance flouts the requirements of the statute. The construction and maintenance requirements of Ordinance 675 together exceed the actual cost of construction by twenty percent. And the Ordinance allows Wildwood to hold the maintenance escrow well beyond the timeframes set forth in the statute. On its face, Wildwood's Ordinance permits, actually requires, what the Missouri legislature has prohibited.

Wildwood devotes much of it brief to an issue that simply is not relevant to the determination of this case – the manner in which Wildwood *might* administer its Ordinance. This case is a facial challenge to the Ordinance. The mere fact that the Ordinance allows what state law prohibits invalidates the Ordinance. Wildwood's application of the ordinance in a particular situation, hypothetical or actual, does not alter that result.

Wildwood also attempts to evade the restrictions of the statute by challenging the validity of Senate Bill 20 under Article III, §§ 21 and 23 of the Missouri Constitution. That effort fails. The Missouri legislature properly enacted Senate Bill 20, appropriately titled an act "relating to community improvement" and containing legislation germane to or naturally connected with the subject of community improvement. Wildwood cannot thus escape the requirements of the statute.

Wildwood's argument that the HBA lacks standing is simply a waste of this Court's time. That issue was squarely decided by the Court of Appeals. That Court's determination that HBA has standing to pursue its claims on behalf of its members is the law of the case, precluding further consideration of that issue. Moreover, the Court of Appeals' conclusion comports with established principles of organizational standing adopted by this Court and the United States Supreme Court.

The arguments of Wildwood, and of the Amicus Missouri Municipal League, really come down one: they do not like the restrictions imposed by the plain language of § 89.410 and they do not feel bound to comply with them. Their argument defies the fundamental maxim that, as political subdivisions of the State, they must comply with the laws of this State. While they argue that they need additional subdivision escrows to protect the public, they ignore the fact that the Missouri legislature has already decided what is in the public interest.

At some point during the subdivision development process, particularly when the improvements are complete, the homeowners or the City must accept responsibility for maintenance of the improvements. Wildwood's imposition of excessive escrows to cover

the remote possibility of a developer's default increases the costs of homebuilding, raising the price the homeowners must pay and possibly driving some people out of the market altogether. The Missouri legislature obviously concluded that those costs outweighed any advantage that Wildwood could gain by imposing the escrow.

The Missouri legislature has balanced these competing interests by clearly identifying the "how much" and "how long" of permissible subdivision escrows. This Court must defer to that legislative decision. If Wildwood and the Municipal League do not like the balance struck by the statute, their remedy lies with the Missouri legislature, not this Court.

Standard of Review

Summary judgment is an important tool for concluding cases that can be determined as a matter of law. *ITT Commercial Fin. v. Mid-America Marine Supply Corp*., 854 S.W.2d 372, 376 (Mo. banc 1991). The Missouri Rules of Civil Procedure and this Court encourage use of this tool to "avoid the expense and delay of meritless claims or defenses and to permit the efficient use of scarce judicial resources." *Id*. Summary judgment is proper if a party establishes that there are no genuine issues as to any material facts and that the party is entitled to judgment as a matter of law. Rule 74.04(c)(3); *Id.* at 376.

This Court reviews a grant of summary judgment de novo, based upon the record and the law. *Id.* at 376. Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. *Id*. After some two and a half years of thorough, albeit

unnecessary, discovery, and extensive briefing, Wildwood had been unable to present any evidence creating a material issue of fact or to defeat HBA's right to relief as a matter of law.

In fact, the length of the record in this case is deceptive. It reflects only Wildwood's attempt to confuse the issues with irrelevant facts and frivolous and redundant legal argument. This Court can decide the case by simple review of the governing statute and Wildwood's Ordinance. The issue before the Court, the conflict between the statute and ordinance, is purely an issue of law. *Cape Motor Lodge, Inc. v. City of Cape Girardeau,* 706 S.W.2d 208, 211 (Mo. banc 1986); *Knipp v. Director of Revenue*, 984 S.W.2d 147 (Mo. App. 1998).

I. The Trial Court Properly Granted Summary Judgment To The HBA And Invalidated The Provisions Of Wildwood's Ordinance Providing For A Construction Escrow Equal To 110% Of Construction Costs Because The State Statute Limits Permissible Construction Escrows To Actual Costs Of Construction.

The trial court determined that Wildwood was "wholly without statutory authority to require construction deposits in an amount 10% in excess of the estimated actual construction costs." L.F. 1134. The trial court based that conclusion upon the language of the statute, which limits such construction escrows to the amount of the "actual construction." L.F. 1134. The trial court properly determined that Wildwood's ordinance conflicts with the state statute.

A. A Municipal Ordinance May Not Permit What State Statute Prohibits.

It is black-letter law that no city, including a charter city, may enact an ordinance that permits what state law has prohibited. *E.g., City of St. Louis v. Stenson*, 333 S.W.2d 529, 536 (Mo. App. 1960); *Pearson v. City of Washington*, 439 S.W.2d 756, 760 (Mo. 1969). *See also* § 71.010 R.S.Mo. The reasons for this rule are obvious: municipal corporations owe their origins to, and derive their powers and rights wholly from the State. Where the Legislature has authorized a municipality to exercise a power and prescribed the manner of its exercise, the right to exercise the power given in any other manner is necessarily denied. *Pearson*, 439 S.W.2d at 760.

While an ordinance may supplement a state law, when expressed or implied provisions of each are inconsistent and irreconcilable, the statute annuls the ordinance. *City of Dellwood v. Twyford*, 912 S.W.2d 58, 59 (Mo. banc 1995). In *Dellwood*, this Court invalidated an ordinance on the grounds that it conflicted with a state statute permitting the posting of signs advertising real property. The ordinance required prior approval and payment of a fee for display of real estate signs. The Court determined that the ordinance restricted the homeowners' rights to erect the signs in violation of the state statute. *Id*. at 60.

The test for determining if conflict exists is whether an ordinance permits what the statute prohibits, or prohibits what the statute permits. *Id*.; *Page Western, Inc. v. Community Fire Prot. Dist. of St. Louis County*, 636 S.W.2d 65, 67-68 (Mo. banc 1982). An ordinance may not enlarge upon statutory provisions by requiring more than a statute requires when the statute limits the requirements for all cases to its own prescriptions. *Id.*

at 67-68. *See also National Adver. Co. v. Missouri State Highway & Transp. Comm'n*, 862 S.W.2d 953 (Mo. App. 1993) (invalidating zoning ordinance prohibiting construction of new off-premises billboards on the grounds that it conflicted with purpose of state billboard law which affirmed use of signs in the state and regulated location, spacing, etc. of new signs). Any fair and reasonable doubt concerning the existence of municipal power to enlarge upon statutory provisions is resolved against the municipality. *State ex rel. City of Blue Springs v. McWilliams*, 74 S.W.2d 363, 364 (Mo. banc 1934).

Wildwood recognizes these general principles. It nevertheless invokes the presumption of validity accorded municipal ordinances, arguing that an ordinance must be construed to uphold its validity. That doctrine is, as it states, simply a presumption. The City cannot invoke the doctrine to establish the validity of its ordinance. *Home Bldg. Co. v. City of Kansas City*, 609 S.W.2d 168, 173 (Mo. App. 1980). HBA's undisputed proof that the ordinance conflicts with state statute overcomes any presumption of validity accorded to Wildwood's ordinance.

Moreover, this case does not involve the *construction* of an ordinance, so the rules of construction touted by Wildwood do not apply. The parties do not dispute the requirements of Wildwood's Ordinance or the effect of those requirements. The question is whether the Ordinance conflicts with the state statute. It is the nature and effect of the statute that is the issue in this case.

Wildwood again confuses the legal standards applicable to this case when it repeatedly argues that HBA failed to offer evidence that the ordinance has ever been

applied unlawfully. Wildwood's application of the Ordinance is not the issue in this case. HBA's petition asserts a facial challenge to the Ordinance.

The Missouri Supreme Court has clearly held that in determining whether an ordinance conflicts with general laws, the test is "whether the ordinance permits that which the statute prohibits, and vice-versa." *Morrow v. City of Kansas City*, 788 S.W.2d 278, 281 (Mo. banc 1990). Application of the Ordinance to a particular set of facts is not relevant to this analysis. For instance, in *Dellwood*, *supra*, this Court did not decline to invalidate the ordinance on the grounds that the city might not in some particular situation require the fee for erection of advertising signs required under the ordinance. Rather, the Court simply concluded that the ordinance, on its face, permitted what the state law prohibited. Wildwood's Ordinance is void on its face, and no actual or hypothetical application of the Ordinance can alter that result.

B. The Construction Escrow Provisions Of Ordinance 675 Conflict With Section 89.410 R.S.Mo.

Section 89.410 imposes specific limits upon municipal subdivision escrow requirements. The amendments adopted in Senate Bill 20 demonstrate the legislative intent to limit subdivision escrows to those specifically authorized in the statute. As amended, § 89.410.1 provides that a "city, town or village, *may only impose requirements and the posting of bonds regarding escrows for subdivision related regulations as provided for in subsections 2 to 4 of this section."* (emphasis added).

Subsection 2 limits the city to "a bond or escrow *in an amount* and with surety and other reasonable conditions, providing for and securing the *actual construction and installation of the improvements and utilities . . .*" § 89.410 (emphasis added).

Ordinance 675 provides that if subdivision improvements are not completed prior to record plat approval, the developer must post a construction deposit which "shall be, in addition to a separate maintenance deposit sum, in the amount of one hundred and ten percent (110%) of the Department of Public Works' estimate of the cost of the construction, completion and installation of the required improvements." L.F. 665-66, § 1005.080(D)(1).) The ten percent added to the estimated construction costs represents a factor for inflation and other unexpected contingencies. L.F. 634. Br. 31, 35.

On its face, the Ordinance requires that any construction deposit posted by a subdivision developer exceed actual construction costs by ten percent. Wildwood does not dispute that fact. Br. 31, 35. Rather, Wildwood argues that its Ordinance does not "require" a construction deposit at all and/or that the statute does not limit the construction guarantee to the amount of actual construction. Wildwood's first argument is irrelevant. The second is simply wrong.

1. Wildwood's Construction Deposits Must Comply With The Statute, Whether They Are Mandatory Or Optional.

Wildwood argues at length that neither the statute nor its ordinance "requires" a construction deposit. That distinction is inconsequential. The point is that Wildwood has chosen to allow developers to post construction deposits for unfinished improvements

prior to record plat approval Since it has given the developers that option, it must do so in accordance with the statute.

HBA does not dispute that Wildwood's ordinance provides the developer the option of completing all improvements prior to record plat approval or posting a construction deposit for that work. That is exactly what § 89.410 contemplates, when it provides that the city *may* accept a construction escrow prior to record plat approval. The statute is clear, however, that any regulations establishing such construction escrows must conform to the confines of the statute. The "may only" impose language of § 89.410.1 so establishes.

Wildwood cannot circumvent the statute by arguing that the construction deposit is optional. Its ordinance establishes a procedure for developers to post construction deposits and a mandatory amount for such deposits. Those items must conform to the statute.

2. Section 89.410 Restricts Construction Escrows To The Amount Of The Actual Construction.

Wildwood argues that it has the right to add a factor for inflation and other unexpected costs to the required amount of the construction deposit. Br. 34. Its argument is based upon is contrived reading of § 89.410.2, which provides that escrows shall be "in an amount and with surety and other reasonable conditions, providing for and securing the actual construction and installation of the improvements." Wildwood interprets this language to state that the escrow shall be in a reasonable amount. That is not what the statute says. Instead, the plain language specifies the amount of the escrow

and allows the city to impose other reasonable conditions on the surety. For example, the statute gives the City some discretion to determine the type of bond or escrow and the details of the escrow agreement it will require to put it in an assured position to perform the work. The "reasonable conditions" do not pertain to the amount of the deposit; they pertain to the form of the bond or escrow.

Wildwood's argument that the term actual cost, does not refer to actual costs at the time the deposit is posted but costs at some unknown time "many years later" when the developer could default is equally nonsensical. Br. 34-36. By definition, those costs would be speculative, future estimates, not estimates of "actual" costs. A city cannot predict when a developer might default or what the actual costs to complete improvements would be at that time. The term "actual costs" can only refer to the construction costs at the time the deposit is posted. If a city could build unlimited factors for inflation, prevailing wages, mistaken estimates, or other unexpected contingencies that occur "years later", (Br.35-36, Amicus Br. 10), why would the legislature have defined the amount of the escrow based upon the actual costs? The courts will not construe statutes in a manner that renders provisions thereof meaningless. *State ex rel. Missouri State Bd. of Registration for Healing Arts v. Southworth*, 704 S.W.2d 219, 225 (Mo. banc 1986).

Wildwood and the Amicus argue that "municipalities must be given discretion" to require amounts they deem sufficient to secure performance of the improvements in order to protect the public. Amicus Br. 10. The language of the statute, however, grants no

such discretion. Rather, it imposes clear limits upon the municipality's powers in this regard.

The arguments of Wildwood and the Amicus stem from their arrogant assumption that they know what is best. While they purport to need additional escrows to "protect the public," they ignore the costs associated with this "protection." Raising the developer's escrow expense in turn raises the costs of homebuilding, costs that will be passed on to the public in the prices of new homes. To what extent should the owners in a community bear the costs associated with the unlikely risk of a developer's default? The Missouri legislature struck the balance in § 89.410. If Wildwood and the Amicus do not like the result, they should direct those policy arguments to the Missouri legislature. They cannot ask the courts to rewrite the language of the statute under the guise of judicial construction. *State v. Hallenberg-Wagner Motor Co.*, 108 S.W.2d 398 (Mo. 1937) (courts must confine themselves to the construction of the law as it is, and not attempt to amend or change the law through judicial construction).

3. Application Of The Ordinance To Any Particular Facts Is Irrelevant.

Wildwood further argues that, as applied, the Ordinance does not violate the statute. It cites a lack of evidence that the Ordinance has ever resulted in a construction deposit in excess of costs incurred by the City to complete subdivision improvements. Such evidence is irrelevant to HBA's case. This case does not rest upon application of the Ordinance to any particular set of facts. On its face, the Ordinance requires a deposit 10% greater than the amount prescribed in the statute and is void. *Page Western*, 636 S.W.2d at 67-68.

Nevertheless, the undisputed facts establish that the City is enforcing the Ordinance in violation of the statute. The record establishes that since 1999, Wildwood has required all new construction escrows to comply with its Ordinance, calculated at 110% of the actual construction costs. L.F. 580-616, 617-627, 642-45, 673-78. Wildwood did not dispute HBA's evidence of specific construction deposits in that amount now held by Wildwood. Thus, while not necessary to HBA's case, the record does establish that Wildwood is enforcing its Ordinance in a manner contrary to the statute.

II. The Trial Court Properly Granted Summary Judgment To HBA And Invalidated The Provisions Of Wildwood's Ordinance Providing For A Separate Maintenance Deposit Because The State Statute Prohibits Any Subdivision Bonds Or Escrows In Excess Of The Actual Costs Of Construction And Mandates Release Of Those Deposits Upon Completion Of Categories Of Improvements.

The trial court also invalidated Wildwood's maintenance deposit, finding it "expressly prohibited by § 89.410." After reviewing the requirements of the statute, the trial court concluded:

> Wildwood is wholly without authority to require this additional 10% deposit at commencement of construction or to require any deposit over and above the construction deposit it already requires. Nor does it have authority to hold any portion of these maintenance

> deposits beyond thirty days after completion of the improvements in a category of improvements.

L.F. 1135; App. 25-26.

As the trial court properly determined, Wildwood's ordinance permits what the state statute prohibits. Not only does § 89.410 limit permissible subdivision escrows to the amount of the actual construction, it limits the duration of the escrow. As amended by Senate Bill 20, subsection 2 allows a municipality to accept such bonds or escrows "provided that the release of such escrow by the city, town or village shall be as set forth in this section."

Section 89.410.3 governs the release of the escrow, requiring that :

> any escrow amount held by the city, town or village to secure actual construction and installation on each component of the improvements or utilities **shall be released within thirty days of completion of each category or improvement or utility work to be installed, minus a maximum retention of five percent which shall be released upon completion of all improvements and utility work.**

Senate Bill 20 also imposed penalties for a city's failure to release the bond or escrow in accordance with these timeframes. § 89.410.5.

In addition to the construction deposit, Wildwood's Ordinance 675 requires all developers to post a separate "maintenance deposit" prior to record plat approval in the amount of ten percent (10%) of the Department of Public Works' estimate of the cost of the construction, completion and installation of the required improvements. L.F. 666.

deposit is mandatory for all developers. L.F. 647, 666, § 1005.080(F)(1) of Ordinance 675 states:

> 1. Scope and Duration. Upon commencement of installation of the required improvements within the subject subdivision, the developer shall be responsible for the maintenance of the improvements, including undeveloped lots, streets, sidewalks, common areas, and storm and drainage facilities, **until the sooner of the (1) expiration of eighteen (18) months after acceptance for public dedication of the specific improvement by the City, or (2) expiration of eighteen (18) months after occupancy permits have been issued on 95% of all of the lots in the subdivision plat(s) subject to the deposit agreement.** Maintenance shall include repair or replacement of all defects, deficiencies, and damage to the improvements that may exist or arise, abatement of nuisances caused by such improvements, removal of mud and debris from construction, erosion control, grass cutting, removal of construction materials . . street deicing and snow removal. . . .

L.F. 667-68.

These maintenance deposit requirements conflict with the statute. Section 89.410.1 expressly prohibits the City from requiring any subdivision escrows or deposits other than those authorized in subsections 2 through 4 of § 89.410. Those subsections authorize escrows only for the actual cost of the construction of specified improvements

and they require release of the escrows within thirty days of completion of various categories of improvements. Section 89.410.3 authorizes only a five percent retention to be released upon completion of all improvements.

Ordinance 675 blatantly conflicts with these statutory provisions. It authorizes the City to require a construction deposit and to retain 5% of that deposit until completion of all improvements. But it also mandates an additional deposit for subdivision-related improvements. This "maintenance deposit" is nothing more than an additional construction and installation guarantee, which the City retains for a longer period of time. The deposit is required at the *commencement* of construction, and it is intended to guarantee the same improvements covered by the "construction" deposit.

In fact, prior to Senate Bill 20, the City required that the developer include *in the construction deposit* an additional 10% of estimated construction costs for maintenance obligations virtually identical to those set forth in Ordinance 675. L.F. 633-34. Apparently recognizing that Senate Bill 20 required release of that deposit upon completion of construction, Wildwood simply made the "maintenance" deposit a separate deposit. L.F. 636, 638. The substance remains the same. It was and is an escrow to secure subdivision improvements governed by the limits in § 89.410. Wildwood cannot require this additional deposit. And it certainly cannot hold the deposit beyond the completion of various categories of improvements.

The maintenance deposit conflicts with the limitations in § 89.410. Under the rule set forth by this Court in *Page Western*, the trial court properly invalidated the maintenance obligations of Ordinance 675.

A. Section 89.410.5 Does Not Exclude Subdivision Maintenance Bonds From The Limitation In The Statute.

Wildwood asserts that it has authority to require maintenance deposits pursuant to § 89.410.5, which states that "nothing in this section shall apply to performance, maintenance and payment bonds required by city, towns or villages." As the trial court determined, that language does not exempt subdivision maintenance bonds from the restrictions in § 89.410. It merely clarifies that other types of performance, payment and maintenance bonds are not so limited.

The only reasonable construction of subsection 5 is that reached by the trial court. It refers to other nonsubdivision-related performance, payment and maintenance bonds commonly required by municipal entities for municipal projects. L.F. 1136. For example, municipalities may require developers or contractors to post bonds to secure the construction and maintenance of public improvements in commercial, retail or industrial projects. As repeatedly argued by Wildwood, cities might require such bonds under their charter or police powers (if not otherwise limited by statute). For instance, a city might require a contractor to post a bond for a public works project, which could contain both construction and maintenance obligations.

In addition, Missouri statutes authorize municipalities to require various types of bonds for municipal projects. Sections 70.851.1 and 107.170 authorize types of public construction bonds. Sections 78.610 and 79.260 authorize municipal performance bonds. Subsection 5 of § 89.410 clarifies that the restrictions in that statute do not apply to bonds required by municipality for projects other than residential subdivisions.

Wildwood's interpretation of § 89.410.5 requires this Court to ignore the language of § 89.410.1, which expressly provides that a municipality "may only" impose requirements for subdivision-related bonds or escrows as set forth therein. It also ignores the critical point that § 89.410 already establishes a maintenance allowance. It allows the city to retain 5% of the amounts held for various categories of improvements until completion of the subdivision, presumably to address problems that might arise prior to completion of all improvements. Senate Bill 20 reduced the retention amount from ten to five percent and added the mandatory release and penalty provisions. What point would that provision serve if the city could also require a separate maintenance deposit and hold it for an unlimited time? Wildwood's interpretation of subsection 5 eviscerates the statute.

The court's primary goal when interpreting statutes is to ascertain the intent of the legislature from the plain language used and to give effect to that intent. *Gott v. Director of Revenue*, 5 S.W.3d 155, 158 (Mo. banc 1999). If construction of the statute is warranted, the goal is to consider the object the legislature seeks to accomplish with an eye toward finding resolution to the problems addressed therein. *Id*. The statute must be given a reasonable interpretation in light of the legislative objective and where necessary the strict letter of the act must yield to the manifest intent of the legislature. *BCI Corp. v. Charlebois Constr. Co.*, 673 S.W.2d 774, 780 (Mo. banc 1984).

In construing legislation, the entire legislative act must be considered together and all provisions much be harmonized, if reasonably possible, and every word, clause, sentence, and section of an act must be given meaning. *E.g., Board of Registration for*

Healing Arts, 704 S.W.2d at 225. If a statute is susceptible of more than one construction, it must be given the interpretation that will effect, rather than defeat, its purpose. *Household Finance Corp. v. Roberston*, 364 S.W.2d 595 (Mo. 1963).

Reading § 89.410.5 to authorize unlimited subdivision maintenance bonds in addition to construction bonds defeats the manifest purpose of § 89.410, as amended by Senate Bill 20. The trial court so recognized:

> The apparent goal of Senate Bill 20 was to prescribe the types of subdivision related escrows a municipality may require, to limit the amount and duration of those escrows, and to require prompt release of the deposits. . . .[I]f a municipality could require an additional deposit in an unlimited amount and hold it for an unlimited time merely by denominating it a "maintenance deposit," the restrictions in § 89.410 and Senate Bill 20 are meaningless.

L.F. 1136. Indeed, what purpose would there have been for the legislature to prescribe the timeframes for release of the deposits and impose penalties for untimely releases if a city could circumvent the requirements by simply changing the name affixed to the deposit?

This Court will not construe statutes to reach absurd results that defeat the legislative purpose. *BCI*, 673 S.W.2d at 780. *See also L.C. Dev. Co. v. Lincoln County*, 26 S.W.3d 336, 340 (Mo. App. 2000). In amending a statute, it is the intent of the legislature to accomplish some change, and the legislature will not be presumed to have

intended a useless act. *Kilbane v. Director of Revenue*, 544 S.W.2d 9 (Mo. 1976). Wildwood's construction of § 89.410 renders Senate Bill 20 useless gesture.

Moreover, the "maintenance" bond language of subsection 5 must be read in conjunction with the other language of that section. While Wildwood attempts to isolate the "maintenance" language of subsection 5, its argument contravenes the established rule that every word, clause, and sentence of a statute should be harmonized. *E.g. Board of Registration for Healing Arts,* 704 S.W.2d at 225. Subsection 5 excludes "performance, maintenance and payment bonds." As the trial court recognized, if that subsection is deemed to exclude such bonds required for subdivision purposes, the statute serves no purpose:

> What would a performance bond refer to in this context, except for the bond the developer posts to secure construction of the improvements? If those bonds were excluded, § 89.410 and the amendments thereto in Senate Bill 20 become a nullity because the exclusion would encompass the entire subject of the statute.

L.F. 1135-36.

Wildwood attempts to offer an alternative explanation, arguing that a municipality might require a subdivision developer to post a performance bond to secure some obligation other than the construction of subdivision improvements. The courts will place the ordinary meaning upon terms in a statute, and will not strain to find some contrived, hypothetical meaning beyond the plain language. *Budding v. SSM Healthcare System,* 19 S.W.3d 678 (Mo. 2000). In the subdivision context, the developer's

performance is the construction of the improvements – obligations secured by the construction deposit. Wildwood's own examples so illustrates.

Wildwood argues that a city might require a non-construction related "performance bond" from a subdivision developer to guarantee the viability of landscaping and erosion control for some period of time. Br. 51. In fact, landscaping and grading are two of the categories of improvements for which the developer must post a construction deposit under Wildwood's own form. *See*, L.F. 607. That deposit is governed by and must be released in accordance with §89.410. If Wildwood could require a separate "performance" bond to ensure maintenance and repair of those items for some indefinite basis under subsection 5, then the restrictions in § 89.410 are meaningless. Wildwood's strained interpretation of the statute simply does not work.

Wildwood also asserts that the term "maintenance bond" is a term of art that refers to subdivision maintenance bonds. Br. 42. In support of that conclusion, it points to other subdivision ordinances that require some maintenance obligation of the developer. Those ordinances, however, contradict Wildwood's argument. The documents establish that municipalities use a number of terms other than "maintenance bonds" to describe this obligation, for example, maintenance escrows, guarantees, deposits, or special funds. L.F. 488 – 510. They also require deposits in different amounts to be posted at different times prior to or after completion of construction and they contain different requirements for release. L.F. 488 – 510. These ordinances suggest the reason the Missouri legislature

chose to regulate this field – to provide consistency and certainty for subdivision developers.[4]

Wildwood argues that since § 89.410 pertains to subdivision improvements, the exclusions in subsection 5 must also relate to subdivision improvements otherwise they serve no purpose. That conclusion is unfounded. Though it has been invoked for the opposite purpose by Wildwood, the language of subsection 5 suggests that it was simply added to clarify the application of the statute.

In a further attempt to strain the meaning of subsection 5, Wildwood argues that HBA's statements prior to this litigation that Senate Bill 20 was intended to assure prompt release of subdivision escrow funds somehow proves that the bill does not impact subdivision maintenance obligations. Br. 47. HBA fails to see how the goal of obtaining prompt release of subdivision escrows is inconsistent with obtaining release of subdivision maintenance escrows held beyond the completion of improvements. The former certainly encompasses the latter. Moreover, the intent of Senate Bill 20 must be

[4] The fact that other municipalities are requiring some sort of maintenance deposit certainly does not validate Wildwood's Ordinance. HBA is unaware of any law to support Wildwood's "they are doing it too" defense.

gleaned from the plain language of the statute, not HBA's prior comments. *Pipe Fabricators, Inc. v. Director of Revenue*, 654 S.W.2d 74 (Mo. 1983).[5]

Perhaps in recognition of the precarious nature of their legal arguments, the most vehement arguments of Wildwood and the Amicus are simply policy. They say they need the ability to impose unlimited maintenance deposits, even permanent maintenance deposits, to ensure that subdivision improvements are appropriately maintained. Amicus Br. 11-12. In reality, municipalities do not need, and have not been given, such a role.

There must be some point in the development process when the developer's responsibility for ongoing maintenance and repair end, and the city or subdivision association accepts responsibility for those improvements. For example, the streets and sidewalks are generally dedicated to the municipality or conveyed to the homeowners' association upon completion. At that point, it is appropriate for those entities to assume responsibility for repair and maintenance. Under Ordinance 675, the developer may have to guarantee those improvements for another eighteen months. The inevitable result of these increased costs to the developer is higher prices for the homebuyer.

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[5] The record in fact supports the purpose suggested by the plain language of subsection 5: clarification. The uncontroverted facts establish that HBA did not object to the insertion of subsection 5 in Senate Bill 20 because it understood that the language was added to alleviate concerns that the bill might impact bonds issued for municipal public works projects and that the "maintenance bonds" referenced therein had no relation to subdivision bonds or escrows. L.F. 1080-1085, 1087-190. Supp. L.F. 93 - 94.

The Missouri legislature obviously determined that the costs associated with these maintenance escrows outweighed any benefits associated with them. In 1999, it made a clear decision to limit a city's ability to hold subdivision improvement bonds. The city may retain 5% of the deposits for various categories of improvements until completion of all improvements in a subdivision. Despite their protestations to the contrary, Wildwood and the Amicus are not above the law. They, and this Court, must defer to the legislative decision. If Wildwood and the Amicus do not believe that the statute affords them sufficient protection, they must return to the Missouri legislature.

B. Wildwood's Charter And Police Powers Do Not Allow It To Circumvent The Requirements Of Section 89.410.

In its most arrogant argument to this Court, Wildwood asserts that, even if maintenance deposits are restricted by § 89.410, its maintenance deposits are authorized under its charter and police powers. Br. 53. Wildwood thus argues that its powers as a charter city trump restrictions imposed by state statute. That argument stands Missouri municipal law upon its head.

Charter or not, Wildwood is a political subdivision of this State. As such, it must observe the laws of this State. The Missouri Constitution so dictates. Article VI, § 19 of the Missouri Constitution authorizes a city to adopt a charter form of government. Section 19(a) provides:

> Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, **provided such powers** are consistent

> with the constitution of this state and **are not limited or denied** either by the charter so adopted or **by statute**. . . .

(emphasis added). In addition, Missouri statutes governing "all Cities, Towns and Villages," require that:

> Any municipal corporation in this state, whether under general or specific charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of ordinances to and in conformity with the state law upon the same subject.

§ 71.010 R.S.Mo. (emphasis added).

Wildwood's status as a charter city does not allow it to circumvent the laws of this state. This Court's decision in *City of Springfield v. Goff*, 918 S.W.2d 786 (Mo. banc 1996) so holds.

The City of Springfield adopted a charter provision that required a favorable vote of ***three-fourths*** of the City Council to approval a zoning change over a valid protest petition. It also provided that a valid protest petition be signed and acknowledged by ***ten percent*** of the owners of the land included in the proposed change and certain surrounding boundaries. In contrast, § 89.060 provides that approval of a zoning change over a protest petition requires a favorable vote of ***two-thirds*** of the members of the City Council and that a protest petition must be signed and acknowledged by ***thirty percent*** of the relevant owners. *Id.* at 788.

Recognizing that the Constitution only allows charter cities to exercise such powers as are not limited or denied by statute, the Court defined the issue as:

> whether the adoption of section 11.18 of Springfield's charter purports to grant the city a power denied it by state statute in violation of article VI, section 19(a). A charter provision that conflicts with a state statute is void. A conflict exists where a charter "permits what the statute prohibits" or "prohibits what the statute permits." (citations omitted).

Id. at 789.

The Court concluded that §§ 89.010 to 89.140 constitute the sole authority for cities in zoning matters, and all cities must adhere to the procedures in chapter 89 when exercising their powers relating to zoning. *Id.* at 789-790. The Court therefor concluded that Springfield's charter provision could not stand:

> In permitting protests by lower percentage of owners and requiring a greater percentage of council votes to override protests, section 11.18 allows what § 89.060 prohibits. Therefore, section 11.18 violates article VI, section 19(a) of the constitution. Section 11.18 is void.

Id. at 790.

Wildwood attempts to distinguish *Goff* on the grounds that it involves a zoning power and § 89.410 deals with subdivision regulations. That distinction is irrelevant. *Goff* establishes the basic principle that when the state has enacted regulations of general applicability, a charter city cannot enact conflicting regulations.

The premise was also recognized in *Mager v. City of St. Louis*, 699 S.W.2d 68, 71 (Mo. App. 1985). The City of St. Louis, a charter city, enacted an ordinance that prohibited liquor licensees from employing convicted felons, despite a Missouri statute providing that persons convicted of a crime shall not suffer any legal disqualification or disability not reasonably related to the felon's crime. § 561.060 R.S.Mo. The court determined that the ordinance as applied to a petitioning felon's crime could impermissibly prohibit what the statute permitted, and rejected the City's claim that its broad home rule power authorized its ordinance:

> Powers which are limited or denied by statute, however, are not among the powers granted to cities by Article VI, § 19(a). Here the disqualification of convicted felons, has been limited by statute and the ordinance may be in conflict with that statute.

Id. at 72.

By its terms, § 89.410 applies to charter cities. The heading to Sections 89.300 - .480 expressly applies to planning for "all municipalities." It grants a planning commission of "any municipality in this state" the power to appoint a planning commission with the powers and duties specified therein, including the power to adopt subdivision regulations providing for construction escrows. § 89.310. 410. It then states that they "may only" impose such regulations as set forth therein. Since Wildwood's escrow requirements conflict with § 89.410, they are void under Article VI, Section 19 of the Missouri Constitution.

Wildwood also makes the ludicrous argument that even if it could not adopt its escrow requirements as subdivision regulations, it could enact them as "police power regulations." Br. 54. It does not matter what Wildwood calls its escrow requirements. It has no authority, from any source, to enact laws that substantively conflict with state statutes. The statutes Wildwood cites in support of this general police establish the fallacy of its argument.

For example, Wildwood cites to § 79.450, which grants general police powers to fourth class cities. That statute, however, only states that the city may enact such laws for the general welfare "not inconsistent with the laws of the state." § 79.450(1). Wildwood's reliance on §82.190 is similarly misplaced. The courts have held that § 82.190, granting charter cities control over public streets and places, must be read in conjunction with § 71.190, which requires ordinances to be in conformity with the laws of the State of Missouri. *Stenson*, 333 S.W.2d at 535. In that case, the court invalidated an ordinance enacted by the City of St. Louis, stating "The City of St. Louis does have the right to regulate and control by ordinance the use of its streets. But such ordinance must not be in conflict with the general laws of the state." *Id*. at 536 (*citing, e.g*., S*tate ex rel. Spink v. Kemp*, 283 S.W.2d 502 (Mo. 1955); *Giers Imp. Corp. v. Investment Serv. Inc.*, 235 S.W.2d 355 (Mo. 1950)).

Finally, Wildwood's statement that the same issues raised in this case were rejected by the court in *Home Builders Ass'n v. City of St. Peters*, 868 S.W.2d 187 (Mo. App. 1994) again distorts the truth. Br. 55. In that case, the court held that the city had the ability under its general police powers to require subdivision developers to post a trust

fund for the enforcement of subdivision covenants. The issue in that case was entirely different from the one before this Court. There was no allegation that any state statute prohibited the St. Peters' ordinance (note that the case was decided prior to Senate Bill 20). The case does not establish that a city's general police powers supercede conflicting state statutes.

Wildwood's creative approach to municipal law is undermined by its own conduct. Prior to this litigation, Wildwood did not dispute that its subdivision escrow regulations must comply with the state statute. In fact, Wildwood amended its escrow requirements in August of 1999 based upon its recognition that it had to bring its requirements into compliance with the state statute as amended by Senate Bill 20. L.F. 637, 648. Wildwood admitted at the time and continues to admit that its escrow process must comply with the restrictions in that statute. L.F. 637.[6]

C. The Fact That Wildwood Might Release Maintenance Bonds Prior To The Timeframes Set Forth In Its Ordinance Does Not Validate Its Ordinance.

Wildwood argues that there is no facial conflict because the City might release a maintenance deposit prior to completion of all improvements. Br. 53. Wildwood's argument again demonstrates its basic misunderstanding of the legal standard applicable

[6] When asked "Did you believe that your ordinances needed to comply with this new state statute,' Joe Vujnich, the City's Director of Planning, responded "Definitely." L.F. 637.

to this case. If the Ordinance allows what the statute prohibits, it is void on its face regardless of how it is administered in a particular situation. *Page Western*, 636 S.W.2d at 67-68. Moreover, the record establishes that Wildwood is holding the maintenance obligations beyond the restrictions in § 89.410.

Ordinance 675 allows Wildwood to hold the maintenance deposits until the earlier of two events – 18 months after public dedication of streets or 18 months after occupancy permits have been issued on 95% of all the lots in the subdivision. L.F. 667-68. The uncontroverted evidence established that, assuming those triggering events have not occurred, when a developer completes construction of a category of subdivision improvements, the City consistently releases 95% of the construction deposit but no portion of the maintenance deposit. L.F. 646. Wildwood's own records establish that on many subdivision plats, the City has released all the deposits held for construction and installation of the various categories of improvements on the plat and continues to hold only a maintenance deposit for those improvements. L.F. 681 – 700. Wildwood's Ordinance, as written and as applied, violates section 89.410.

D. Wildwood's Maintenance Deposits Are Not Even In The Form Of "Maintenance Bonds."

Throughout its argument, Wildwood ignores the critical fact that its maintenance deposits are not in the form of "maintenance bonds." Prior to Senate Bill 20, Wildwood allowed subdivision deposits in the form of bonds, cash or letters of credit. L.F. 639. In Ordinance 675 Wildwood chose to eliminate the option for the developer to post the deposit in the form of a bond, limiting the permissible form of the maintenance deposit to

cash or letter of credit. L.F. 639; L.F. 666, § 1005(D)(2). Ordinance 675 does not authorize "maintenance bonds." Subsection 5 expressly pertains to "performance, maintenance and payment *bonds*." § 89.410 (5). Therefore, even if this language is interpreted as suggested by Wildwood, it does not authorize the maintenance deposits required in Ordinance 675.

Ordinance 675 plainly fails the test set forth by this Court in *Page Western, 636 S.W.2d 65*. The Ordinance requires construction and maintenance deposits in excess of actual construction costs, which § 89.410.1 prohibits, and it seeks to enlarge upon statutory provisions by requiring more – the maintenance deposits – when the statute plainly limits the permissible deposits. The trial court properly invalidated the offending provisions of the Ordinance.

III. The Trial Court Properly Granted Summary Judgment To The HBA And Rejected Wildwood's Defense That The Title To Senate Bill 20 Violated Article III, § 23 Of The Missouri Constitution In That The Title "Relating To Community Improvement" Does Not Encompass Nearly All State Activities And Properly Describes The General Nature Of The Contents Thereof.

Wildwood asserts that the legislation amending § 89.410 violates Article III, §§ 21 and 23 of the Missouri Constitution in that the bill's title is not clearly expressed. The trial court found no merit to Wildwood's Article III affirmative defenses when it granted summary judgment in favor of the HBA. Review of the undisputed facts establish that these challenges fail as a matter of law.

Article III, §§ 21 and 23 are procedural limitations designed to facilitate orderly legislative procedure and to defeat surprise in the legislative process. *See Hammerschmidt v. Boone County*, 877 S.W.2d 98, 101 (Mo. banc 1994). The courts are reluctant to invalidate legislation on these grounds. An act of the legislature carries with it a strong presumption of constitutionality. *Id.* at 102. When such attacks are raised:

> This Court will resolve doubts in favor of the procedural and substantive validity of an act of the legislature. [Citation omitted]. Attacks against legislative action founded on constitutionally imposed procedural limitations are not favored; we ascribe to the General Assembly the same good and praiseworthy motivations as inform our decision-making processes. Therefore, this Court interprets procedural limitations liberally and will uphold the constitutionality of a statute against such an attack **unless the act clearly and undoubtedly violates the constitutional limitation.**

877 S.W.2d at 102 (emphasis added).

The "clear title" provision was designed to prevent fraudulent and misleading legislation. To satisfy Article III, § 23, the title of the statute need only indicate in a general way the kind of legislation being enacted. *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 329 (Mo. banc 2000) (*citing Fust v. Attorney General*, 947 S.W.2d 424, 429 (Mo. banc 1997); *Missouri State Medical Ass'n v. Missouri Dep't of Health*, 39 S.W.3d 837, 839 (Mo. banc 2001). If the contents of the statute fairly relate to and have a natural connection with the subject expressed in the title, the constitution is satisfied. *E.g., State*

v. King, 303 S.W.2d 930, 932 (Mo. 1957). The touchstone of the clear title rule is that the bill's title cannot be underinclusive. *Dillon*, 12 S.W.2d at 329 If the title of a bill contains a particular limitation or restriction, a provision that goes beyond the limitation in the title is invalid because the title affirmatively misleads the reader. *Id*.

The title to a bill passes constitutional muster as long as the title to a bill includes, rather than excludes, the bill's provisions. *Dillon*, 12 S.W.3d at 329. In that case, the Court held that title "relating to transportation" properly included billboard regulation since federal highway transportation funds depend on the state's billboard regulations and the state has given regulatory authority of billboards to MoDot. *Id*.

The title to Senate Bill 20 plainly states that it is "An Act to repeal sections 88.812 and 89.410, R.S.Mo. 1994, ….relating to community improvement, and to enact in lieu thereof forty new sections relating to the same subject, with penalty provisions and an effective date for certain sections." L.F. 701. Interestingly, Wildwood argues that the title to Senate Bill 20 is both too restrictive and too broad to satisfy Article III, section 23. Wildwood's argument is inherently contradictory, indicating another attempt by Wildwood to create a legal challenge to the Bill where none exists.

The title "community improvement" is not underinclusive. As defined in the dictionary, the first meaning of the term "community" is "a group of people living in the same locality and under the same government." The American Heritage Dictionary, Second College Edition (1985). Thus the plain language of the title indicates that the legislation relates to improvement of a neighborhood, community, municipality, or other local governmental area. Examination of the bill confirms that its contents all relate to

that subject. L.F. 701-729. For example, in addition to the amendments to § 89.410, Senate Bill 20 authorized tax credits for businesses in distressed communities, L.F. 701-05, 724-29, allowed a community improvement district to impose a tax to further the objectives of the district, L.F. 711, authorized charter cities to provide for special assessments for constructing and repairing streets, sidewalks and other improvements, L.F. 723, and created a home equity program to guarantee "only against specifically local adverse housing market conditions within the area of the program." L.F. 705-722 (quoted language on L.F. 721).

Wildwood concedes that the contents of the bill are properly included within the term "community improvement" with the exception of § 89.410, which it claims benefits developers and is not germane to community improvement. Br. 61. Wildwood's argument misstates the issue.

Given their simplest connection, the amendments to § 89.410 define a municipality's ability to require and retain escrows for new subdivision improvements. Since the topic directly relates to new subdivision improvements within a municipality, it has a natural connection with the subject of community improvement. From a broader perspective, by authorizing municipalities to accept escrows for new subdivision developments, § 89.410 provides municipal bodies with a mechanism to facilitate and attract new subdivision development to their communities. Amendments to those provisions therefor patently relate to community improvement. Finally, by providing consistent limitations upon escrow requirements, the amendments in Senate Bill 20 serve as additional incentive for developers to embark upon new subdivision improvements in a

municipality and they protect against increased housing costs. In that sense they directly benefit the community.

The specific contents of Senate Bill 20 need not independently bring about community improvement. They must merely relate to that topic. Amendments to regulations governing escrows for new subdivision developments relate to the general topic of community improvement. Who benefits from the legislation is not the issue. It can certainly be argued that benefits accrue to individuals other than the community at large from other provisions of Senate Bill 20, such as the corporations receiving the tax credits authorized therein. Yet Wildwood concedes that those portions of Senate Bill 20 properly relate to community improvement.

Contrary to Wildwood's interpretation of the legislation, the word "program" is conspicuously absent from the title of Senate Bill 20. Thus there is no basis for Wildwood's suggestion that the contents of the bill must establish some formal "program," whatever Wildwood means by that term, for community improvement. Even if the Court so construed the Bill, §89.410 could be characterized as a program for municipal bodies to accept escrows for new subdivision improvements.

Wildwood also seeks to restrict the title to Senate Bill 20 by arguing that it must be interpreted to mean "programs that benefit distressed communities." Br. 61. There is no basis for reading those words into the title of the legislation just because some of the earlier contents pertain to distressed communities. The clear title rule applies to the version of the bill that passed, not a prior version. *Dillon*, 12 S.W.3d at 329. This Court construes bill titles in their plain and ordinary sense, not in a strained and unnatural

meaning. *State Medical Ass'n*, 39 S.W.3d at 841. If alternative readings exist, the Court chooses the reading that is constitutional. *Id*.

All of the contents of Senate Bill 20 naturally fall under the subject of "community improvement." Therefore, Wildwood's argument that the title is underinclusive must fail.

National Solid Waste Management Association v. Director of the Deparment of Natural Resources, 964 S.W.2d 818 (Mo. 1998), cited by Wildwood, is not controlling. There, the title "relating to *solid* waste management" was underinclusive because the bill also contained sections pertaining to hazardous waste management. This Court found the title affirmatively misleading because it erroneously implied that the bill only pertained to solid waste management. *Id*. at 821. The Court suggested that an appropriate title would have encompassed both topics, such as "environmental control" or "waste management." *Id*. at 822. In contrast, all the contents of Senate Bill 20 are properly included within the subject of community improvement.

Wildwood's further argument that the title is underinclusive because it does not specifically reference all the contents, including subdivision escrows, has been squarely rejected by this Court. In *Dillon*, this Court refused to invalidate the title "relating to transportation" simply because it did not express the particular subject of billboards, stating that the "title need not describe every detail contained in the bill." *Id.* (*citing Fust* 947 S.W.2d at 429).

Conversely, the title to Senate Bill 20 is not too broad or amorphous. This Court recently affirmed that a bill's diverse topics, absent specific itemization, can only be

clearly expressed by their commonality—by stating some broad umbrella category that includes all the topics within its cover. *State Medical Ass'n*, 39 S.W.2d at 841. This Court is reluctant to invalidate legislation on these grounds unless the title is so broad as to describe nearly every activity the state undertakes. *Id*. In *State Medical Association*, this Court held that bill's title "relating to health services" was not too broad and amorphous because it did not describe most, if not all, legislation enacted and did not include nearly every activity the state undertakes. *Id*. *See also Corvera Abatement Techs. v. Air Conservation Comm'n*, 973 S.W.2d 851, 861-62 (Mo. 1988) (rejecting attack on the title "environmental control").

Under this test, "community improvement" is not too broad because it does not encompass all or nearly all state activities. While all the contents of Senate Bill 20 relate to improvements at a neighborhood or local government level, much of the state legislation enacted each year does not have any bearing on that subject. For instance, laws regulating occupations and professions, Chapters 325-346 R.S.Mo., governing corporations and partnerships, Chapters 347 – 360, regulating debtor-creditor relations, Chapters 425-430, and establishing state agencies, such as the Department of Mental Health, Chapter 630, would not fall under the rubric of community improvement. They lack the neighborhood, community or local government connection implied in that title. Similarly, many of the examples cited by Wildwood, such as statewide legislation promoting voting or protecting religious worship, do not fairly relate to the topic of community improvement. Unlike the titles in the cases cited by Wildwood, the term "community improvement" does not encompass every act the State undertakes.

As a matter of law, Wildwood cannot establish that the title of Senate Bill 20 "clearly and undoubtedly" violated Article III, Section 23.

IV. The Trial Court Properly Granted Summary Judgment To The HBA And Rejected Wildwood's Defense That Senate Bill 20 Contained More Than One Subject In Violation Of Article III, § 23 Of The Missouri Constitution In That The All The Provisions Of Senate Bill 20 Fairly Relate To The Subject Of "Community Improvement."

Wildwood further argues that Senate Bill 20 contains more than one subject in violation of Article III, § 23. This Court will construe the "one subject" requirement broadly. *Hammerschmidt*, 877 S.W.2d at 102. The test for "single subject" is whether all the provisions of the statute fairly relate to the same subject, have a natural connection therewith, or are incidents or means to accomplish its purpose. *E.g.*, *State Medical Ass'n*, 39 S.W.3d at 840; *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 327 (Mo. banc 1997). Wildwood's attempt to narrow the subject of the legislation to the municipality's creation of a home equity program ignores the proper standard for measuring "single subject."

The "single subject" determination "does not concern the relationship between individual provisions, but between the individual provisions and subject as expressed in the title." *Dillon*, 12 S.W.3d at 328. The bill as enacted is the only version relevant to the single subject requirement. *Id*. at 328-29. The Court first looks to the title of a bill to determine its subject. *Stroh Brewery*, 954 S.W.2d at 327. Where the title to the bill is clear, the courts need not look to the contents of the bill to determine its subject. *Id*.

In *State Medical Association*, this Court addressed a challenge that a bill entitled "relating to health services" contained at least three different subjects: health insurance, medical records, and pre-operation information on breast implantation. The Court rejected that challenge, finding that all of those topics are incidents or means to health services. 39 S.W.3d at 841. *See also Dillon*, 12 S.W.3d at 328 (billboard regulation fairly relates to or is naturally connected with transportation).

The subject of Senate Bill 20, as stated in its clear title, is "community improvement" not "home equity programs." All of the provisions of Senate Bill 20, including programs to guarantee home equity values in certain municipalities and municipal escrow requirements for subdivision improvements, relate to or are naturally connected with community improvement.

The *Hammerschmidt* case is certainly not controlling on this point. In that case, the inclusion of a provision allowing certain counties to adopt an alternative form of charter government did not relate to or have a natural connection with the subject expressed in the title, "relating to elections." 877 S.W.2d at 103. No such disparate topic is included in Senate Bill 20, and thus *Hammerschmidt* does not apply.

Wildwood asserts that the purpose of the amendments to § 89.410 was to require prompt release of escrow funds upon completion of subdivision improvements, and such purpose has nothing to do with community improvement. Br. 69. The plain language of Wildwood's argument belies its message. The amendments in §89.410 pertain to a municipality's regulation of escrows for new subdivision, or community, improvements, and they provide incentives to developers to undertake new subdivision developments.

The prompt release of escrow funds lowers the homebuilder's costs, thus encouraging new subdivision developments.

As a matter of law, Wildwood cannot establish that Senate Bill 20 "clearly and undoubtedly" contained more than one subject in violation of Article III, Section 23.

V. The Trial Court Properly Granted Summary Judgment To The HBA And Rejected Wildwood's Defense That Senate Bill 20 Was Changed From Its Original Purpose In Violation Of Article III, §23 Of The Missouri Constitution In That All The Amendments To Senate Bill 20 Were Germane To The Original Purpose Of "Community Improvement."

Wildwood also claims that Senate Bill 20 was amended so as to change its original purpose in violation of Article III, § 21. The original purpose of a bill is "the general purpose, not the mere details through which and by which the purpose is manifested and effectuated." *State Medical Ass'n*, 39 S.W.3d at 839; *Akin v. Director of Revenue*, 934 S.W.2d 295, 302 (Mo. banc 1996). The title of a bill may change as the bill progresses and extensions or limitations of a bill's scope, even the addition of new matter, are not categorically prohibited. Article III, Section 21 "was not designed to inhibit the normal legislative processes, in which bills are combined and additions necessary to comply with the legislative intent are made." *State Medical Ass'n*., 39 S.W.3d at 840; *Stroh Brewery*, 954 S.W.2d at 326. Germane amendments do not change a bill's original purpose. *Id*.

This Court liberally interprets the procedural limitation of original purpose. *State Medical Ass'n.*, 39 S.W.3d at 840. The original purpose is measured by the general purpose at the time of the bill's introduction:

> At this time, a bill's sponsor is faced with a double-edged strategic choice. A title that is broadly worded as to purpose will accommodate many amendments that may garner sufficient support for the bill's passage. Alternatively, a title that is more limited as to purpose may protect the bill from undesired amendments, but may lessen the ability of a bill to garner sufficient support for passage.

Stroh Brewery, 954 S.W.2d at 326. In *Stroh*, the Court emphasized that the original purpose should be construed broadly based upon the bill's title, even if the original content is more restrictive. In that case, the Court held that the purpose of an act originally titled "an act to amend chapter 311, RSMo" by adding one new section relating to the auction of vintage wine, with penalty provisions" was not changed by the addition of provisions repealing eight other sections of Chapter 311 and adding nine new sections. The Court stated that although the original content of the bill was limited to one specific addition to the statute,

> the title to the bill was not so limited. . . The use of the word "by" in the title of S.B. 993 is admittedly troublesome. While it might have been meant to convey exclusivity, such a construction is not clearly and undoubtedly so. When alternative readings of a statute are possible, we must choose the reading that is constitutional. By including the words, "an

> act to amend chapter 311, RSMo" without any further language of specific limitation, such as "for the sole purpose of," S.B. 933 gave fair notice to all concerned that the amendment of Missouri's liquor control law, chapter 311, was the purpose of S.B. 933.

Id at. 326.

The original purpose of Senate Bill 20, as clearly stated in its title, was community improvement. As in *Stroh Brewery*, Wildwood's attempt to limit the original purpose to the specific contents of the original bill fails, where the title indicates a broader purpose. The original purpose of Senate Bill 20 remained consistent throughout the process. The original home equity program allowed a municipal body to create a home equity program designed to guarantee "against local adverse housing market conditions." L.F. 721. It thus served the original purpose of community improvement. The amendments to Senate Bill 20 all similarly relate to municipal, neighborhood or community improvement. When the content of the bill remains substantially intact and germane amendments are added, "this Court has consistently rejected "original purpose" challenges during the 125 year history of this constitutional provision." *State Medical Ass'n*, 39 S.W.3d at 840. (citations omitted).

In *State Medical Association,* this Court rejected a purpose challenge to a bill originally entitled, "insurance coverage for early cancer detection." Several amendments were added prior to the bill's passage, including a provision mandating pre-operation information abut the risks of breast implantation. 39 S.W.3d at 837. The Court broadly construed the original purpose of the bill as mandating health services for serious

illnesses, including cancer. Id. at 840. It then determined that the additional sections were germane because "the original purpose logically relates to mandating pre-operation information about the risks of breast implantation, including cancer." *Id*. *See also Akin,* 934 S.W.2d at 302 (noting that "[I]n this case, the purpose of SB 380 was consistent throughout, that purpose being a bill relating to education.")

At best, Wildwood's description of the history of Senate Bill 20 merely illustrates the day-to-day negotiation, revisions, and amendments that impact the majority of legislation that passes through the Missouri legislature. As a matter of law, Wildwood cannot establish that the purpose of Senate Bill 20 was "clearly and undoubtedly" changed in violation of Article III, Section 23.

VI. The Court Of Appeals Properly Determined That HBA Has Standing To Pursue Its Claims On Behalf Of Its Members And That Decision Is The Law Of The Case Precluding Further Review Of This Issue.

The Court of Appeals squarely held that HBA has standing to bring its claims on behalf of its members. *Home Builders,* 32 S.W.3d 612 (Mo. App. 2000). This Court denied Wildwood's application for transfer. Wildwood now attempts to raise the standing issue yet again. Further litigation of this issue, however, is foreclosed by the law of the case doctrine.

Wildwood argues that standing may be raised at any time. Br. 70-71. While that may be true as a general rule, that rule does not apply when a party's standing has already been decided by a court of appeals. The doctrine of the law of the case governs successive appeals involving substantially the same issues and facts, and applies appellate

decisions to later proceedings in that case. *Williams v. Kimes*, 25 S.W.3d 150, 153-54 (Mo. banc 2000). A previous holding is the law of the case, precluding relitigation of the issues on remand and subsequent appeal. *Id*.

Application of the doctrine is illustrated by *Giddens v. Kansas City Southern Railway Company*, 29 S.W.3d 813 (Mo. banc 2000), *cert. denied* 532 U.S. 990 (2001). In that case, this Court held that the law of the case doctrine precluded the appellant from challenging the trial court's decision regarding the admissibility of certain evidence. Because the court of appeals had decided this issue unfavorably to the appellant in a prior appeal, this Court concluded that "[appellant] is not free to re-litigate this issue now." *Id*. at 825. *See also Gamble v. Hoffman*, 732 S.W.2d 890, 895 (Mo. 1987) (court of appeals' prior determination affirming state board's dismissal of highway patrolman held law of the case binding upon this Court).

The law of the case doctrines applies to all issues directly or indirectly decided in the prior litigation, including jurisdictional issues. *Bellon Wrecking & Salvage Co. v. David Orf, Inc.*, 983 S.W.2d 541 (Mo. App. 1998), involved a construction dispute. Thirty-three days after the trial court dismissed the case for failure to prosecute, it set aside its dismissal and entered judgment in favor of the plaintiff on an arbitration award. Defendant appealed, arguing, among other things, that the trial court lost jurisdiction over the case thirty days after its order of dismissal. *Id*. at 544.

The court of appeals dismissed the appeal on the grounds that the trial court's order was not a final judgment disposing of all the issues in the case, and it remanded the case back to the trial court. The trial court amended its judgment, and the Defendant

appealed a second time, again raising the argument that the trial court lacked jurisdiction over the case. The court of appeals held that further review of the jurisdictional issue was barred by the law of the case. The appellate court held that its prior determination that the judgment was not final implicitly determined that the trial court had jurisdiction of the case. That determination barred further examination of the issue. *Id*. at 46.

In the first life of this case, the trial court dismissed HBA's petition on the grounds that HBA did not have standing to pursue the claims because the organization lacked a personal stake in the case. L.F. 122. The court of appeals reversed, flatly holding that the HBA does have standing to pursue its claims on behalf of its members. *Home Builders*, 32 S.W.3d at 612. Wildwood now attempts to raise the identical issue – HBA's standing to assert a facial challenge to Wildwood's subdivision escrow ordinance. Further review of that issued is barred under the law of the case doctrine.

Wildwood's persistence in this matter demonstrates its determination to beleaguer HBA and this Court with redundant, frivolous arguments. In fact, Wildwood's standing was a baseless argument when first raised – serving only to delay the litigation and burden the court of appeals' docket. As the court of appeals recognized in its decision, this case presents a classic example of organizational standing.

This Court has adopted the three-prong test set forth by the United States Supreme Court to determine if an organization has standing to bring claims on behalf of its members. Such standing exists when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim not the relief requested require the

participation of individual members. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 344 (1977); *Missouri Health Care Ass'n v. Attorney General*, 953 S.W.2d 617, 620 (Mo. banc 1997); *Missouri Outdoor Adver. Ass'n v. Missouri State Highways and Transp. Comm'n*, 826 S.W.2d 342, 344 (Mo. banc 1992).

The court of appeals easily found that HBA's claims satisfy this test. It determined that HBA's members would have standing to sue in their own right because the challenged ordinance provisions "are clearly directed at HBA's developer members and are designed to regulate financially the way those members engage in developing subdivisions within Wildwood." *Home Builders*, 32 S.W.3d at 615. It also found that the interests the HBA seeks to protect in this litigation are germane to HBA's purpose, noting that "[t]he preservation of members' business opportunities and economic well-being may be germane to a trade association's purpose. *Id*. at 615. (*citing Real Estate Bd. v. City of Jennings*, 808 S.W.2d 7, 9 (Mo. App. 1991). Finally, the court determined that individual participation of HBA members is not necessary to the prospective relief sought by the HBA. *Id*. (*citing Ferguson Police Officers Ass'n. v. City of Ferguson*, 670 S.W.2d 921, 925 (Mo. App. 1984).

Wildwood argues that § 89.410.4, permitting "owners or developers" aggrieved by a city's failure to observe the requirements of the statute to bring suit to enforce the statute, somehow limits standing to owners and developers and precludes suit by the HBA. For good reason, the court of appeals readily disposed of that argument. It is precisely because the statute allows owners and developers to sue that HBA has standing.

Relying upon § 89.410.4 to support the HBA's right to pursue its claims, the court of appeals stated:

> [W]e understand our Supreme Court to require an allegation that a plaintiff falls within any class of person that is statutorily specified as able to pursue litigation. Here, HBA alleges that its members include developers. A developer is one of the statutorily specified "aggrieved" persons able to pursue a civil action for violation of the statute.

Home Builders, 32 S.W.3d at 616. The court of appeals' decision comports with the law of this state. *See State ex rel. Missouri Health Care Ass'n v. Missouri Health Facilities Review Comm.*, 768 S.W.2d 559, 561-62 (Mo. App. 1988) (organization may pursue claims on behalf of its members when its members include statutorily specified plaintiffs), *overruled on other grounds, West County Care Center, Inc. v. Missouri Health Facilities Review Comm*., 773 S.W.2d 474, 476-77 (Mo. App. 1989).[7]

[7] Wildwood's citation to federal cases denying labor unions standing to bring ERISA claims is not persuasive or controlling. *See Communications Workers of Am. v. SBC Disability Income Plan*, 80 F. Supp.2d 631 (W.D. Tex. 1999). Those cases are based upon Congress' explicit limitation of a cause of action under ERISA to participants, beneficiaries and fiduciaries, as defined therein, and upon the recognition that a claim for benefits under ERISA requires the participation of the individual claimants. *Id*. at 632-34.

Wildwood also asserts that the court of appeals erred when it held that the relief HBA requested did not require the participation of individual members. It asserts that the trial court's judgment, ordering Wildwood to return all escrow amounts held by the City in excess of the amounts authorized in the statute, equates to monetary relief that requires individual members and their specific escrows to be before the court. Br. 75. Wildwood's argument mischaracterizes the relief granted by the trial court.

Once equitable jurisdiction attaches, a court of equity has broad powers to grant relief necessary to do justice, even relief traditionally legal in nature such as restitution. *Craig v. Jo B. Gardner, Inc.*, 586 S.W.2d 316, 325 (Mo. banc 1979); *Siesta Manor, Inc., v. Community Federal Sav. & Loan Ass'n*, 716 S.W.2d 835, 838-39 (Mo. App. 1986). After determining that Wildwood is holding certain categories of funds under an illegal ordinance, the trial court's order that Wildwood release all illegally held funds simply assured that justice was done.

The trial court did not, as Wildwood suggests, order specific damages to any HBA member. It simply ordered Wildwood to release all illegally held funds. Contrary to Wildwood's assertion, the illegal funds are easily identified. The trial court invalidated the ten percent factor added to Wildwood's construction escrow and the ten percent maintenance escrow in its entirety. Wildwood attempts to complicate the issues by suggesting that there may be individual disputes as to when improvements were certified as complete. Such determinations are not relevant or necessary.

It is not just the portion of that deposit held post-completion that must be released. The entire maintenance deposit was invalidated. This makes the calculation quite simple.

Wildwood must release any maintenance deposits it is now holding and the extra ten percent on all the balances in the construction accounts. Wildwood's records reveal that it maintains careful records reflecting current accounts in all pending construction and maintenance deposits, facilitating simple release of the illegal portions. L.F. 681-959.

The court of appeals recognized that the type of relief granted by the trial court does not undermine HBA's organizational standing in this case: "A court may decide whether the statute applies to the challenged ordinance provisions and to the amounts on deposit with Wildwood as of August 28, 1999, without each member's presence." L.F. *Home Builders*, 32 S.W.3d at 615. That determination precludes further review of this issue.

VII. The Trial Court Properly Granted Summary Judgment Finding That Senate Bill 20 By Its Terms Applies To All Escrow Funds Held By Wildwood Prior To The Effective Date Of The Bill And Such Application Of Senate Bill 20 Does Not Constitute Retroactive Legislation In Violation Of Article I, Section 13 Of The Missouri Constitution.

Granting summary judgment on Count III of the Petition, the trial court properly determined that that Section 89.410 R.S.Mo., as amended by Senate Bill 20, applies to escrow funds paid to, and held by, the City of Wildwood prior to August 28, 1999, the effective date of Senate Bill 20. L.F. 1130-37. Wildwood alleges that this relief violates Article I, § 13 of the Missouri Constitution's prohibition against the "retroactive" application of laws. Wildwood's argument fails for several reasons.

First, application of § 89.410, as amended, to escrow agreements and funds held by Wildwood before August 28, 1999 does not require a retroactivity analysis. The 1999 amendments contained in Senate Bill 20 expressly apply to security deposits and/or escrows held by Wildwood at the time of Senate Bill 20. Section 89.410.3 provides that a city's regulations apply to "**any escrow amount held by the city.**" Application of Senate Bill 20 to escrows held by the City on August 28, 1999 is prospective, not retroactive, relief. Wildwood may have had the right to obtain those escrows prior to Senate Bill 20. From and after the effective date of the statute, however, Wildwood cannot retain escrows in excess of the amount allowed therein.

Secondly, even assuming *arguendo* that a retroactivity analysis is warranted, this situation falls within the exceptions to Article I, § 13's prohibition. In the first instance, Article I, § 13 was "intended to protect citizens and not the state" and therefore, "the legislature may constitutionally pass retrospective laws that waive the rights of the state." *Savannah R-III Sch. Dist. v. Public Sch. Ret. Sys.*, 950 S.W.2d 854, 858 (Mo. 1997); *see also American Family Mut. Ins. Co. v. Fehling*, 970 S.W.2d 844, 848 (Mo. App. 1998). In *Savannah School District*, school districts sued the Public School Retirement System of Missouri for refunds of contributions made by the school districts to the system and sought a declaratory judgment that the statute amending the applicable statute violated Article I, § 13 of the Missouri Constitution. *Id.* at 855. The Missouri Supreme Court held that the amendment did not violate Article I, § 13 because the school districts were "creatures of the legislature…created and governed by the legislature," and "[h]ence, the

legislature may waive or impair the vested rights of school districts without violating the retrospective law prohibition." *Id.* at 858.

Wildwood, like the school districts, is a creature of the legislature and created and governed by the legislature. "Municipal corporations owe their origins to, and derive their powers and rights wholly from the State. Where the Legislature has authorized a municipality to exercise a power and prescribed the manner of its exercise, the right to exercise the power given in any other manner is necessarily denied." *Pearson,* 439 S.W.2d at 760. Any reasonable doubt concerning the existence of municipal power to enlarge upon statutory provisions is to be resolved against the municipality. *See Blue Springs v. McWilliams*, 74 S.W.2d at 364.

Because Wildwood is legislatively created and governed, the Missouri legislature can enact laws, such as § 89.410, which apply retrospectively without violating Article 1, § 13 (assuming § 89.410, as amended, can be held to apply retrospectively). Just as the Missouri legislature originally granted Wildwood the authority to subdivide land and to regulate the development of subdivided land, the Missouri legislature similarly can take away or limit such grant of power, as in the present case through the enactment of amended § 89.410.

The undisputed facts establish that Wildwood is holding escrow deposits made prior to August of 1999. L.F. 673-678; L.F. 645, L.F. 646-647, L.F. 679-680. Those deposits included a ten percent increase over the cost of actual construction and another ten percent maintenance component. L.F. 633; L.F. 635. The trial court properly

determined that Section 89.410, as amended by Senate Bill 20, requires release of the illegal portions of those deposits.

VIII. The Trial Court's Order Requiring Return Of All Illegally Held Funds Is Appropriate Equitable Relief.

Wildwood claims that the relief granted by the trial court is "incomprehensible." Br. 84. The adjective is better suited to Wildwood's argument. This Point contains no clear allegation of error by the trial court, and it completely fails to identify the "legal reasons for the appellant's claim of reversible error" as required by Rule 84.04(d)(B). Wildwood does not cite any authority in support of last Point Relied Upon. It simply asserts various reasons why it does not like the relief granted by the trial court. This Point is defective under Rule 84.04 and this Court's decision in *Thummel v. King*, 570 S.W.2d 679 (Mo. banc 1978). Point VIII fails to preserve anything for review. *Cohn v. Century Venture Dev. P'ship*, 938 S.W.2d 647, 651 (Mo. App. 1997).

Moreover, Wildwood's objections to the trial court's order distort the true nature of that relief. It is not nearly so complicated as Wildwood's argument. After determining that Wildwood's requirement of certain escrow funds was illegal, it was entirely appropriate for the equitable court to order return of those funds. Once equitable jurisdiction attaches, a court of equity has broad powers to grant relief necessary to do justice, even relief traditionally legal in nature such as restitution. *Craig*, 586 S.W.2d at 325; *Siesta Manor*, 716 S.W.2d at 838-39 (Mo. App. 1986). This is particularly true when, as in this case, the plaintiff's petition includes a general prayer for relief. *Id*.

As previously identified, the trial court ordered return of two distinct categories of funds. Those funds are easily identified. And the relief applies the same to all escrow accounts: any maintenance deposits and the extra ten percent on the balances in any construction deposits must be returned to all developers.

Wildwood's concern that the judgment will expose it to potential claims of breach of contract is ridiculous. Is Wildwood really suggesting that developers are going to claim that Wildwood is in breach of contract because it returns a portion of money, illegally held by the City, to the developer?

Nor will it be necessary for the City to enter all new escrow agreements. Because the standard agreements require escrow deposits in express compliance with ordinance provisions found illegal by the trial court, L.F.583-87, 609-613, 643, the offending terms of the agreements are simply deemed void. The primary subject of the agreements, the provisions governing the construction deposit (prior to the inflation factor) and its release, do not violate the statute. As a general rule, where illegal portions of a contract can be severed, the balance of the contract remains enforceable. *Thomas v. Schapeler*, 92 S.W.2d 982, 984 (Mo. App. 1936); *Schibi v. Miller*, 268 S.W. 434, 436 (Mo. App. 1925); RESTATEMENT (SECOND) OF CONTRACTS § 178. It is easy to identify and sever the improper portions of the escrow deposits required under the agreements. Therefore, the agreements can continue to govern the rights and obligations of the parties with respect to the lawful portions of the escrow deposits.

Underlying Wildwood's final argument is the same theme that emanates throughout its brief – it does not like the current escrow laws and should not have to

follow them. Its eighty-five page brief is devoid of any legal basis for that premise. Wildwood is holding escrow funds in violation of state statute. Equity demands that it return them.

IX. The Trial Court Erred In Denying HBA's Claim For Attorneys' Fees Because Section 89.410.4 Allows Recovery Of Attorneys' Fees In Actions For Enforcement Of The Escrow Requirements Therein And Wildwood Made No Good Faith Effort To Comply With The Ordinance Or Reasonably Litigate This Matter.

Section 89.410.4 provides:

> Any owner or developer aggrieved by the city, town or village's failure to observe the requirements of this section may bring a civil action to enforce the provisions of this section. In any civil action or part of a civil action to enforce the provisions of this section, the court may award the prevailing party or the city, town or village the amount of all costs attributable to the action, including reasonable attorneys' fees.

Both the court of appeals and the trial court recognize that this section pertains to HBA's action for enforcement of § 89.410. The court of appeals relied upon that statute to support HBA's standing to bring its claims, observing that HBA's developer members are statutorily specified "aggrieved" persons entitled to bring claims for violation of the statute. L.F. 136. On remand, the trial court also acknowledged application of the statute to HBA's claims, awarding interest in accordance with the statute. L.F. 1138.

The trial court denied HBA's claim for attorneys' fees on the grounds that this case is one of first impression and its finding that Wildwood acted in good faith. L.F. 1138. The trial court's holding was in error. Wildwood's conduct before and during this litigation demonstrates its intent to purposefully circumvent the application of the statute and to unduly prolong this litigation. The standard of review governing this issue is abuse of discretion. *Avanti Petroleum v. St. Louis County*, 974 S.W.2d 506, 512 (Mo. App. 1998). An abuse of discretion occurs when the lack of an award of attorneys' fees is so arbitrarily arrived at, or is so unreasonable, that it indicates indifference and lack of proper judicial consideration. *Id*.

The court may order an award of attorneys' fees where they are specifically authorized by statute. *Laubinger v. Laubinger*, 5 S.W.3d 166, 181 (Mo. App. 1990). The merits of the case and the actions of the parties during the pendency of the action are relevant to such an award. *T.B.G. v. C.A.G.*, 772 S.W.2d 653, 655 (Mo. banc 1989) (one factor to be considered in awarding fees is the extent to which one party's conduct required the expense of attorneys' fees); *Thomas v. Thomas*, 989 S.W.2d 629, 636-37 (Mo. App. 1999) (party's actions in hindering and delaying discovery increased other party's fees and merited award of fees).

The fact that this case is one of first impression does not negate HBA's claim. Wildwood intentionally chose to evade the plain language of § 89.410. It opted to craft an ordinance that it knew, or should have known, was in violation of the statute and to zealously defend any litigation challenging its ordinance. Its conduct overstepped the boundaries of "good faith."

Wildwood cannot plead ignorance of the requirements of § 89.410 or its obligation to follow the restrictions in the ordinance. The undisputed facts establish that Wildwood amended its subdivision ordinance immediately after passage of Senate Bill 20 in recognition that its ordinance must comply with the statute. The City's Director of Planning testified that he "definitely" believed that Wildwood's ordinance needed to comply with the new state statute, L.F. 637, and that "we knew we had to get this done by August" when the Senate Bill 20 became effective. L.F. 637. In fact, Ordinance 555, the predecessor to Ordinance 675, states in its title that its purpose is to enact a new section "Improvements Installed and Guaranteed *to Reflect Changes in the State Enabling Legislation* . . ." L.F. 648 (emphasis added).

Instead of amending its ordinance to comply with the statute, however, Wildwood decided to play a game of semantics. It moved the ten percent maintenance aspect of its deposit, previously required as a component of its construction deposit, and made it a separate deposit with a new name. LF 633-634. The substance of the deposit did not change. It was and remains a deposit in the amount of ten percent of construction costs required at the commencement of construction, which can be held by the City long past completion of improvements. L.F. 633-34, 650-651. Joe Vujnich, Wildwood's Director of Planning, so testified:

> Q. So you took the 10 percent maintenance deposit out of the original joint deposit and made it a separate deposit?
>
> A. That is correct.

Q. Okay. Now, the impetus for these changes to the city's code [was] the passage of Senate Bill 20 and the amendment to Chapter 89.410 of the Missouri state statutes?

A. Primarily.

L.F. 636.

Q. Okay. The maintenance deposit essentially stayed the same in terms of how long you kept the maintenance deposit before and after the statute [Senate Bill 20], is that correct?

A. That is correct.

L.F. 638. Vujnich confirmed that, other than some minor modifications to the maintenance obligations with respect to snow and ice removal, the only change to the Wildwood's maintenance deposit was that it became a separate deposit. L.F. 638.

Wildwood knew Senate Bill 20 prohibited a municipality from requiring and holding this additional deposit as part of the deposit posted by the developer for construction of the improvements. Adhering to the adage of "form over substance," Wildwood tried to evade the restrictions by giving its deposit a form. Wildwood's conduct might be called many things. Good faith is not one of them.

That conduct has continued throughout this litigation. Wildwood has consistently invoked frivolous legal arguments and embarked upon unnecessary, burdensome discovery to prolong the duration and expense of this litigation. Perhaps that conduct is best illustrated by the standing argument repeatedly raised by Wildwood throughout this litigation. As the court of appeals' decision illustrates, HBA's right to bring its suit on

behalf of its members is conclusively established under the standards adopted by this Court and the United States Supreme Court. Nevertheless, Wildwood persisted in its standing challenge to the trial court, court of appeals, in its transfer application to this Court, upon remand in another motion to dismiss to the trial court, and again in this appeal. L.F. 113, 129, 258. The time and expense the parties have devoted to that one issue are certainly not justified by the feeble merits of the argument.

Wildwood's approach to discovery was similarly excessive. This case could have been decided years ago, based solely upon a facial comparison of the statute and the Ordinance. Nevertheless, Wildwood insisted upon deposing multiple representatives of the HBA on topics clearly not relevant to the simple issue in this case. *See* L.F. 261. For example, Wildwood deposed representatives of the HBA, even HBA's lobbyist, and sought extensive production of documents pertaining to HBA's intent in sponsoring Senate Bill 20. L.F. 261, 269, 1086. Wildwood went so far as to request redacted information on documents produced by HBA, which contained information sent from the HBA to its lobbyist pertaining to legislative efforts by the HBA unrelated to Senate Bill 20. L.F. 288. HBA claimed those documents were privileged and irrelevant to the issues in the case. Wildwood filed a motion to compel. L.F. 286, 288. The trial court agreed that HBA need not produce such documents. L.F. 294. This request demonstrates the unnecessary attorneys' fees HBA incurred as a result of Wildwood's burdensome and unreasonable discovery tactics.

Similarly, Wildwood engaged in extensive discovery on issues pertaining to Wildwood's application of its escrow ordinance with regard to specific developments.

L.F. 271, 292. Again, since HBA has asserted a purely a facial challenge to the ordinance, those issues were not relevant to the case. Wildwood's message to HBA throughout this litigation was clear. If you sue Wildwood, Wildwood will make you pay. The litigation will be long, burdensome and costly.

The Missouri legislature sent a message to municipal bodies when it enacted Senate Bill 20. It imposed restrictions upon their ability to hold escrow funds, and it authorized penalties and attorneys' fees for a city's failure to comply with the statute. Wildwood's conduct in purposely evading the plain language of the statute and unduly prolonging the time and expense of HBA's challenge to its Ordinance justifies an award of attorneys' fees under the statute. Under the circumstances of this case, the trial court's refusal to award fees indicates a lack of proper consideration of this issue. *Avanti*, 974 S.W.2d at 512.

Conclusion

Based upon the plain language of the statute, the trial court properly granted summary judgment to the HBA and invalidated the provisions of Wildwood's Ordinance that conflict with § 89.410. The judgment of the trial court granting HBA's motion for summary judgment on Counts I, II and III of its second amended petition should be affirmed. HBA respectfully requests this Court to reverse only that portion of the trial court's judgment refusing HBA an award of attorneys' fees and to remand the case to the trial court for determination of an award of reasonable attorneys' fees to the HBA.

Respectfully submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 19,321 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 97 SR-2. The undersigned counsel further certifies that the accompanying diskette has been scanned and is free of viruses.

JoAnn T. Sandifer

CERTIFICATE OF SERVICE

I certify that one copy of this brief and one copy on floppy disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by placement in the United States Mail, postage paid, on February 7, 2003.

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