IN THE SUPREME COURT OF MISSOURI

Case No. SC084647

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

Respondent,

v.

CITY OF WILDWOOD, MISSOURI

Appellant.

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

Division No. 10

The Honorable Kenneth M. Romines

BRIEF OF AMICUS CURIAE MISSOURI MUNICIPAL LEAGUE

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INTEREST OF AMICUS CURIAE

The Missouri Municipal League is an association of 618 municipalities in the State of Missouri. The Municipal League provides a vehicle for cooperation in formulating and promoting municipal policy at all levels of government to enhance the welfare and common interests of municipalities' citizens. The trial court granted the Municipal League's motion to intervene to file its Amicus Brief in Support of the City of Wildwood before the trial court.

The Municipal League believes that the Court's decision in this case could have a serious impact on municipal authority to protect the public with regard to regulation of subdivisions. The Municipal League believes that the trial court's interpretation of R.S.Mo. §89.410 was contrary to the plain language of the statute and the context in which it was enacted, and that significant interests of the public and local governments are not fully represented by the parties to the case. Therefore, while the Municipal League supports the Points Relied On as presented by Appellant City of Wildwood, it respectfully submits this additional discussion and argument.

JURISDICTIONAL STATEMENT

Amicus Curiae Missouri Municipal League adopts the jurisdictional statement of Appellant City of Wildwood.

STATEMENT OF FACTS

Amicus Curiae Missouri Municipal League adopts the statement of facts of Appellant City of Wildwood.

POINT RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT, HOME BUILDERS ASSOCIATION, BECAUSE THE JUDGMENT CONFLICTS WITH THE PLAIN LANGUAGE OF R.S.Mo. §89.410, WHICH EXPRESSLY EXEMPTS MAINTENANCE BONDS FROM REGULATION AND LEAVES TO THE REASONABLE DISCRETION OF MUNICIPALITIES THE AMOUNT OF A SUBDIVISION CONSTRUCTION BOND THAT IS NECESSARY FOR "PROVIDING FOR AND SECURING" THE ACTUAL CONSTRUCTION THAT WILL OCCUR YEARS AFTER THE BOND IS ACCEPTED.

State ex rel. Jackson County v. Spradling, 522 S.W.2d 788, 791 (Mo. banc 1975)

Short v. Short, 947 S.W.2d 67, 71 (Mo. App. 1997).

Gott v. Director of Revenue , 5 S.W.3d 155, 159-160 (Mo.banc 1999)

Martinez v. State, 24 S.W.3d 10, 18 (Mo.App. 2000)

City of Green Ridge v. Kreisel, 25 S.W.3d 559, 564 (Mo.App.W.D. 2000)

Borron v. Farrenkopf, 5 S.W.3d 618, 622 (Mo.App.W.D. 1999)

Section 89.410 RSMo.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT, HOME BUILDERS ASSOCIATION, BECAUSE THE JUDGMENT CONFLICTS WITH THE PLAIN LANGUAGE OF R.S.Mo. §89.410, WHICH EXPRESSLY EXEMPTS MAINTENANCE BONDS FROM REGULATION AND LEAVES TO THE REASONABLE DISCRETION OF MUNICIPALITIES THE AMOUNT OF A SUBDIVISION CONSTRUCTION BOND THAT IS NECESSARY FOR "PROVIDING FOR AND SECURING" THE ACTUAL CONSTRUCTION THAT WILL OCCUR YEARS AFTER THE BOND IS ACCEPTED.

Introduction

This case involves a challenge by the Home Builders Association of Greater St. Louis, Inc. (the "HBA") seeking to strike down a municipal ordinance relating to subdivision construction and maintenance bonds in light of an amendment to R.S.Mo. Section 89.410 sponsored by the HBA. The Missouri Municipal League (the "League") files these Suggestions of Amicus Curiae because the statutory interpretation propounded by the HBA and accepted by the trial court: (1) abolishes the longstanding authority and practice of local governments throughout Missouri to protect the public during the subdivision process while still preserving the option for developers to avoid completing

improvements prior to platting, and (2) violates the plain language of the amendment to §89.410 as well as the HBA's statements espousing the purpose of the amendment.

A. The trial court's judgment improperly strikes down longstanding authority and practice throughout the state for subdivision bonds of a type and amount that are necessary to protect the public.

On behalf of municipalities across the state, the League urges this Court to vacate the summary judgment in favor of the HBA and to grant judgment for Appellant, the City of Wildwood, Missouri (the "City"). This case presents an issue that is critical to the authority and responsibility of municipalities to protect the public health and welfare and their clearly expressed statutory right to enact regulations to fulfill that responsibility.

In line with the accommodation to subdivision developers contained in Section 89.410, it is common practice in municipalities throughout the state of Missouri to authorize developers to provide a financial guarantee to municipalities in lieu of completion of improvements prior to platting. Generally, developers are hesitant to complete all infrastructure in a proposed subdivision prior to receiving a final plat. Subdivision construction and maintenance bonds allow developers to delay the outlay of capital for completion of all streets, sidewalks, sewers, and other required improvements until later in the process, while allowing the city to protect the public by ensuring that such improvements will in fact be properly installed and maintained. These financial guarantees often include separate maintenance guarantees, which are necessary to protect the public from the failure by a developer to maintain any improvement either before,

during or after construction of any specific improvement. Municipalities have a legitimate public interest in ensuring that subdivision improvements are safely maintained (e.g., mud and debris removed, safety barriers erected, etc.) once construction of a subdivision has commenced, and even after completion of that improvement, particularly while construction is ongoing in the subdivision.

For these reasons, it is a common practice throughout the state for local governments to authorize both construction and maintenance bonds. The construction bonds ensure that the improvement is actually completed, but it should be noted that, as in this case, construction bonds are not "required" if the developer completes the improvements prior to platting as contemplated by the Section 89.410.2. However, where a developer seeks to delay improvements, the amount of such bonds must include an amount sufficient for the city to actually complete the improvements years later if the developer defaults or is no longer in business. Municipalities must be given discretion to require an amount sufficient to actually "secure" performance, as the language of the statute clearly grants. This requires not only the "estimate" of the cost for the developer to install the improvement today, but also any additional amounts that would be incurred if the municipality is forced to complete the improvements in the future, considering (among other things) inflation, changed conditions and the added costs that a city incurs due to prevailing wage requirements. In addition, municipalities must have leeway to include in its estimates such amount as to address the reality that "estimates" are sometimes wrong and actual cost may be more.

The HBA would have this Court mandate bond amounts that consider none of these factors. For example, while the cost of installing street or sidewalk segments may be $25,000 today, the cost may be $30,000 in five years when the improvement is actually installed. Moreover, what if the developer pours defective concrete and then abandons the subdivision? The costs necessary for "securing" actual construction (the language of the statute) of an acceptable street may have to include removal of defective improvements. Due to prevailing wage requirements, the cost of labor to the City to complete the improvements may also be significantly higher than the cost to the developer. Finally, estimates are just that. To prohibit the City from adding any amount over today's "typical" costs for contingencies is to deprive the public of any meaningful assurance that the improvements could in fact ever be installed with the escrow funds.

Similarly, maintenance bonds are routinely required as a condition of platting to ensure that the improvements are safely and appropriately maintained during the subdivision process. The Legislature acknowledged this practice in its express exemption for "maintenance" bonds and this fact is also supported by the unrebutted record in this case, which includes a sampling of numerous ordinances across the state providing for subdivision "maintenance bonds." Because the need for maintenance of publicly accessible improvements does not end when only one out of a number of categories of improvements is complete, especially while other construction is ongoing, maintenance bonds were properly exempted from the requirements of §89.410, including the requirement that a bond be released within thirty days of completion of a category of

improvements. Some improvements, such as streets or stormwater facilities, must be maintained free of mud, debris, or building materials throughout the construction in the subdivision. While both the construction and maintenance period may continue for only a year or two after completion of any improvement, it is certainly more than thirty days. Similarly, an escrow for street trees or erosion control is meaningless if the funds are returned within thirty days, and then the "improvements" die because the developer failed to water or maintain the vegetation.

Moreover, for other improvements, public safety depends on a permanent maintenance requirement. For example, maintenance of a sewage treatment plant installed to serve a subdivision is critical to the public health and safety. If the City authorizes a private sewage treatment plant to handle sewage in a new subdivision, that plant must be properly maintained and the authority of the City to require a bond to ensure monitoring and maintenance is critical to the public safety, health and welfare. If such a bond had to be released within thirty days of the completion of the sewer improvements, there would be no guarantee that the private system would not discharge raw sewage into the watershed. Forcing cities to use tax dollars (or other public funds) to monitor and enforce maintenance of such necessary subdivision improvements would violate the established practices and public policy of this state, and would constitute an unfunded mandated in violation of Art. X, §23 of the Missouri Constitution. As noted below, there is nothing in the language of the statute or the legislative statements to support such a drastic abrogation of municipal authority to reasonably protect the public

by requiring maintenance and guarantees of subdivision improvements.

The League urges this Court to vacate the trial court's interpretation of the statute that would materially deprive local governments of the authority to protect the public regarding installation and maintenance of subdivision improvements.

B. The plain language of the statute and the HBA's Statements of its Purpose contradict the broad preemption of authority adopted in the trial court's judgment.

Contrary to the trial court's judgment, the plain language of §89.410 RSMo. expressly preserves to the discretion of the local government body the amount of the bond that is necessary to secure "actual construction" and also expressly exempts maintenance bonds from the release provisions.

When interpreting statutory language, the ordinary meaning of the words must be considered in the context of the entire statute and the statute should be interpreted so as avoid absurd results. See, State ex rel. Jackson County v. Spradling, 522 S.W.2d 788, 791 (Mo. banc 1975). A maxim of statutory construction provides that words or phrases are known by the company they keep, and while this principle is not an inescapable rule, it is often wisely applied to avoid giving unintended breadth to words or phrases that are capable of many meanings. Short v. Short, 947 S.W.2d 67, 71 (Mo. App. 1997). The provisions of a legislative act are not to be read in isolation, but are to be construed together and read in harmony with the entire act. Gott v. Director of Revenue, 5 S.W.3d 155, 159-160 (Mo.banc 1999). See also Martinez v. State, 24 S.W.3d 10, 18 (Mo.App.

2000) (It is not proper to confine interpretation to the one section of a statute being construed; related clauses are to be considered when construing a particular portion of a statute).

The trial court clearly erred when it held that §89.410 as amended "only allows subdivision bonds or escrows in the amount of the actual construction." LF 1160; Judgment at p. 5. The language of the statute in fact states that the "council may accept 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 also that the regulations may provide for such other method "whereby the council is put in an assured position" that the improvements will be completed. R.S.Mo. §89.410.2. As noted above, when applied against the actual words of the statute, it is clear that the amount of a bond necessary to provide for, secure or "assure" that improvements are completed is not the "actual cost" of the developer at the time the bond is issued. The statute properly leaves to the discretion of the local government what amount is necessary, and certainly authorizes inclusion of a mere 10%, as at issue here, for inflation or other costs that will be incurred to secure the "actual construction" of the improvements, at a later time, if the subdivider defaults.

Similarly, subsection 5 of R.S.Mo. §89.410 states that the statute does not apply to "performance, maintenance and payment bonds," which appropriately should not be subjected to the release and other provisions applicable to "actual construction" bonds. Given the longstanding use of "maintenance bonds" as a condition of subdivision

platting, and their importance throughout the state in protecting the public**,** the exemption for "maintenance" bonds in the same section regulating all subdivision requirements can plainly be interpreted only one way: that the release and other provisions in the prior subsections shall not "apply" to maintenance bonds that would otherwise be considered a subdivision related regulation. Obviously, this only includes bonds that are in fact related to subdivisions, and so the trial court's attempt to interpret §89.410.5 to apply to "non-subdivision" bonds destroys any meaning in enacting the exemption.

The trial court's interpretation simply ignores that performance, maintenance, and payment bonds that are not purely "actual construction bonds" have a legitimate and vital role in subdivision regulation that should not be subject to immediate release procedures. For example, if subdivision regulations require posting of a "payment" bond to ensure payment to any subcontractor for any public improvements, the trial court's interpretation would require that bond to be released within thirty days of completion without regard to the date that the subcontractor is actually paid. As with the maintenance bond exemption, the exemption for payment and performance bonds is not limited to "nonsubdivision" circumstances. To do so would wholly defeat any real purpose or effect from the exemption, and would produce the absurd result of the application of construction bond requirements to these types of subdivision bonds that are intended to guarantee requirements other than "actual construction." Moreover, Subsection 5 must exempt bonds related to subdivisions, as non-subdivision bonds were never within the scope of Section 89.410, which is limited to "subdivision-related regulations." R.S.Mo. 89.410.1.

As the representative and legislative information arm of municipalities, the League is familiar with the stated purposes of the amendments to §89.410 sponsored by the HBA. Nowhere in the record is there any statement by the HBA prior to enactment that the language it promoted would abolish maintenance bonds or impose new and unrealistic requirements as to the amounts of any escrow or bond. Rather, the sole purpose of the HBA, as clearly reflected in the text of the amendment, was to establish requirements for the "release" of actual construction escrows, not to abolish maintenance bonds and force cities to accept bonds that would be insufficient to pay for the construction when a subdivider default actually occurs. See LF 483-4 (HBA letter and fact sheet dated April 19, 1999, stating "the purpose behind the escrow language" was to require municipalities to "promptly release funds upon installation of improvements"). The League is unaware of any evidence anywhere that the abolition, as opposed to the express preservation, of maintenance bonds was ever discussed by anyone in the Legislature as a purpose or possible interpretation of the new language. Similarly, there is no evidence that the Legislature did not intend what is stated in the plain language of the statute, leaving discretion to the municipality to set the amount of the bond.

Finally, even if the Legislature had limited the subdivision authority of local governments as interpreted by the HBA, the protection of the public is paramount and may still be enforced if authorized as a police power ordinance necessary for public safety and welfare. The mere fact that a regulation enacted to protect the public welfare and safety involves the construction of improvements within a subdivision does not mean

that a city does not have other authority to enact ordinances independent of the subdivision authority contained in Section 89.410. See, City of Green Ridge v. Kreisel, 25 S.W.3d 559, 564 (Mo.App.W.D. 2000) and Borron v. Farrenkopf, 5 S.W.3d 618, 622 (Mo.App.W.D. 1999).

CONCLUSION

The trial court's interpretation is contrary to the plain language of the statute and the context in which the words appear. The implied abolition of important authority to protect the public should not be lightly accepted, particularly when the words of the statute state just the opposite.

Based on the foregoing facts, arguments and authority, Amicus Curiae Missouri Municipal League respectfully urges this Court to vacate the trial court's decision and grant Appellant all other relief that it deems just and proper.

Respectfully submitted,

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CERTIFICATION PURSUANT TO SUPREME COURT RULE 84.06(c) AND (g)

I, W. Dudley McCarter, hereby depose and state as follows:

1. I am an attorney for Amicus Curiae Missouri Municipal League.

2. I certify that the foregoing Suggestions of Amicus Curiae Missouri Municipal League contains 3270 words and 363 lines (including footnotes) and thereby complies with the word and line limitations contained in Missouri Rule of Civil Procedure 84.06(b).

3. In preparing this Certificate, I relied upon the word count function of the Microsoft Word 1997 word processing software.

4. I further certify that the accompanying floppy disk containing a copy of the foregoing Suggestions of Amicus Curiae has been scanned for viruses and is virus-free.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of November, 2002, a copy of the foregoing was sent by United States Mail, postage pre-paid, to:

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