**IN THE SUPREME COURT OF MISSOURI**

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**Case No. SC 84647**

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

**Respondent,**

v.

**CITY OF WILDWOOD,**

**Appellant.**

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

**The Honorable Kenneth M. Romines, Division No. 10**

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# BRIEF OF APPELLANT

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The trial court's judgment declared that "the amendments to Section 89.410 R.S.Mo., enacted in Senate Bill 20, apply to all escrow deposits held by the City of Wildwood on August 28, 1999." (LF 1150). The trial court then ordered Wildwood to "return all escrow amounts now held by the City in excess of those authorized by Section 89.410 … including such funds deposited prior to August 28, 1999." (LF 1150). As a result, the application of statutory provisions retrospectively and so as to impair existing rights and contracts violates Article I, §13 of the Missouri Constitution's prohibition. *In re Marriage of Haggard*, 585 S.W.2d 480 (Mo. 1979); *Hoyne v. Prudential Sav. & Loan Ass'n*, 711 S.W.2d 899 (Mo.App. 1986) The trial court's judgment improperly applies a prospective statute retrospectively and in so doing also applied the statutory changes in



violation of Art. I, §13 to impair escrow contracts that had established previously lawful requirements.

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## Jurisdictional Statement

This action applies Senate Bill 20 ("SB 20"), codified as amendments to Section 89.410 R.S.Mo., in a facial challenge by a homebuilders association to an ordinance of the City of Wildwood, Missouri relating to subdivision and development escrows. The trial court interpreted SB 20 to find that City Ordinance No. 675 violated Section 89.410, as purportedly amended, and applied SB 20 retroactively in disregard of escrow contracts in place on the date of enactment of SB 20.

The exclusive jurisdiction of this Court is invoked pursuant to Art. V, §3 of the Missouri Constitution as this case involves the validity of a statute of the State in that SB 20 is unconstitutional because (1) the subject matter of the bill is not clearly expressed in its title in violation of Article III, §23 of the Missouri Constitution, (2) the bill contains more than one subject in further violation of Article III, §23, and (3) the original bill was amended to add provisions amending §89.410 so as to change its original purpose in violation of Article III, §21. Furthermore, the retrospective application of SB 20 by the trial court alters the terms of, and obligations of the parties under, *existing* subdivision escrow agreements in violation of Article I, §13 of the Missouri Constitution, which states that "no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation . . . can be enacted."

## STATEMENT OF FACTS

### A. Procedural History.

This action was filed by the Home Builders Association of Greater St. Louis, Inc., (the "HBA") against the City of Wildwood, Missouri ("Wildwood" or the "City") alleging that Wildwood's guarantee and bond requirements for installation, maintenance and completion of subdivision improvements contained in its Ordinance 555 (subsequently revised by Ordinance 675) were in violation of the purported 1999 changes to Section 89.410 R.S.Mo., which were added to the end of "SB 20" in the final days of the 1999 Legislative session. (§89.410 R.S.Mo., *See* 1999 amendments (LF 424-25), also attached hereto as Appendix A). The City moved to dismiss because, among other things, the HBA lacked standing to assert its claims for relief under Section 89.410 because (1) that Section only allowed suits by two types of parties: "owners" or "developers" aggrieved by a city's failure to observe the requirements of §89.410, and (2) the remedy afforded by §89.410 (return of specific funds and interest) was not available in that such remedy was wholly dependent upon an actual controversy over a specific escrow being held. (Appendix A; LF 116-17). The trial court agreed and dismissed the HBA's First Amended Petition finding that the HBA had "no personal stake" in the application of Wildwood's ordinance and therefore no standing. (LF 122). The HBA appealed and the Court of Appeals reversed and remanded the case finding only that the HBA did have standing. (LF 129-38).

On remand, the HBA filed a Second Amended Petition. This time the HBA challenged the validity of Wildwood Ordinance 675,[1] which amended the same subdivision guarantee and bond requirements, again asserting that those requirements violated the changes to §89.410. Specifically, the HBA argued that Ordinance 675 violated §89.410 because the "City of Wildwood is wholly without statutory authority to require construction deposits that exceed the estimated cost of the improvements and to require post-completion maintenance deposits." (LF 144, 559). The HBA maintained that maintenance bonds and the City's addition of ten percent for inflation and other contingencies to the construction bond, were banned by the statute. Finally, the HBA also sought a declaration that its interpretation of SB 20, as it amended §89.410, also applied to escrow funds previously received and held on the date of passage of SB 20, irrespective of whether such application would retrospectively abrogate pre-existing agreements and obligations between developers and the City. (LF 148-50).

The City again moved to dismiss and filed affirmative defenses to the Second Amended Petition seeking dismissal because (1) the HBA lacked standing under §89.410 because such Statute allowed an action only by an aggrieved owner or developer

[1] A copy of the pertinent portion of Ordinance 675 (which was codified as §1005.080 of the Wildwood Municipal Code, "*Improvements Installed and Guaranteed*") is attached as Appendix B. For the Court's reference, the entire Ordinance 675 is found at LF 152-226.

(§89.410.4), and, as a matter of law, the HBA had failed to state a claim for relief in that the Missouri Declaratory Judgment and Injunctive Relief Acts do not allow the HBA to evade the requirements of §89.410, and file suit; (2) there was no ripe controversy in that the HBA had alleged no actual controversy as to any existing escrow of any "owner or developer" to which §1005.080 was applied or threatened to be applied contrary to §89.410; (3) the HBA's petition failed to state a claim for relief because the plain language of the Statute does not prohibit or otherwise regulate "maintenance" bonds because Subsection 5 of §89.410 specifically exempts "performance, maintenance and payment bonds required by cities, towns or villages" from its coverage; (4) the HBA's claims were barred because SB 20 was enacted in violation of the Missouri Constitution because (a) the subject matter of the bill is not clearly expressed in its title, in violation of Article III, Section 23, (b) the bill contained more than one subject, also in violation of Article III, Section 23, and (c) the bill amended the Statute so as to change its original purpose, in violation of Article III, Section 21; and (5) the HBA's claim is barred in that the relief it sought, application of the statutory provisions retroactively to alter existing rights and contracts, would violate Article I, Section 13. (LF 113-20, Wildwood Motion to Dismiss).

These arguments were also asserted as affirmative defenses, with additional defenses that: (1) if interpreted as the HBA proposed, the purported amendments to §89.410 were invalid in that they could not apply to charter cities because §82.190 R.S.Mo. grants a constitutional charter city, such as Wildwood, "exclusive control" over its public streets and public places notwithstanding "any law of this state to the contrary

. . ."; (2) the HBA had not been damaged, either directly or in its representational capacity, by any actions allegedly taken by Wildwood in that the HBA had no contracts with Wildwood and there were no facts that showed that any of its members had been damaged by any acts of Wildwood; and (3) Wildwood, a charter city and political subdivision duly organized under the laws of the State of Missouri, has sovereign immunity in the instant case and the HBA had not alleged that Wildwood had waived its immunity. (LF 275-80 and 301-04). The trial court denied the Motion to Dismiss. (LF 274).

The parties then filed cross-motions for summary judgment. The HBA claimed that Ordinance 675, §1005.080, "facially" violated §89.410 by requiring (1) costs in excess of the "actual costs" of construction through its ten percent adjustment for inflation and other contingencies, and (2) a "maintenance" bond, which the HBA claimed is banned by the Statute. (LF 730-31; LF 144 at ¶17, Counts I and II). The HBA also continued to seek application of the legislation to bonds obtained and escrows entered into prior to and held after the enactment of SB 20. (LF 758, Count III).

The City's Motion for Summary Judgment and response to the HBA's motion reasserted the arguments previously raised that entitled the City to judgment as a matter of law. The City also provided undisputed factual evidence that Ordinance 675 did not require more than the actual amount of construction (even if that was the language of the statute), but in fact "in almost all instances" had obtained amounts that were insufficient to complete the improvements. (LF 436)

In the "Judgement, Order and Decree" dated 27 June 2002, the trial court granted the HBA summary judgment on Counts I, II and III and denied the City's motion for summary judgment. (LF 1137; *see also* Judgement, Order and Decree, attached as Appendix C). The trial court also declared that the "provisions of City of Wildwood Ordinance 675 codified as §1005.080(A)(1) and (2), 1005.080(D)(1) and (2) and 1005.080(F)(1)(2) and (3) are in direct conflict with Section 89.410 R.S.Mo., … and "are hereby declared void and the City is hereby enjoined from further enforcement of these provisions of its Ordinance." (LF 1137). The trial court further ordered that the amendments to §89.410 "apply to all escrow deposits held by the City of Wildwood on August 28, 1999" and that the City is "ordered to immediately return all escrow amounts now held by the City in excess of those authorized by Section 89.410 … including such funds deposited prior to August 28, 1999." (LF 1137-38). Finally the trial court found that the case was "one of first impression" and that "Wildwood acted in good faith, and thus an award of attorneys fees would be inappropriate." (LF 1138).

**B. Legislative History of SB 20.**

In the final days of the legislative session in 1999, at the behest of the HBA, a change to §89.410 of the Missouri Revised Statutes was inserted by enactment of Conference Committee Substitute No. 2 for House Substitute for House Committee Substitute for Senate Bill 20. The history of SB 20 follows.

SB 20 was pre-filed as a Missouri Senate bill on December 1, 1998, and first read on January 6, 1999. (LF 334). SB 20 was originally entitled:

**An Act To amend chapter 67, RSMo, by adding thereto twenty-two new sections relating to community improvement.**

(LF 322). Upon introduction and first reading, SB 20's sole purpose and effect was to provide for a "home equity program" that would guarantee home values in certain municipalities and areas by amending Chapter 67 R.S.Mo. through the addition of twenty-two new sections, those being §§67.1600-67.1663. (LF 322-33).

On March 1, 1999, SB 20 was taken up for perfection. (LF 334). The Bill was declared Perfected and ordered printed with the title:

**An Act To amend chapter 67, RSMo, by adding thereto twenty-two new sections relating to community improvement, with penalty provisions and with a termination date.**

(LF 344). Thereafter, on April 14, 1999, SB 20 was reported from the Committee on Consumer Protection and Housing with a recommendation that the House Committee Substitute for Senate Bill No. 20 Do Pass ("HCS/SB 20"). (LF 356). The title of HCS/SB 20 was:

**An Act To repeal 67.1421, 67.1461, 67.1501 and 67.1531, RSMo Supp. 1998, relating to community improvement, and to enact in lieu thereof twenty-six new sections relating to the same subject, with penalty provisions and a termination date for certain sections.**

(LF 356). HCS/SB 20 still affected only Chapter 67 "relating to community improvement," by repealing certain sections of Chapter 67 and adding certain new

sections respecting a home equity program. (LF 356-74). As of that time, no provisions relating to subdivision escrows or Chapter 89[2] were yet in any way a part of SB 20.

Then, on May 10, 1999, three days before the end of the session, several amendments were added to HCS/SB 20, including Amendment No. 4 offered by Representative Green that amended House Substitute for House Committee Substitute to Senate Bill 20 ("HS/HCS/SB20") by inserting the amendments to §89.410[3] that modified Subsections one and two of that Section and added new Subsections relating to escrow requirements for subdivisions. (*See* LF 387-89, House Journal, May 10, 1999).

On that same day, the House further amended the Bill by adding a section to amend certain sections of Chapter 32 and Chapter 135 R.S.Mo., which related to tax credits for certain businesses and residents locating or relocating in distressed communities. (*See* LF 376-87, House Journal, May 10, 1999). Also on that day, Representative Hosmer offered House Amendment No. 5, which purported to amend §88.812 to allow constitutional charter cities to "provide for special assessments for constructing and repairing sidewalks and sidewalk curbing, and for sewers, and for grading, paving, excavating, macadamizing, curbing and guttering of any street, avenue, alley, square or other highway, or part thereof, and repairing the same, upon such terms,

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[2] Chapter 89 R.S.Mo. relates to zoning and subdivision regulations.

[3] Section 89.410 is entitled "Regulations governing subdivision of land, limitations, contents--public hearing--escrow funds, when released."

conditions and procedures as are set forth in its own charter or ordinances." (LF 389-90). These amendments were allowed over specific objections that they were not germane to the bill or went "beyond the scope of the bill." (*See* LF 384-90, House Journal, May 10, 1999).

Three days later, on the last day of the legislative session, May 13, 1999, SB 20 was read by the Senate and the House for the third time and finally passed. The agreed title of SB 20 was then changed to:

> **An Act To repeal sections 88.812 and 89.410, RSMo 1994, and sections 32.110, 32.111, 32.112, 32.115, 67.1421, 67.1461, 67.1501, 67.1531, 135.530 and 135.535, RSMo Supp. 1998, 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.**

(LF 400, 402). CCS#2/HS/HCS/SB 20 was signed by the Governor and purportedly became effective on August 28, 1999. (LF 402).

The amendment to §89.410 was inserted near the end of SB 20 and added certain restrictions on the ability of cities, towns and villages to withhold from developers or owners of subdivisions certain amounts of escrowed funds upon completion of certain subdivision improvement and utility work, as well as to provide for a cause of action against cities by the owner or developer if the city, town or village violates the provisions of §89.410. (*See* LF 424-25). As stated in the Current Bill Summary for the enacted SB 20, the amendment to §89.410 "affects how cities, towns and villages may impose the

posting of bonds regarding escrows for the improvement of plats within subdivisions." (*See* LF 431, 433).

The Legislation's original purpose, the Home Equity Program Act, authorized a new property tax, with voter approval, to be used to protect homeowners against declining property values. On final passage, besides the Home Equity Program and the purported amendment to §89.410, SB 20 also contained a section pertaining to the "Rebuilding Communities And Neighborhood Preservation Act" authorizing state tax credits for certain residential rehabilitation and construction costs and an amendment to §88.812 R.S.Mo., which allowed a constitutional charter city to provide for special assessments for sidewalks, sewers, curbing, and street paving, etc. (*See* LF 431-33).

**C. Undisputed Evidence Relating to Section 89.410 R.S.Mo. and Wildwood's Ordinance 675.**

Prior to 1999, the City's escrow ordinance required release of ninety percent of the construction escrow immediately after completion and allowed the remaining ten percent to be used for maintenance obligations. The SB 20 changes, however, required a ninety-five percent release on construction bonds, but expressly exempted "maintenance" bonds from any release requirements. Therefore, in response to the enactment of the SB 20 amendments to §89.410, the City amended its ordinance in 1999 to require release of ninety-five percent on its construction bonds, and moved the maintenance obligations to a separate ten percent maintenance deposit so that the maintenance deposit was not a part of nor commingled with the escrow for "actual construction," which was then subject to separate statutory procedures. (LF 434, Vujnich Aff.; LF 637; & Appendix B).

Section 89.410, both before its purported amendment and now, authorizes cities to establish requirements and conditions relating to subdividing land, including requirements that improvements be installed.

The amendments to Section 89.410 added several new requirements, including that escrows "to secure actual construction and installation on each component of the improvements . . . shall be released within thirty days of completion of each category of improvement . . . " as certified by the City, "minus a maximum retention of five percent." §89.410.3 R.S.Mo.

The HBA lawsuit did not allege that Ordinance 675 failed to contain the new release provisions required by SB 20. Rather, the HBA claimed that Ordinance 675 violates the statute because the Ordinance requires guarantee amounts that “exceed” the “actual cost of construction” and maintenance bonds, which the HBA asserts are simply not authorized under §89.410. (LF 144, Second Am. Pet.). Ordinance 675 (Section 1005.080 of the Wildwood Municipal Code) amended and codified the City's Subdivision and Development Regulations pursuant to the City's charter authority to regulate housing, sanitary sewage treatment, grading and construction and other aspects relating to the public health, safety and welfare, as well as the City's authority to control and regulate the division of land to protect the public interest. (LF 153).

The HBA, however, was primarily responsible for most of the language pertaining to §89.410 that was tacked on to the finally passed version of SB 20. (LF 478, Bilderback Dep. at 36). The HBA's stated purpose for the amendments to §89.410 was to assure "prompt release of funds upon installation of improvements." (LF 483-84, Memo

to HBA Lobbyist Bardgett from Bilderback; and LF 486-87, Bardgett Dep. at 37-39). This purpose is echoed by the Current Bill Summary. (LF 433). The record does not reflect that either elimination of maintenance bonds or regulation of how cost estimates were calculated was ever a purpose of the HBA's language or legislative efforts. (*See* LF 483-84,Memo to Bardgett from Bilderback; and LF 433, Current Bill Summary).

Ordinance 675, as consistent with the Statute, requires certain subdivision improvements (i.e., streets, sidewalks, sewers, etc.) to be installed in accordance with the approved improvement plans *prior* to final plat approval, but also allows developers to enter into improvement guarantee agreements *in lieu of* actually installing all the improvements prior to final plat approval. (LF 167, §1005.080(A)(1); and LF 167, §1005.080(A)(2)). While the City *may* authorize a developer to delay installation or completion of improvements by posting a bond, the City is not *required* by the Statute to offer this *option*. §89.410.2 ("regulations may provide that, in lieu of the completion . . .). By allowing a bond or escrow option, Ordinance 675 provides developers the benefit of postponing expenditure of funds on construction of improvements until after final plat approval, while still ensuring that the improvements will be properly installed according to the improvement plans. (LF 436, Vujnich Aff.). As categories of improvements are completed and approved by the City, the cash or letter of credit deposit is reduced, with all remaining amounts of the construction guarantee released at final completion. (LF 167-73).

Ordinance 675 authorizes the developer to post a 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" to guarantee proper construction and completion of improvements, and calculates such deposit based on an estimate of the cost to the City of completing the actual construction. (LF 167-168, §1005.080; and LF 435-36, Vujnich Aff.). This deposit amount in any given case may not equal nor be sufficient to cover the *actual* cost of completing such improvements due to increases arising from inflation, prevailing wage requirements, cost of repairing defective improvements, and other contingencies. (LF 435-36, Vujnich Aff.). In fact, in almost all instances in which Wildwood has had to complete subdivision improvements using deposited funds forfeited by a developer, the funds forfeited have been less than the amount needed to complete the improvements. (LF 436, Vujnich Aff.). In many of those instances, the shortfall was substantial and additional funds were unavailable to complete the basic improvements that the developer had originally been required to complete as a condition of the subdivision. *Id*. In determining the amount to be held to guarantee improvements, the City uses cost estimates provided by St. Louis County. *Id*. These estimates have resulted in substantial shortfalls exactly because they do not take into account any future contingencies and have thereby necessitated the City's inclusion of a ten percent inflation factor in an attempt to at least reduce continued shortfalls and to thereby ensure that construction of subdivision improvements are completed as planned. *Id*. The HBA did not dispute these facts. (*See* LF 311, Undisputed Facts 27 & 28; LF 1069, HBA response; LF 436, Vujnich Aff.).

Apart from the “construction” deposit for actual construction and completion, Ordinance 675 requires a separate maintenance guarantee to ensure that the

improvements (streets, sidewalks, sewers) are properly, safely and adequately *maintained* for a defined period of time commencing with construction. (LF 168-69). The separate maintenance bond is designed to ensure only the developer's preservation and upkeep of the subdivision improvements for public safety and welfare during the period of the guarantee. (LF 436, Vujnich Aff.; LF 169, Ord. 675, §1005.080).

The construction and maintenance escrow provisions of Ordinance 675 challenged by the HBA have been in place since 1996 and, in addition, are found in various forms in other city ordinances across St. Louis County and throughout the state of Missouri. (LF 435, Vujnich Aff.; *See* certified copies at LF 488-510).

Maintenance bond requirements have existed in cities throughout Missouri both before and after the purported amendments to §89.410 by the subject legislation. (LF 435, Vujnich Aff.; *see also* LF 488-510, relevant excerpts from ordinances of various cities).[4]

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[4] City of Black Jack Subdivision Code §060 (maintenance deposit equal to ten percent (10%) of the estimated cost of construction held until eighteen (18) months after acceptance or eighteen months after ninety-five percent (95%) occupancy); City of Ferguson Code §41-96 (maintenance guarantee deposit equal to fifty percent (50%) of cost of construction of improvements held for two (2) years after acceptance); City of Raytown Subdivision Code (maintenance guarantee in the amount of twenty-five percent (25%) of cost of construction held for two (2) years after acceptance); City of Raymore Code §410.510 (maintenance bond equal to fifty percent (50%) of the cost

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The City's experience has been that subdivision improvements remain incomplete beyond the date that the subdivision is ninety-five percent built-out and the maintenance bond is released. (LF 437, Vujnich Aff.). Since August of 1999, in each of the thirty-six or more deposit agreements entered into by developers with the City, the developer expressly accepted the agreement as "a lawful and satisfactory" agreement. (LF 312, Undisputed Fact No. 32). These agreements contain the provisions set forth in Ordinance 675, which the HBA now challenges. (LF 437, Vujnich Aff.).

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of construction of improvements held for two (2) years from completion); Creve Coeur Subdivision Code §22A-43 (maintenance guarantee of ten percent (10%) of cost of construction placed in transit account upon acceptance and held for one (1) year); City of Greenwood Subdivision Code §410.090 (maintenance guarantee equal to twenty-five percent (25%) of the construction cost of improvements held one (1) to three (3) years after completion); City of Ellisville Subdivision Code §23-116 (maintenance guarantee of ten percent (10%) of cost of construction placed in transit account upon acceptance and held for one (1) year); and City of Independence Code §14.02.017 (maintenance guarantee of twenty-five percent (25%) of cost of construction held until two (2) years after acceptance or two (2) years after ninety-five percent (95%) occupancy)).

## POINTS RELIED ON

**AUTHORIZED TO SUE OR SEEK THE RELIEF SOUGHT AND OBTAINED.**

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**VII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ORDERING DECLARATORY AND INJUNCTIVE RELIEF TO THE HBA AS TO ALL ESCROWS INCLUDING "FUNDS DEPOSITED PRIOR TO AUGUST 28, 1999" BECAUSE SUCH RELIEF IS IMPROPERLY RETROACTIVE AND RETROSPECTIVE IN VIOLATION OF THE STATUTE AND ARTICLE I, §13 OF THE MISSOURI CONSTITUTION IN THAT RETROSPECTIVE APPLICATION OF NEW ESCROW REQUIREMENTS TO FUNDS ACCEPTED PRIOR TO THE PROSPECTIVE LEGISLATIVE CHANGE WOULD IMPAIR AND ABROGATE EXISTING RIGHTS AND CONTRACTS BETWEEN WILDWOOD AND DEVELOPERS EXECUTED PRIOR TO AUGUST OF 1999.**

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The trial court's judgment declared that "the amendments to Section 89.410 R.S.Mo., enacted in Senate Bill 20, apply to all escrow deposits held by the City of Wildwood on August 28, 1999." (LF 1150). The trial court then ordered Wildwood to "return all escrow amounts now held by the City in excess of those authorized by Section 89.410 … including such funds deposited prior to August 28, 1999." (LF 1150). As a result, the application of statutory provisions retrospectively and so as to impair existing rights and contracts violates Article I, §13 of the Missouri Constitution's prohibition. *In re Marriage of Haggard*, 585 S.W.2d 480 (Mo. 1979); *Hoyne v. Prudential Sav. & Loan Ass'n*, 711 S.W.2d 899 (Mo.App. 1986) The trial court's judgment improperly applies a

## ARGUMENT

### Summary

This case involves a challenge by the HBA to the validity of a municipal ordinance establishing requirements for construction and maintenance bonds relating to subdivision improvements. The trial court erred in granting summary judgment in applying the SB 20 changes to Section 89.410 R.S.Mo. because (1) the Ordinance does not violate Section 89.410, (2) SB 20 amendment is void because it was enacted and

applies in violation of the Missouri Constitution, (3) the HBA lacks standing, and (4) the trial court erred in granting ambiguous monetary relief.

The HBA's Second Amended Petition alleges that the City's Ordinance 675 conflicts with the requirements of governing state law and is void. Specifically, the HBA claims that Ordinance 675 violates Section 89.410 R.S.Mo. because the ordinance (1) calculates escrow amounts to include an additional ten percent for inflation and other contingencies, and (2) requires a separate maintenance bond to guarantee the improvements are maintained. The HBA also sought retroactive application of the statute to funds received prior to the enactment of SB 20.

The HBA's Second Amended Petition seeks invalidation of Ordinance 675 and related relief on three grounds: (1) that Section 89.410 prohibits any subdivision escrows in excess of the "actual costs" of construction, (2) that cities are now wholly unauthorized to require "maintenance bonds," and (3) that the new escrow requirements establishing release times, maximum retention after completion of certain improvements, and other requirements are retroactively applicable to funds deposited (and subject to agreements executed) prior to the effective date of SB 20. The trial court accepted these claims, and while acknowledging that "Wildwood acted in good faith" (LF 1138), voided the Ordinance provisions and ordered return of unspecified escrow funds "with interest."

The trial court's judgment contradicts the plain language and context of Section 89.410 and the HBA failed to meet its heavy burden of overcoming the presumption of validity of municipal ordinances. First, the trial court adopted the HBA's incorrect

quotation of the statute. Nowhere does Section 89.410 limit the subdivision guarantee amounts to "actual costs" of construction, and certainly it does not prohibit the inclusion of inflation and other real costs that a city is forced to complete the improvements. The statute expressly authorized the City to set the amount and "reasonable conditions" necessary for "securing" the improvements. Moreover, the undisputed evidence was that the bond amounts required by Ordinance 675 in fact did not exceed actual costs, but "in almost all instances" was insufficient to complete the improvements. (LF 436, Vujnich Affid.).

Similarly, the Statute does not prohibit maintenance bonds, but expressly exempts them from the new regulations. Section 89.410.5 expressly states that the restrictions on escrows shall not apply to "performance, maintenance and payment bonds required by cities, towns or villages." Not only is this exemption plain and unambiguous, the undisputed historical record is that "maintenance bonds" were, prior to the enactment of SB 20, and remain subsequent to its enactment, an integral part of subdivision ordinances throughout the state. Moreover, given the public safety concerns addressed by maintenance requirements, maintenance bonds would be within a city's police power authority even if not expressly preserved by Section 89.410.5.

The HBA's claims also fail as matter of law because the changes to Section 89.410 were inserted into SB 20 in the final days of the Legislative session and enforcement of the provisions violates the Missouri constitutional mandates in Art. III, §§21 and 23 requiring a "clear title," single subject and unchanged purpose. Here the subdivision escrow requirements were inserted in a bill whose original purpose, title and subject was

a Home Equity Program "relating to community improvement." The HBA may not rely on an unconstitutionally enacted bill and its claims must be dismissed.

Finally, the HBA lacks standing under the statute because it is not an "owner or developer" and no actual controversy relating to any specific escrow was alleged. This compounded the court's error because the relief requested is incomprehensible as it purports to apply a general unspecified requirement to a multitude of escrows, and escrow circumstances, for which no controversy was alleged and no evidence presented. The court even applied the relief retrospectively without the clear legislative expression required by, and in violation of, Article I, §13 of the Missouri Constitution, which prohibits retrospective application of statutes that would impair existing contracts, such as the escrow agreements at issue here.

For all of these reasons, the trial court's judgment must be vacated and the case dismissed or judgment rendered against the HBA as a matter of law.

## Standard of Review

When considering appeals from summary judgment, a court will review the record in the light most favorable to the party against whom judgment was entered. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. 1993). The non-movant is accorded the benefit of all reasonable inferences from the record. *Id*. This court's review is essentially *de novo* and an appellate court need not defer to the trial court's order granting summary judgment. *Id*.

Summary judgment should only be granted where the "motion for summary judgment and the response thereto show that there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law." Mo.R.Civ.P. 74.04. When a party moves for summary judgment, "[t]he burden on a summary judgment movant is to show a right to judgment flowing from facts about which there is no genuine dispute." *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. 1993). A "claimant" such as the HBA must establish that there is no genuine dispute as to those material facts upon which the "claimant" will have had the burden of persuasion at trial; the same is not true for a "defending party." *Id*. at 381.

In this case, the HBA has failed to meet its burden, under any legal interpretation, to show that its genuine issues of material fact are not in dispute or entitle it to judgment. Because the HBA's claims also depend on an erroneous interpretation of the statute, and because of the other legal and factual impediments to the Second Amended Petition, the HBA's claims should be dismissed.

## I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE HBA FOR DECLARATORY AND INJUNCTIVE RELIEF CHALLENGING ORDINANCE 675 BECAUSE THE TRIAL COURT MISAPPLIED R.S.MO. §89.410 IN HOLDING THAT WILDWOOD'S ORDINANCE 675 CONTRADICTS STATE LAW IN THAT §89.410 DOES NOT LIMIT THE INITIAL AMOUNT OF SUBDIVISION BONDS TO "ACTUAL COSTS" WITHOUT ADJUSTMENT FOR INFLATION OR OTHER CONTINGENCIES, BUT EXPRESSLY LEAVES DISCRETION TO THE CITY COUNCIL TO REQUIRE "REASONABLE CONDITIONS,

**PROVIDING FOR AND SECURING THE ACTUAL CONSTRUCTION AND INSTALLATION."**

The trial court held that Ordinance 675 violates §89.410 because the ordinance requires a construction deposit that includes an additional ten percent over the initial estimated costs of the improvements. (LF 1134, App. C). The trial court found that the statute limits initial escrow amounts to actual cost of construction. *Id*. The trial court erred in granting the HBA summary judgment because (1) the statute nowhere limits the bonds to "actual cost of construction," as alleged by the HBA (LF 559), (2) the ordinance does *not* "require" construction bonds, but offers such bonds as an option to the developer, (3) the ordinance does *not* on its face require more than the actual cost of construction, and (4) the HBA provided *no* evidence that the amount of the deposits actually required were greater than the actual costs necessary to complete the improvements.

**A. HBA Failed to Offer Evidence Necessary to Invalidate an Ordinance.**

In seeking to invalidate a municipal ordinance, a party bears the burden of overcoming the presumption that ordinances are presumed valid and lawful. *McCollum v. Dir. of Revenue*, 906 S.W.2d 368 (Mo. 1995), *citing Parking Sys., Inc. v. Kansas City Downtown Redevelopment Corp*., 518 S.W.2d 11 (Mo. 1974). Thus, an ordinance must be construed to uphold its validity unless it is expressly inconsistent or in irreconcilable conflict with the statute *Id., citing Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208 (Mo.1986).

While an ordinance must not conflict with state law, it may supplement or enlarge upon the provisions of a state statute by requiring more than what is required in the statute. *Combined Communication Corp. v. City of Bridgeton,* 939 S.W.2d 460 (Mo.App. 1996). To determine if a conflict exists, the test is whether the ordinance prohibits that which the statute permits or permits that which the statute prohibits. *Morrow v. City of Kansas City,* 788 S.W.2d 278 (Mo. 1990).

This Court should give the words contained in §89.410 their plain and ordinary meaning and should interpret it to avoid absurd results. *Id*. It is not necessary that Ordinance 675 follow the exact language of §89.410 to avoid being invalid. *Id*. Finally, the interpretation of an ordinance by the municipality is entitled to "great weight." *Taylor v. City of Pagedale,* 746 S.W.2d 576, 578 (Mo.App.1987).

Particularly in light of the presumption of validity, the HBA's lack of evidence that the Ordinance has ever been applied unlawfully--even under the HBA's strained interpretation of the statute--is glaring. (LF 313, Undisputed Fact 36: "the HBA has not alleged a single factual controversy between an HBA member and the City regarding enforcement of Ordinance 675;" LF 1071, HBA response offering no rebutting evidence and resting on its pleadings; Undisputed Fact 32, admission of HBA that its members expressly agreed that City escrows were "lawful and satisfactory"). Without such proffered evidence, and with no facial conflict between the ordinance and the statute, the HBA's claims fail as a matter of law.Section 89.410 Is Not Violated By an *Optional* Construction Deposit that Includes a 10% Amount for Inflation and Other Real Costs.

The trial court held, as the HBA alleged in its Second Amended Petition, that Ordinance 675 violates Section 89.410.1, which states that a "city, town or village may only *impose requirements*" as provided in Section 89.410, because the statute limits deposits to the "amount of the actual construction." (LF 1134, App. C; LF 144, App. A). This is incorrect as a matter of law because (1) Ordinance 675 simply does not "impose" or "require" any construction guarantee at all, and (2) the Statute nowhere limits the guarantee amount to the "amount of the actual construction."

**1. Ordinance 675 does *not* "require" any construction guarantee.**

Ordinance 675 does not "impose" or "require" any construction guarantee. Rather, it provides an option as authorized by Section 89.410.2 that allows, but does not require, a city to authorize a developer to provide such guarantee "in lieu of the completion of the work and installations previous to the final approval of a plat." Specifically, Section 89.410.2 further provides that:

> Compliance with all of these requirements is a condition precedent to the approval of the plat. The regulations or practice of the council ***may provide*** for the tentative approval of the plat previous to the improvements and utility installations; but any tentative approval shall not be entered on the plat. 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 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. (emphasis added).

Consistent with this authority, §1005.080(A) of Ordinance 675 states that the "developer shall either: 1. Complete the improvements ….; or 2. Establish a deposit ...." (App. B). It is clear then that Ordinance 675 does not "require" or "impose" any construction guarantee at all, and that developers may choose to build the improvements prior to final platting if they do not desire to post a construction bond.

The fact that the developer is not required to post a construction deposit was undisputed. (App. B, §1005.080(A); LF 436, Vujnich Aff.). Section 89.410 expressly declares that municipalities "may" allow guarantees "in lieu" of completion of the improvements. Nothing in the statute requires cities to offer this choice and nothing in Ordinance 675 requires the developer to choose that option. Indeed, a political subdivision may choose to wholly eliminate the option, and if it offers it, the option enures wholly to the benefit and convenience of the developer.

Having chosen to accept an alternative that is expressly not required under the Statute or Ordinance 675, the members of the HBA can hardly then claim that the option they selected is illegal and "imposed" on them. To do so, of course, would leave them with only the option that the Statute otherwise allows--completing the requirements *before* plat approval. Likely because Ordinance 675 clearly grants a concession and does not impose a requirement, the HBA was unable to find even one member to raise a justiciable controversy, despite filing three different versions of its Petition. Indeed, the

undisputed evidence was that, unlike the HBA, the actual interested parties – the "owners" and "developers" - verified in each agreement that the City's escrow agreements were in fact "lawful and satisfactory." (LF 312, Undisputed Fact 32).

Accordingly, the trial court's finding that Ordinance 675 violates the provision of Section 89.410 that a "city, town or village may only **impose requirements**" as provided in Section 89.410 fails as a matter of law because the construction guarantee being challenged is simply not "imposed" or "required" facially or as applied.

**2. Section 89.410 does *not* restrict bonds to the "amount of actual construction."**

Even if Ordinance 675 was read to "require" a construction escrow, the trial court erred in holding that the statute limits the bond amounts to "the amount of actual construction." (App. C, Judgment, at. 5). Ordinance 675 allows "construction deposits 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." (Appendix B, §1005.080.D.1) The trial court, without citation, concluded that this provision is "expressly prohibited by 89.410, which only allows subdivision bonds or escrows in the amount of the actual construction." (LF 1146, Judgment at 5).

This recitation of the HBA position is just flat wrong. Never, for example, does Section 89.410 "expressly" or even impliedly state that the amount of the initial deposit is limited to "the amount of actual construction." Moreover, Section 89.410 sets no restriction as to how cost estimates are determined, and certainly contains no prohibition

against including additional amounts for inflation or other construction costs that are reasonably foreseeable for a time years later when the construction will actually occur.

The trial court's conclusion that the City's construction bond amount exceeds the statutory limit rests on the unstable premise that the statute requires an escrow to be "*equal to*" the "*actual cost to the developer at the time the guarantee is established*." The emphasized language is simply not in the statute. Much to the contrary, Section 89.410 expressly provides that the city "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 utilities within a period specified by the council and expressed in the bond." §89.410.2 (emphasis added). Elsewhere in the same subsection, the council is authorized to establish requirements "whereby the council is put in an *assured position* to do the work." *Id*. The amount necessary to be put in "an assured position" and necessary for "securing" the actual construction years from the date of the estimate cannot be the "current" estimated cost of the construction by a developer, but must include an amount for inflation, defects, additional prevailing wage costs required if the City must complete the work, and unexpected costs not factored into the 100% estimate. (LF 435, Vujnich Aff.; LF 640, Vujnich Dep.at.58; §1005.080.D, providing for estimate list of "current" costs).

The undisputed evidence in the summary judgment record showed that the City used standard estimates of the construction costs provided by St. Louis County and added the ten percent adjustment to partly account for the other actual costs that would be incurred if the developer failed to complete the improvements, including inflation,

prevailing wage requirements, cost of repairing defective improvement, or other contingencies not in the St. Louis County base estimate used. (LF 435, Vujnich Aff.; LF 640, Vujnich Dep. At 58; §1005.080.D, provides for list of “current” costs).

What possible purpose would be served by a bond intended to “secure” actual construction that was limited to an amount that would not be enough for the City to “actually construct” the improvements years later when the bond was called for? The purpose of the section is to protect the City by putting it in the same position it would have been in had the developer completed the infrastructure prior to plat approval, i.e., a guarantee of completed streets, sewers, etc., with no substantial risk that the City will be forced to expend taxpayer funds.

Thus, the HBA's attempt to rewrite Section 89.410.2 is simply an effort to thrust Ordinance 675 into a conflict that does not exist under the Statute’s plain language. The HBA cannot simply strike through the City's express authority in Section 89.410.2 to impose "reasonable conditions" and to ask for security in an “amount” that provides for and “secures” the actual construction of the improvements, and which allows the council to be placed in an "assured position." While a bond must cover costs of construction of the improvements at the time the deposit is placed, it is equally important that it also be sufficient many years later when the subdivision is still not complete, the developer has defaulted, and homeowners have moved in and rightfully expect safe and finished roads, sidewalks and stormwater facilities. Disallowing inflation or other such costs would simply *not* “secure” the actual construction or put the City in an "assured position" to complete the improvements.

In short, there is simply no evidence that Ordinance 675 as written or applied requires a deposit guarantee in excess of that which is authorized by the statute. Ordinance 675 calculates the cost to the developer of improvements based on costs set at or prior to the placement of the escrow, without prevailing wage, overruns, mistakes, inflation, or other accommodation for the conditions that will exist years later when the improvements are actually to be installed. The ordinance adds a mere ten percent to address these factors and, as discussed below, the HBA offered no evidence that even this ten percent addition ever once exceeded the actual costs of construction when it was actually performed, and certainly no evidence that Ordinance 675 requires an amount that is not reasonably required for "securing" actual construction. As a matter of law, the HBA failed to offer evidence supporting its claim and summary judgment in favor of the HBA should be reversed.

### B. Even Under the HBA's Reading of the Statute, the Unrebutted Evidence Showed That Bond Amounts Under Ordinance 675 Do *Not* Exceed the "Actual" Costs for Construction.

Even if the Statute were rewritten to limit bond amounts to the "actual costs of construction," the undisputed evidence was that Ordinance 675 required *less* than that amount, not *more*. The HBA conceded it had no evidence to rebut the City's evidence that the construction deposit amount provided by Ordinance 675 was *not* necessarily even enough "to cover the actual cost to the City of completing such improvements" and was "in almost all instances" actually "below the amount needed to complete the improvements." (LF 311, Undisputed Fact Nos. 27 & 28; LF 1069, HBA response; LF 436, Vujnich Aff.). In many instances, the shortfall has been substantial and funds were unavailable to complete the basic improvements that the developer had been required to complete as condition of the subdivision. (LF 436, Vujnich Aff.). Given the many years that it takes to complete a subdivision, including an "inflation factor" or other contingency is indisputably a "reasonable condition" as authorized in §89.410.2.

As a matter of law then, even if the Statute were interpreted to require the City to have perfect predictive powers as to the "actual costs of construction," either now or years in the future, there is zero evidence to support the claim that Ordinance 675 on its face requires, or as applied in fact, has *ever* resulted in a developer bond amount being more than the actual costs, and "in almost all cases" the amount has been insufficient.

### C. Conclusion.

In summary, the trial court erred in declaring the 110% calculation in Ordinance 675 violates Section 89.410 because the deposit is (1) optional and simply not an escrow "imposed" on the developer in violation of §89.410, (2) Section 89.410 does *not* limit deposit amounts of future improvements to the cost of actual construction on the day of the deposit, and (3) the Ordinance language and actual practice does not require more than the cost of even "actual construction" because 110% of the developer costs in the year of the deposit has never exceeded the actual cost that the City incurred in completing the improvements in the future. The HBA failed to offer undisputed facts to rebut the presumption of validity on any of these points, and each independently requires denial of the summary judgment for the HBA and judgment for the City.

## II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE HBA FOR DECLARATORY AND INJUNCTIVE RELIEF THAT THE MAINTENANCE BONDS AUTHORIZED IN ORDINANCE 675 VIOLATE R.S.MO. §89.410 BECAUSE THERE IS NO STATUTORY CONFLICT IN THAT R.S.MO. §89.410.5 EXPRESSLY EXEMPTS "MAINTENANCE" BONDS FROM THE SPECIFIC REGULATIONS OF THE STATUTE AND THE LANGUAGE OF THE ORDINANCE DOES NOT OTHERWISE CONFLICT WITH THE STATUTE.

The trial court similarly erred in declaring that the maintenance bond provisions of Ordinance 675 violate Section 89.410. (LF 1134-35, App. C). The HBA alleged that Ordinance 675 violated Section 89.410 because the City was "wholly without statutory

authority" to require maintenance bonds and such bonds "extend beyond the mandated release provisions set forth in the statute." (LF 144; 559; 731). The HBA's claim must be rejected because "maintenance bonds" are expressly exempted from the restriction in Section 89.410 and the trial court's interpretation would, contrary to the express language, actually abolish all performance, maintenance and payment bonds in the subdivision context.

### A. The express language of the statute excludes maintenance bonds from the scope of §89.410.

The HBA correctly points out that Section 89.410.1 is a general limitation of authority for subdivision bonds, but then ignores that Section 89.410.5 expressly qualifies that limitation by exempting "performance, *maintenance* and payment bonds" from coverage. (emphasis added). Subsections one through four of Section 89.410 establish "subdivision-related regulations" for bonds that secure "actual construction and installation" of improvements. Maintenance bonds are expressly exempted from these regulations by Section 89.410.5, which states:

> **Nothing in this section shall apply to performance, *maintenance* and payment bonds required by cities, towns or villages.**

(emphasis added). Section 89.410, therefore, does not conflict with or contradict Ordinance 675. Rather, Section 89.410.5 expressly contemplates that cities such as Wildwood may continue to require "maintenance" bonds.

As a constitutional charter city, Wildwood is empowered to impose maintenance guarantees pursuant to its constitutional authority. Constitutional charter cities may take

any legislative action "consistent with the constitution of this state and . . . not limited or denied either by the charter . . . or by statute." Mo. Const. Art. VI, § 19(a). Thus, as long as no charter or statute prohibits maintenance bonds, the city has authority to require them.

Nothing in Section 89.410 prohibits maintenance bonds; rather Section 89.410.5 expressly ***preserves*** a city's power to impose them. The language of Section 89.410.1 first establishes requirements for all "subdivision-related regulations" and "posting of bonds." Sections 89.410.2 and 3 then expressly establish regulations applicable to subdivision bonds "*securing the actual construction*" of improvements. Finally, Section 89.410.5 expressly exempts from these regulations "maintenance" and other specific types of bonds required by cities. There is nothing ambiguous here. Because Subsection 1 limits only "subdivision-related" bond authority and because Subsections two and three establish rules only for "actual construction bonds," Subsection five was necessary to preserve specific subdivision-related bonds that are not intended for "actual construction," but would otherwise still be subject to the general limitation in Subsection one restricting "subdivision-related" bonds and regulations. "[W]hen a statute is clear and unambiguous, extrinsic aids to statutory construction cannot be used." *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596 (Mo. 1977). "Courts may not read into a statute a legislative intent contrary to the intent made evident by the plain language." *Keeny v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622 (Mo. 1995). Here, "maintenance" bonds are plainly exempted.

The HBA's Second Amended Petition claims that the maintenance bonds violate the release and other procedures in §89.410.3. (LF 144.) As noted above, however, that subsection expressly applies only to bonds for "actual construction," not for "maintenance," "payment" or "performance" purposes. Section 89.410.3 states that:

> 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 . . ..

Thus, in *both* the regulating and exempting sections, the Legislature clearly articulated that it was establishing release procedures for "construction" bonds and not "maintenance" bonds or the other exempted bonds.

Here, the plain language of the statute expressly exempts "maintenance bonds" from the regulations. On this basis alone, the trial court's judgment should be reversed in improperly granting summary judgment striking down a provision in a municipal ordinance that is expressly exempted from state regulation.

**B. The term "maintenance bond" is also unambiguous given the context and historical practice relating to subdivision "maintenance bonds."**

Rejecting the plain language, the trial court accepted the HBA's argument that "maintenance bonds" does not really mean "maintenance bonds," but instead means bonds relating to maintenance that are *unrelated* to subdivisions. This, of course, defeats any purpose of having the provision in a statute that already expressly applies *only* to "subdivision-related" regulations. R.S.Mo. §89.410.1. The term "maintenance bond" is so clearly recognized as a type of "subdivision" bond found in subdivision ordinances

that the trial court's judgment was forced to arbitrarily exclude the obvious parlance and meaning of "maintenance" bond.

The HBA did not dispute the abundant evidence that the term "maintenance" bond was used throughout Missouri both before and after the amendment to §89.410 to refer to a specific type of subdivision bond "required by cities, towns and villages" in subdivision ordinances. (LF 313, Undisputed Fact No. 37; LF 435, Vujnich Aff.; LF 1071, "HBA does not dispute the statements"; LF 488-510, verified ordinances attached). The record also included the verified copies of such subdivision ordinances throughout the state, which, like Ordinance 675, provided for separate "maintenance" bond provisions required of subdividers both before and after §89.410.5 was adopted.

For example, the undisputed evidence included the City of Ferguson Code §41-96 that established a two-year maintenance guaranty requiring that a "subdivider shall provide to the satisfaction of the council a *maintenance bond* …" separate from the construction bonds that are provided in §41-96 "in lieu of actual completion of the improvements." (LF 499-500). Similarly, the City of Raymore Code §410.510 provides in its subdivision regulations for a separate *"Maintenance Bond"* equal to fifty percent (50%) of the cost of construction of improvements held for two (2) years from completion. (LF 509; *See* numerous other examples at *supra* fn.4, LF 488-510). The City of Wildwood has provided for subdivision "maintenance" bonds since 1996, shortly after its incorporation. (LF 310). Finally, the Missouri Municipal League filed *amicus curiae* briefing in the trial court and before this Court also noting the use and importance of "maintenance" bonds in subdivision ordinances throughout the state. (LF 1125).

The Missouri courts have also referenced this recognized meaning of the term "maintenance" bonds in the subdivision development context both before *and* after enactment of SB 20. *See City of Chesterfield v. DeShetler Homes, Inc.* 938 S.W.2d 671 (Mo.App. E.D. 1997); *State ex rel. Remy v. Alexander*, 77 S.W.3d 628 (Mo.App. 2002). For example, in *City of Chesterfield* the court reinstated an ordinance violation proceeding under the city's ordinance that "required Developer to post a *bond*, before grading began, to assure *maintenance* of the adjoining property." (emphasis added). Similarly, in *State ex rel. Remy v. Alexander*, 77 S.W.2d at 631, the court of appeals just this year applied a permit condition under the City of Branson's subdivision ordinance that also required "a *bond* in conformance with Section 430.140 of this Chapter, 'Maintenance Guarantee'")(emphasis added).

Not only is the requirement and reference to "maintenance bond" as a type of subdivision bond a recognized term in this state, it is part of a broader recognized subdivision-related practice that embraces the concept of separate "maintenance bonds" as an important public requirement for subdividing and developing property. For example, in the neighboring state of Kansas, a statutory subdivision provision expressly acknowledges this practice of requiring a separate "maintenance bond" for subdivision improvements. *See* K.S.A. §19-2961 (2001) (in addition to bonds "in lieu of the completion of such work . . . the board of county commissioners may require a *maintenance bond* . . . for a period of one year following final county approval of such work or improvements.") (emphasis added).

The Missouri Legislature is deemed to have been aware of these practices, ordinances, court decisions, and public use of separate subdivision "maintenance bond" requirements. The goal in interpreting a statute is to determine the legislative intent as to the meaning of a particular word in the context of the entire statute in which it appears. *Household Fin. Corp. v. Robertson*, 364 S.W.2d 595 (Mo. 1963). Here, the legislature exempted "maintenance" bonds from regulations in a statute relating to subdivision escrows in a state in which the term "maintenance bond" has been commonly and unequivocally "required by cities, towns and villages" as a type of subdivision bond.

In light of the undisputed factual evidence regarding the use of the term "maintenance" bonds, the express exclusion of "maintenance" bonds in a statute relating to subdivision escrows unambiguously refers to subdivision maintenance bonds such as at issue here.

### C. The trial court's interpretation of "maintenance" bonds contradicts the language and context of Subsection 89.410.5.

Despite the plain language and undisputed use of the term "maintenance bond" in subdivision regulations, the trial court declared that the "manifest intent and purpose" of the law would be defeated by exempting "performance, maintenance and payment" bonds. The court questioned "What would a performance bond refer to in this context, except for the bond the developer posts to secure construction of the improvements?" (LF 1162, Judgment at p.6). To solve this new hypothetical question not before the court, the trial court ruled that the exclusion in subsection five must "merely refer to other nonsubdivision related performance, payment, and maintenance bonds." The trial court's

interpretation improperly rewrites the plain language of the statute and incorrectly opines that application of the actual language of the act defeats the legislative purpose.

**(1) The trial court's interpretation improperly rewrites the statute.**

The trial court's reading of the statute rewrites its language to excise the obvious meaning of the term "maintenance bond" and the only use for which abundant evidence was presented. The trial court's interpretation ignores both the context and actual language of the statute. The question it should have asked was: What possible sense would it make to exempt "nonsubdivision bonds" from a statute that in its first section already stated that it governed only "subdivision-related" regulations? None. Doing so, of course, makes subsection five "meaningless surplusage" and must therefore be rejected. *Comm. on Legislative Research v. Mitchell*, 886 S.W.2d 662 (Mo.App.1994) (*citing Hadlock v. Dir. of Revenue*, 860 S.W.2d 335 (Mo. 1993) and reversing the trial court because courts "should not interpret statutes in a way which will render some of their phrases to be mere surplusage. We must presume that every word of a statute was included for a purpose and has meaning.").

Interpreting subsection five as exempting "nonsubdivision bonds" also violates this Court's dictate that it is "fundamental that a section of a statute should not be read in isolation from the context of the whole act. *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15 (Mo. 1995). Here, the whole statute relates to subdivision regulations – subsection five therefore must apply to subdivision bonds that the Legislature desired or needed to exempt from the otherwise applicable limitations. The trial court's interpretation reaches the absurd result of exempting "non-subdivision" bonds that are

not within the scope of Section 89.410 applicable only to "subdivision-related" regulations. §89.410.1 R.S.Mo. This would be as if the legislature expressly stated in the statute that "this section does not apply to bonds to which it does not apply." Nowhere does Section 89.410.5 in anyway state that it only exempts "non-subdivision" maintenance bonds that are unrelated to the subject matter of this section.

Given the undisputed existence of maintenance bonds being used in this subdivision context, the HBA's argument is in essence that the Legislature's *express* preservation of "maintenance" bonds actually was an *implied* abolition of maintenance bonds! This interpretation defies commonsense and any reasonable reading of the amendment.

The HBA also attempted to justify rejection of the plain language because the express exemption for "maintenance" bonds "is plainly a reference to the various statutes by which the Legislature *has* authorized or required municipalities to obtain other types of bonds." (LF 743). The term "maintenance bond," however, does *not* appear *anywhere* in the Revised Statutes of Missouri, and so the Legislature could not possibly have intended to refer to "statutory maintenance bonds" that do not exist. Moreover, subsection five does not exempt "statutorily" required bonds; it exempts maintenance and other specified bonds "required *by* cities, town, and villages."

In one of the most ridiculous arguments to be presented to the trial court, the HBA argued that exclusion of "performance, maintenance and payment bonds *required by* cities, towns or villages" actually referred to general obligation bonds *issued by* cities! (LF 744, attempting to pass off Missouri statutes authorizing cities to issue general

obligation bonds to pay for the construction and “maintenance” of jails or other infrastructure). Unlike its undisputed meaning as a “maintenance bond” in subdivision ordinances across the state, nowhere is the term "maintenance bond" used in any “nonsubdivision related” statute cited by the HBA nor does any statute authorize a city to "require" municipal financing bonds to be issued. Simply put, the HBA *excludes* "maintenance bonds" commonly required by cities in subdivision regulations, while *including* seemingly every other kind of bond wholly unrelated to the subject of the statute.

Finally, the HBA's own statements as to the purpose of the statutory amendment also contradicts the interpretation it now espouses. Prior to this litigation, the HBA consistently stated that the purpose for the changes to Section 89.410 was merely a “prompt pay act,” and at no such time did the HBA ever identify the abolition of the maintenance bonds as a purpose or effect of the statutory amendment. (*See* LF 483-84, HBA's "description of the purpose behind the escrow language”; LF 478-82, Bilderback Dep. 108-12; 115-120, no documents known by HBA referencing "maintenance bonds" as an issue relating to the Legislation and no discussions known or recalled that "maintenance" was discussed as an issue; LF 312-13, Uncontested Fact Nos. 34 & 35). Never once during this time did the HBA claim that the procedures for “actual construction” bonds actually abolished subdivision maintenance bonds statewide by a provision that expressly preserves them.

**(2) Application of the plain language does *not* defeat the legislative intent.**

The trial court's interpretation that Ordinance 675 contradicts the language of the statute was premised on a faulty conclusion that accepting the obvious meaning of "maintenance" bonds would defeat the "manifest intent" of the statute because the other exempted bonds -- "performance and payment bonds" -- would wholly exempt all bonds from the regulation.

In focusing on the meaning of "performance bonds," the trial court premised its holding on a dispute not even remotely before it and involving a case even more hypothetical than the facial dispute as to "maintenance" bonds. No evidence whatsoever was presented as to the meaning of performance bonds in this context and no dispute relating to the meaning or application of "performance" bonds was ever raised.

Moreover, the assumption that one of the three exempted bonds *could* be construed broadly is not a justification to reject the obvious and plain meaning of the other two exempted bonds, nor is it a reason to interpret the exemption to apply only to bonds that are already not governed by the statute. The plain reading of the exception in Section 89.410.5 does not nullify the statute because each bond can and should be interpreted to have a meaning in a subdivision regulation and which does not wholly exempt regulation of "actual construction" bonds addressed in subsections two and three.

The exception is clearly explained as an exemption by the Legislature of certain "subdivision-related" bonds which it would reasonably *not* want to prohibit or require to be returned within a mere thirty (30) days after "completion" of improvements. The Legislature reasonably exempted "maintenance bonds" from the release provisions

because, unlike "actual construction" bonds, maintenance bonds continue to serve an important purpose in protecting the public both before and after construction is complete. For example, while a construction bond ensures that a street or stormwater improvement is ultimately installed, a maintenance bond makes sure that mud and debris is kept clear of the road, that erosion control is maintained for a minimum period of time, and that the improvements are "maintained" in a safe and appropriate manner. Accordingly, the exemption of maintenance bonds does not nullify the subsections as they continue to regulate bonds for "actual construction" of the improvements.

The exemption of payment and performance bonds similarly does not nullify the regulation of "actual construction" bonds but rather exempts other specific types of bonds that reasonably should not be subject to the construction bond requirements. Like maintenance bonds, each of "performance" and "payment" bond also performs distinctly different purposes. *See Miller-Stauch Const. Co. v. Williams-Bungart Elec.,* 959 S.W.2d 490 (Mo.App. 1998) (distinguishing "payment" and "performance" bonds in that a "payment bond" required payment to the subcontractor whereas the "performance" bond guaranteed the contractual obligations). For example, "payment bonds" are required in certain circumstances to be posted by contractors on street and other projects for political subdivisions to ensure "payment" of subcontractors on the project. *See Nat'l Oil & Supply, Inc. v. Vaughts, Inc.,* 856 S.W.2d 912 (Mo. App. 1993) ("payment bond" provision applied pursuant to §107.170.2 R.S.Mo.). Section five reasonably exempts "payment bonds" required by cities in subdivision-related regulations because even if the subdivision improvement is complete, the municipality has a legitimate concern that the

subcontractor be paid for completion of these public subdivision improvements. Release of the bond within thirty (30) days, however, makes no sense where the purpose of the bond is to guarantee payment of the subcontractor, not construction of the improvement. Moreover, as these bonds are not expressly authorized in subsections one through four, they too would be prohibited in the subdivision context under the HBA's interpretation, a result that would directly violate §107.170 R.S.Mo., which mandates payment bonds without regard to whether the improvement is "subdivision-related" or not. The exemption was therefore necessary to retain municipal authority to require the exempted bonds in subdivisions approvals.

Finally, the only potentially ambiguous term is the "performance" bond seized on by the trial court and also not part of any controversy with Ordinance 675. While it is certainly possible that a "performance" bond could include a bond for "actual construction," such a broad interpretation would nullify Section 89.410, and would therefore be an unreasonable interpretation (even in the purely hypothetical case before us today). Rather, given the clear meaning of the other two bonds in the subdivision context, "performance bond" must also refer to a bond in the subdivision context as may be required by a city to complete certain obligations that were not subject to "actual construction" regulations. For example, Section 89.410 expressly authorizes subdivision requirements to be imposed to obtain "adequate open spaces." While dedication of land or vacation of easements for such space could be required prior to platting, it certainly could also be guaranteed by a performance bond "in lieu" immediate compliance, such as when the developer does not want to vacate a road easement until the development is

complete. Similarly, a subdivision requirement relating to periods of time in which landscaping or erosion control must survive is an appropriate subject for a "performance" obligation as opposed to an "actual construction" obligation. Thus, any subdivision obligation that does not involve "actual construction" of an improvement could be exempted from a requirement that the bond be released within thirty (30) days of completion of construction. This interpretation not only protects the purposes of the statute for "prompt release" as to actual construction escrows, it is absolutely necessary to avoid abolition of all bonds, including subdivision maintenance, payment and performance bonds that do not involve actual construction.

The scope of the "payment" bond and "performance" bond exemptions, however, is simply not before this Court, and any definitive interpretation of the scope of those terms should await a ripe controversy. But because the meaning and application of "maintenance" bonds clearly includes guarantees required in subdivision ordinances, such as Ordinance 675, the Court need only affirm the validity of the Ordinance as to the limited issue before it.

### D. Ordinance 675 does not conflict with Section 89.410 even under HBA's interpretation.

Even under the HBA's erroneous reading of the statute, Ordinance 675 would not conflict with the statute. The HBA alleges a "facial" challenge to Ordinance 675 on the basis that it would require retention of a deposit in an amount or during a time (post-completion) contrary to §89.410. (LF 730). An ordinance must be construed to uphold its

validity unless it is expressly inconsistent or in irreconcilable conflict with the statute. *McCollum v. Dir. of Revenue*, 906 S.W.2d 368 (Mo. 1995).

Here, there simply is no facial conflict. The words of the statute do not prohibit including maintenance as part of an "actual construction" bond rather expressly authorize the City Council to require other "reasonable conditions" as part of such bonds. . §89.410.2 R.S.Mo . Likewise, the words of the ordinance do not authorize or require anything prohibited by the statute.

Even under the HBA's erroneous claim that maintenance bonds are subject to the 30-day release requirements of 89.410.3, there is nothing in the Ordinance that conflicts with this requirement. The HBA offers no proof that even one maintenance bond has actually ever been held after enactment of SB 20 for more than 30 days after completion of the improvements. Meanwhile, the City offered undisputed evidence that no maintenance deposits were being held for any subdivision in which the improvements were completed. (LF 312, Undisputed Fact No. 30). Moreover, as discussed above, the evidence was that the amounts of the bonds were not even enough to complete the improvements, there was no evidence that even the total amount of the construction and maintenance bonds added together has exceeded the "actual cost" of the improvements (the standard alleged by the HBA).

The City requires a maintenance guarantee to ensure that a developer safely maintains improvements "upon commencement of installation of the required

improvements." And the guarantee is released upon the sooner of one of two events[5] – either of which may occur *prior* to completion of any or all improvements. (LF 170, §1005.080.6). Moreover, Section 6(b)2 permits the Director of Planning to grant releases earlier to the extent such amounts are "necessary for completion of the maintenance obligations." While the maintenance guarantee conceivably *could* extend to a time after completion and in excess of the *purported* five percent retention cap, the HBA does not allege that that actually ever has occurred. Thus, the HBA's facial challenge is not only wrong in its interpretation of the statute, it depends on an event that is not required by the ordinance and in fact may never happen.

### E. A valid police power regulation is not limited by the procedural requirements of Chapter 89 for subdivision regulations.

Even if this Court ignored the express exemption for "maintenance" bonds, the City did not adopt the maintenance requirement solely as a subdivision related regulation. Ordinance 675 is express that the maintenance guarantee section (1005.080) was adopted under statutory authority and the City's authority as a charter city and under its authority to regulate housing, construction, sanitary sewers, grading, and rights-of-way acceptance and management. (LF 153; Ord. 675, App. B). While the maintenance bond is certainly a typical part of subdivision regulations, and the statute expressly preserves them in that

[5] Deposits are released upon the sooner of 18 months after dedication of the improvement or 18 months after occupancy permits are issued for 95% of the lots.

context, the City would still retain public safety authority to enforce Ordinance 675 to ensure maintenance even without authority under Chapter 89. The purpose of the maintenance bond (keeping streets clear of debris, remedying unsafe conditions, replacing dead vegetation) is within a city's police power, even if it could *not* be enacted as a subdivision regulation. The fact that subdivision regulations also affect public safety does not mean that all ordinances affecting subdivisions that regulate health and safety are limited by the requirements for subdivision ordinances in Chapter 89.300 *et seq*. *See City of Green Ridge v. Kreisel*, 25 S.W.3d 559 (Mo.App. 2000) (junkyard regulations authorized as public safety regulations even though enacted in violation of requirements of Chapter 89 for enactment of zoning).

The HBA previously has argued that Wildwood cannot require maintenance guarantees because no provision in Chapter 89 of the Revised Missouri Statutes expressly allows a city to require such guarantees. The HBA bases this argument on a misapplication of *City of Springfield v. Goff*, 918 S.W.2d 786 (Mo. 1996) ("[s]ections 89.010 to 89.140 constitute the sole source of authority for cities in *zoning* matters."). (emphasis added). The HBA contends that this language prevents Wildwood from taking any action not expressly authorized by Chapter 89. Because Subsection 89.410.1 imposes procedural requirements on all subdivision escrows authorized therein, the HBA argues that failure to authorize maintenance bonds (except of course where it expressly exempts them) must therefore mean they are prohibited.

The regulation at issue here is simply not a *zoning* regulation (enacted under §§89.010 -140 R.S.Mo.), and even if it were described as a *subdivision* regulation

(subject to §89.300 R.S.Mo., *et seq*.), courts have held that subdivision regulations are bound only by the authority provided in Chapter 89. The HBA's argument to the trial court was the same argument that was essentially raised by the HBA and *rejected* in *Home Builders Ass'n v. City of St. Peters*, 868 S.W.2d 187 (Mo.App. 1994), where the HBA challenged an ordinance requiring the subdivider to fund the initial subdivision association so that it could enforce the covenants. While the court agreed that neither §§89.410 nor 445.030 R.S.Mo. (also regulating subdivisions) authorized the regulation, the court nevertheless upheld the requirement not as a subdivision regulation, but as a police power regulation authorized pursuant to the general police power authority of §79.450 R.S.Mo. (*See* §82.190 R.S.Mo., which provides charter cities exclusive control over public streets and places which would include subdivisions, notwithstanding "any law of this state to the contrary.").

For each of the reasons stated above, this Court should vacate the summary judgment in favor of the HBA and order judgment as a matter of law against HBA and in favor of the City.

## III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE HBA BASED ON THE AMENDMENT TO R.S.MO. §89.410 ENACTED BY SB 20 BECAUSE THE TITLE TO SB 20 "RELATING TO COMMUNITY IMPROVEMENTS" DOES NOT "CLEARLY EXPRESS" THE SUBJECT MATTER OF THE LEGISLATION AS MANDATED BY THE MISSOURI CONSTITUTION ARTICLE III, §23 IN THAT THE TITLE IS EITHER TOO RESTRICTIVE OR TOO BROAD AND AMORPHOUS.

As if an exercise from the popular children's program *Sesame Street*, even a glance at the bill summary for SB 20 suggests the jingle "one of these things is not like the others." (LF 431-33). The Current Bill Summary for SB 20 indicates that it "Authorizes and revises community improvement programs" and includes the headings "Home Equity," "Rebuilding Communities and Neighborhood Preservation Act," "Tax Credit for Community Improvement," "Special Assessments" and "Zoning and Planning." At least one of these things just doesn't belong.

As a result, the City has consistently asserted in its affirmative defenses (LF 302-3), its motions to dismiss (LF 118-19, 254), its motion for summary judgment (LF 318, 546-553), and in its response to the HBA's motion for summary judgment (LF 1043-44) that the HBA's claims were also barred because SB 20 on which it relied contravened the Missouri Constitution. The trial court failed to specifically address these serious

constitutional claims (App. C) and the HBA utterly failed to negate the elements of these defenses.

Consequently, neither the trial court nor the HBA can rely on the amended Section 89.410 because SB 20 which purports to amend Section 89.410 violates multiple provisions of the Missouri Constitution mandating certain procedures for enactment of legislation to safeguard the public. The procedural limitations are contained in Article III, sections 21 and 23 and are designed to "facilitate orderly legislative procedure" ensuring that the issues presented by each bill are clearly presented for more intelligent debate. *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. 1994). These limitations also have a number of other purposes: (1) to prevent "logrolling" (i.e., the practice of combining a number of unrelated amendments in a bill, none of which could garner enough votes to pass, but which, taken together, combine the votes of a sufficient number of legislators who are interested in one portion of the amended bill to command a majority for the entire bill); (2) to prevent surprise in the legislative process by prohibiting legislators from surreptitiously inserting unrelated amendments into the body of a bill; (3) to assure that the public is apprised of the subjects of legislation being considered in order to allow an opportunity to be heard on the bill; and (4) to allow the governor to line item veto those portions of appropriations bills with which he disagrees. *Hammerschmidt*, 877 S.W.2d at 101-02.

So, while legislative acts carry a presumption of constitutionality, this Court must invalidate legislation if the bill clearly violates the requirements of Article III, Section 23

that the bill's title be clearly expressed in its title. *Home Builders Ass'n v. State*, 75 S.W.3d 267 (Mo. 2002). Article III, Section 23 provides in relevant part:

> ***Limitation of scope of bills—content of title—exceptions***. No bill shall contain more than one subject which shall be clearly expressed in its title ….

This constitutional mandate that a subject be "clearly expressed" in a bill's title can be violated in one of two ways: (1) the subject may be so general or amorphous as to violate the single subject requirement; or (2) the subject may be so restrictive that a particular provision is rejected because it falls outside the scope of the subject. *Fust v. Attorney Gen.*, 947 S.W.2d 424 (Mo. 1997).

In this case, the title of the final version of SB 20 was an Act:

> To repeal sections 88.812 and 89.410, RSMo. 1994, and sections 32.110, 32.111, 32.112, 32.115, 67.1421, 67.1461, 67.1501, 67.1531, 135.530 and 135.535, RSMo. Supp. 1998, 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.

This title facially violates the constitutional provision and cannot be enforced against the City.

First, the restrictions abolishing maintenance bonds in subdivisions and a mandate that construction bonds be limited to initial actual cost of construction without allowance for inflation or other contingencies is not even reflected in the statute, much less in the title. Neither is there even a generic reference to subdivision escrows or bond release procedures. The title only indicates that it relates to programs for "community

improvement." The bill's diverse subjects, "absent specific itemization, can only be clearly expressed by their commonality—by stating some broad umbrella category that includes all the subjects within its cover." *Nat'l Solid Waste Mgmt. Ass'n v. Dir. of Dep't of Natural Res.*, 964 S.W.2d 818 (Mo. 1998). But, because SB 20 also includes an amendment dealing with subdivision platting requirements of cities, towns and villages, the title becomes unclear because it requires the reader to "search out the commonality" between the community improvement programs and subdivision platting procedures. *Id.* In other words, where a title of a bill does not generally indicate what the bill contains but "descends to the particulars and details," the bill must conform to the title. *Id*. (finding title of bill "relating to solid waste management" unconstitutionally underinclusive because it also pertained to hazardous waste management—the title gave "the reader the mistaken impression that the bill pertains to solid waste management only"). Thus, because the title is so restrictive and underinclusive that it does not reflect specific subjects contained in the bill--community improvement programs, special assessments and regulation of subdivision escrows--the title fails to conform to the bill making it affirmatively misleading.

Conversely, if interpreted, as the HBA has argued[6] that all contents of the Bill "relate to various forms of 'community improvement,'" then the title ("relating to

[6] The HBA argued that all of SB 20's provisions, including programs to guarantee home values, state tax credits, municipal assessments for sidewalk and street repairs, and

Continued on Next Page

community improvement") is so general or amorphous that it violates the clear title and single subject rule. *See Carmack v. Dir. of Mo. Dep't of Agric.*, 945 S.W.2d 956 (Mo. 1997) (words "economic development" were "too broad and amorphous to describe the subject of a pending bill with the precision necessary to provide notice of its contents" – "nearly every act the State undertakes falls within the meaning of economic development").

Close examination of the actual sections cited in the title reflects that, except for Section 89.410 (and arguably Section 88.812), the cited sections relate generally to community improvement *programs*–curiously also the original stated purpose of the Bill. (LF 239). The sole original contents of SB 20 were 22 *new* sections to Chapter 67 (§§67.1600-1663) that created a new "home equity program." (LF 322-23). SB 20 only added new sections, it did not repeal any. (LF 322).

Afterward, SB 20 was amended to repeal sections 67.1421, 67.1461, 67.1501 and 67.1531 in the Community Improvement District Act (which provides for levying a tax on the property and businesses in the district) and replace them with new sections of the same numbers. Later additions to SB 20, Sections 32.110-112 and 32.115 of Chapter 32 (entitled "Department of Revenue"), were provisions in the Neighborhood Assistance Act which similarly provides for tax credits for business firms that engage in "providing

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escrows for subdivision infrastructure, "are incidents and means to the overall subject of 'community improvement.'" (LF 1116).

affordable housing assistance activities or market rate housing in distressed communities." Correspondingly, Sections 135.530 and 135.535 of Chapter 135 (entitled "Tax Relief"), relate to tax credits and define "distressed communities" and the mechanisms for tax credits for corporations moving into distressed communities.[7] All of these sections relate to programs that benefit distressed communities.

Finally, one of the late additions, Section 88.812 (authorizing third class, fourth class and charter cities to levy and collect special tax bills for construction and repair of sidewalks, curbs, gutters, streets, alleys, etc.), was amended to allow charter cities to provide for assessments upon such terms, conditions and procedures as are contained in the charters or ordinances. The title "community improvement" even if broadly interpreted might include all of these sections (although §88.812 is a stretch). But under no circumstance can such title encompass the entirely unrelated regulations in Section 89.410 for the benefit of developers, establishing police powers relating to subdivision authority and in no way part of the taxing authority or a community improvement program.

Undaunted, however, the HBA offers that city, town or village regulations relating to subdivisions of land, is "related to community improvement" because subdivisions have streets, sewers and houses which may "improve" the community. But, as with the

[7] Vernon's Annotated Missouri Statutes references two Sections 135.535 indicating that the section was amended twice in 1999—by SB20 *and* HB701.

infirm title in *Carmack*, such a broad reading of "community improvement" renders the title meaningless. If such a broad reading was constitutional, legislation restricting obscenity, reducing crime, promoting voting, protecting religious worship, regulating billboards or nuisance buildings, or even authorizing cities to provide fiber optic telecommunications to its residents might all reasonably be described as legislation relating to "community improvement." Indeed, would any Legislature ever describe any of its enactments to be anything other than for community improvement?

It is clear that "community improvement," if not meant to relate to programs to revitalize blighted and distressed areas, is such a broad phrase that under its common and ordinary meaning includes anything that enhances the value of part or all of the state of Missouri or even "society at large." (*See Merriam-Webster Collegiate Dictionary, 10th Ed.*). This Court has time and again rejected the Legislature's use of such laconic and uninformative titles. The title of a bill "cannot be so general that it tends to obscure the contents of the act" or "be so broad as to render the single subject mandate meaningless." *See, Carmack*, 945 S.W.2d at 960 (words "economic development" were "too broad and amorphous to describe the subject of a pending bill with the precision necessary to provide notice of its contents" – "nearly every act the State undertakes falls within the meaning of economic development"); *Nat'l Solid Waste Mgmt. Ass'n*, 964 S.W.2d at 821 ("solid waste management" does not include hazardous waste management); *St. Louis Health Care Network v. State*, 968 S.W.2d 145 (Mo. 1998) (finding a violation of clear title where bill related to "certain incorporated and unincorporated entities"); *Home Builders Ass'n*, 75 S.W.3d 267 (Mo. 2002) (finding a violation of clear title provision

where bill related to "property ownership"). If interpreted as contended by the HBA, this title "relating to community improvement" fails for the same reason as those entitled, "relating to certain incorporated and unincorporated entities" and "relating to property ownership." These general phrases fail to give notice of the statute's actual content since the title could describe most all legislation passed by the General Assembly.

Because the title of SB 20 clearly violates this constitutional mandate, the enactment is void and cannot form the basis of a judgment. Accordingly, summary judgment in favor of the HBA should be vacated and summary judgment against the HBA should be granted

## IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE HBA AND BASED ON THE AMENDMENT TO R.S.MO. §89.410 ENACTED BY SB 20 BECAUSE SB 20 VIOLATED ARTICLE III, §23 OF THE MISSOURI CONSTITUTION IN THAT IT CONTAINED MORE THAN ONE SUBJECT.

Although similar to a violation of the "clear title" mandate, the Bill also violates the second aspect of Article III, §23 of the Missouri Constitution because it contains "more than one subject." By including at least three or more separate subjects in the Bill, the Legislature violated the single subject prohibition.

Pursuant to Section 23 of the constitution, a bill contains more than one subject if all of its provisions are not fairly related to the same subject, do not have a natural connection therewith *or* are not incidents or means to accomplish the bill's core purpose. *Hammerschmidt*, 877 S.W.2d at 102. The test for whether a bill contains a single subject

focuses on the title of the bill. *Missouri Health Care Ass'n v. Attorney Gen.*, 953 S.W.2d 617 (Mo. 1997). If the bill's title is not too broad or amorphous to identify the single subject of the bill, then the bill's title serves as the touchstone for the constitutional analysis. *Id. citing Carmack v. Dir. of Mo. Dep't of Agric.*, 945 S.W.2d 956 (Mo. 1997). The test is not whether the individual provisions of the bill relate to each other but whether the particular provision under consideration fairly relates to the subject described in the title, has a natural connection to the subject or as a means to accomplish the laws purpose. *Fust v. Attorney Gen.*, 947 S.W.2d 424 (Mo. 1997). Where an amorphous title to a bill renders its subject uncertain, the court may determine the subject of the bill by examining the contents of the bill originally filed to determine its subject. *Carmack*, 945 S.W.2d at 960. Whether a bill violates the single subject rule first requires a determination as to whether the bill's provisions fairly relate to, have a natural connection with, or are a means to accomplish the subject of the bill as expressed in the title. *Missouri Health Care Ass'n*, 953 S.W.2d 622.

As noted above, the final title of SB 20 was:

> "An Act To repeal sections 88.812 and 89.410, RSMo. 1994, and sections 32.110, 32.111, 32.112, 32.115, 67.1421, 67.1461, 67.1501, 67.1531, 135.530 and 135.535, RSMo. Supp. 1998, *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."

(emphasis added).

The amendment to the Bill amending Section 89.410 was added three days prior to the end of the legislative session and buried within its voluminous text dealing with home equity programs, community improvement districts, neighborhood assistance tax credits and special assessments for sidewalks. All these subjects were added to a bill that, at least originally, was designed to encourage and sustain home ownership in economically disadvantaged areas through the Home Equity Program Act (the original sole purpose of SB 20). Moreover, the Home Equity Program Act and the section pertaining to the Rebuilding Communities and Neighborhood Preservation Act, at least arguably, could be considered related to "community improvement" as originally intended by SB 20. The same cannot be said of the portion of the Bill purporting to amend Section 89.410. The subject amendments to SB 20 do not fairly relate to, have a natural connection with, or accomplish the stated goal of a community improvement program. After all, Chapter 89 R.S.Mo., relates to zoning and subdivision actions by cities, towns and villages and has no relation to taxing authority or government programs to guarantee home equity in deteriorating inner-city neighborhoods (which are already subdivided!).

Such melding together of multiple matters under excessively general headings renders the single subject restriction meaningless. *Missourians to Protect Initiative Process v. Blunt*, 799 S.W.2d 824 (Mo. 1990). Thus, the title "community improvements" in and of itself, if it is to be considered to encompass zoning and subdivision regulations, sidewalks and curbs, as well as the taxing authority and home equity programs, violates the constitution.

SB 20 must suffer the same fate as the unconstitutional bill in *Hammerschmidt*.

In that case, a bill "relating to elections" was challenged because it violated the single subject requirement. *Hammerschmidt*, 877 S.W.2d at 99. After introduction, an amendment was added that provided that a certain county could adopt an alternative form of charter. As here, the title remained the same. *Id*. at 100. This Court found a violation of Article III, §23 even though the challenged amendment dealing with charter counties contained provisions requiring voter approval (hence, an election), as its *raison d'etre* was to authorize a new form of county governance. As such, this Court concluded that:

> [T]he bill sent by the legislature to the governor contained two subjects. The amendment authorizing a county to adopt a county constitution does not fairly relate to elections, nor does it have a natural connection to that subject. Further, provisions of a bill vesting authority in counties to adopt a new form of government are not necessary incidents nor do they provide a means to accomplish the purposes of a bill to amend laws "relating to elections."

*Id*. at 103.

Likewise, an amendment regulating "bonds relating to escrows for subdivision related regulations" does not fairly relate to, nor have a natural connection to community improvement. Furthermore, provisions of a bill regulating "bonds relating to escrows for subdivision related regulations" of a city, town or village are not necessary incidents nor do they provide a means to accomplish the purposes of a bill to amend laws designed to revitalize economically distressed areas. So, as in *Hammerschmidt*, this Court should sever the unconstitutional amendment to §89.410 because it contains the additional

subject and permit the bill to stand with its primary, core subject intact. *Id*.

## V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE HBA BASED ON THE AMENDMENT TO R.S.MO. §89.410 ENACTED BY SB 20 BECAUSE SB 20 WAS CHANGED FROM ITS ORIGINAL PURPOSE IN VIOLATION OF ARTICLE III, §21 OF THE MISSOURI CONSTITUTION.

The trial court further erred because original bill amending §89.410 changed its original purpose in violation of Article III, §21 of the Missouri Constitution. Article III, §21 of the Missouri Constitution provides that:

> … **[N]o bill shall be so amended in its passage through either house as to change its original purpose**.…

The rationale behind Section 21 is to control the "introduction of subject matter that is not germane to the object of the legislation or that is unrelated to it original subject." *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. 2000) *citing Stroh Brewery v. State*, 954 S.W.2d 323 (Mo. 1997). The original purpose of a bill is to be measured at the time of its introduction. *Id.*

The original purpose of SB 20, as measured at its introduction, was to amend Chapter 67 to create a home equity program that authorized "a property tax, with voter approval, to be used to protect homeowners against declining property values" by guaranteeing minimum home sale prices in economically depressed areas. The title of SB 20, when introduced was "*An Act To amend chapter 67, RSMo. by adding thereto twenty-two new sections relating to community improvement*." The bill's purpose was

described as "authorizing and revising community improvement programs." (LF 334, 431). But, when finally enacted, after inclusion of the late-session amendments, the Bill now was a home to amendments dealing with such disparate subjects as: (1) modifications to how cities, towns and villages may impose certain bonds securing certain preconditions to the filing of subdivision plats, (2) tax credits for business firms that provide market-rate housing, and (3) authority for special tax bills for macadamizing streets in certain municipalities. These expanded subjects are a far cry from the original purpose of providing for the home equity program and clearly not germane to the "idea as formulated in the first draft of the bill." *See, State ex rel. McCaffery v. Mason*, 55 S.W. 636 (Mo.) *aff'd*, 179 U.S. 328 (1900).

To determine whether the addition of new sections was designed to accomplish the original purpose of the bill, the Court must look to the changes being made to the bill. *See Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2 (Mo. 1984). The prohibition is against the introduction of matter that is not germane to the object of the legislation or is unrelated to its original subject. *Id*. Here, the new subjects added by the tack-on amendments merely provided a foster home for wayward amendments and did nothing to further the original purpose of the bill which instituted home equity programs or even more broadly "community improvement programs" designed to revitalize blighted and economically distressed areas. As the HBA explained to the legislators when lobbying for a bill to which to attach the amendment, the purpose of the proposed amended Section 89.410 was to make that section "much like the Prompt Pay Act [§34.057 R.S.Mo.] for public works projects." (LF 484, 486-87). This subdivision escrow

mini-prompt pay act has *absolutely nothing* to do with *community improvement* and everything to do with "requiring municipalities … to promptly release funds upon installation of" *subdivision improvements*. (LF 484).

In a case much more difficult than this one, this Court found unconstitutional a bill that originally only had the effect of eliminating a *tax deduction* for reinsurance premiums, but was amended to add a *tax* upon insurance premiums and premium receipts. *Allied Mut. Ins. Co. v. Bell*, 353 Mo. 891, 185 S.W.2d 4 (Mo. 1945). The Court held that:

> The only effect of House Bill No. 281, had it been passed as originally introduced, would have been to eliminate the deduction of premiums paid for reinsurance authorized under Section 5857, supra, and *it would seem that the effect of the bill as introduced should have some weight in determining its general purpose*. The purpose of a bill to eliminate the deductions of premiums paid for reinsurance from a statute defining taxable premiums or premium receipts for the purpose of taxation under any law of this state seems different from the effect of a law (Section 5968, R.S.1939) providing a tax upon taxable premiums or premium receipts, although the law providing the tax contained no provision for deductions of premiums paid for reinsurance.

*Id*. at 6 (emphasis added).

Similarly, if the original purpose was a specific community improvement program (the Home Equity program), the Bill violates the change in purpose prohibition because

the final Bill includes much broader purpose including changes to subdivision plat escrow release regulations.[8] To find that the addition of escrow changes related to such subdivision regulations is the "same purpose" as the authorization of a property tax for the Home Equity Program, means that there exists virtually no change in purpose that would ever violate Article III, §21. As with the violation of Article III, §23, the phrase "relating to community improvement," if not limited to the original "community improvement program," is so broad there is no regulation that could not be included.

## VI. THE TRIAL COURT'S JUDGMENT SHOULD BE VACATED AND THE CASE DISMISSED BECAUSE THE TRIAL COURT DID NOT HAVE JURISDICTION OVER THE HBA'S CLAIMS IN THAT THE HBA LACKS STANDING UNDER THE EXPRESS LIMITATION IN R.S.MO. §89.410.4 BECAUSE THE HBA IS NEITHER AN OWNER NOR A DEVELOPER AUTHORIZED TO SUE OR SEEK THE RELIEF SOUGHT AND OBTAINED.

This Court is "compelled to address the standing of the [HBA]. Standing is akin to jurisdiction over the subject matter, *in limine*. *State ex rel. Schneider v. Stewart*, 575 S.W.2d 904 (Mo.App. 1978). As such, the question of a party's standing may be raised at

[8] On the other hand, if the purpose was not a community improvement program (i.e., the Home Equity Program), but rather the amorphous purpose of improving the community, then it violates the clear title mandate.

any time, and even *sua sponte* by this Court." *State ex rel. Mathewson v. Bd. of Election Comm'rs*, 841 S.W.2d 633 (Mo. 1992) Accordingly, notwithstanding that the court of appeals reversed the trial court's dismissal of the First Amended Petition for lack of standing, the trial court lacked jurisdiction to decide the Second Amended Petition and it must be dismissed if the HBA has no standing. *Id*.

The standing conundrum evolves from the HBA's sole basis for relief in this action—that the City violated §89.410. The HBA does not dispute that actions to enforce §89.410 are limited to "owners or developers." That Section could not be clearer in imposing its limitation:

> . . . 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 brought pursuant to this section, the court may award the prevailing party *or* the city, town or village[9] the amount of all costs attributable to the action, including reasonable attorneys' fees.

§89.410.4 (emphasis added), Appendix A. Section 89.410.4 also limits to such owner or developer the recovery of attorneys' fees and "interest at the rate of one-half percent per

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[9] Another interesting result could arise under subsection 4 of 89.410 in that, if interpreted literally, the city, town or village could never be the "prevailing party" but could still be awarded all costs attributable to the action.

month calculated from the expiration of the thirty-day period until the escrow funds have been released." (App. A).

Here, because the HBA is not and does not claim to be an "owner or developer," it instead attempts to (and persuaded the Court of Appeals to enable it to) be a "virtual" owner or developer. As such, it claims standing not as an aggrieved party but in a "representative capacity" of some of its members (none specifically alleged or in controversy) who are allegedly affected. Yet, after multiple amendments of pleadings the HBA still failed to allege or ultimately prove even one actual member with a specific escrow claim, no specific escrow subject to the "thirty-day period," no dates or amounts triggering the entitlement to interest, no proof that escrows were held after any improvements were "certified" complete as required no facts of kind as to any specific member grievance necessary for determining a claim under Section 89.410.4. The HBA has cross-appealed for its attorneys' fees pursuant to 89.410.4.

While representative standing has been upheld to allow an association to assert unrestricted claims of its members, the court of appeals erred in extending, for the first time in Missouri history, representative standing to a statutory cause of action expressly *limited to certain individuals or entities*. By doing so, the Court of Appeals contradicted the express standing limitations set forth in the statute.

Because of the Legislature's express intention to limit who may bring suit by inclusion of the limiting language "owner or developer," the HBA once again seeks to ignore the Legislature's language and insert its own. Specifically, the HBA seeks to insert the phrase "and developer associations" to the two specified parties entitled to seek

relief under §89.410. The Legislature, however, intended no such thing, given that such disputes involving the "thirty-day period" necessarily involve individualized enforcement issues, contracts and defenses that are not common to all members of the HBA.

Unlike common law claims, when the legislature specifies what parties may bring a statutory cause of action, only those parties whom the legislature has identified have standing to file that claim. *See Mo. Ass'n of Counties v. Wilson*, 3 S.W.3d 772 (Mo. 1999) (denying standing to not-for-profit association and political subdivisions under the Hancock Amendment because the Hancock Amendment grants the right to sue only to "any taxpayer"); *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918 (Mo. 1995) (denying standing to school districts to sue for violation of the Hancock Amendment because school districts are not "taxpayer[s]"); *Sauter v. Schnuck Markets, Inc.*, 803 S.W.2d 54 (Mo.App. 1990) (refusing to allow any person other than a duly appointed "personal representative" to bring a personal injury suit under R.S.Mo. § 537.020, the Missouri survival statute); *see also Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983) (stating that only those persons specified by ERISA may bring actions under that statute) (*superceded by statute on other grounds*). Moreover, when the Legislature wants to give standing to an association in a statutory cause of action, it has expressly done so. *See* §89.491 (expressly granting "neighborhood organization" standing to sue on private cause of action for violation of zoning ordinances).

Despite the cases rejecting standing where the association or party does not meet the statutorily-specified requirements of standing, the court of appeals reversed the trial court in this case and held that associations that do not meet the requirements of the

statute may still sue under a statute if its members would satisfy the standing requirements. (LF 137, *Home Builders Ass'n v. City of Wildwood*, 32 S.W.3d 612 (Mo.App. 2000)). In reaching this expansive conclusion, the Eastern District was first forced to rely on a *vacated* Western District decision, *State ex rel. Mo. Health Care Ass'n v. Mo. Health Facilities Review Comm*., 768 S.W.2d 559 (Mo.App.1988). (LF 137). It then allowed the HBA "representational standing" even while acknowledging that:

> a request for monetary relief usually does require membership participation. . . (citation omitted). Here, the requests for relief are prospective, and not monetary.

*Home Builders Ass'n*, 32 S.W.3d at 615, *citing Ferguson Police Officers Ass'n v. City of Ferguson*, 670 S.W.2d 921 (Mo.App. 1984). Both the legal and factual conclusions of the court of appeals were wrong.

Factually, not only did the HBA seek "monetary" relief in the form of the return of escrowed funds plus interest, but the trial court actually granted that relief! (LF 150, 1150, Judgment ordering Wildwood to "immediately return all escrow amounts now held by the City in excess of those authorized…" plus "the interest set out in §89.410…"). It is unimaginable how the City will be able to honor such a judgment given that that it purports to apply to unnamed escrows for which there is no dispute or adjudication as to whether or what improvements were completed or "certified" complete and no way to determine on what amount and when the "thirty-day period" commenced. Would contrary contract terms be ignored? Would interest run where a maintenance amount had been taken but now the total amount held was less than "actual construction" due to

releases by the City in the past? Simply put, the HBA sought and obtained "as applied" monetary relief with no "as applied" disputes, facts or parties.

Given this factual error by the court of appeals, the HBA clearly did not meet the general standing requirements for associations even if the statutory limits on standing requirements were ignored. At common law, an association has standing to represent its members where three requirements are met:

> (a) its members must otherwise have standing to bring suit in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Mo. Growth Ass'n v. Metro. St. Louis Sewer Dist.*, 941 S.W.2d 615 (Mo.App. 1997). These are the three factors established in *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977).

Hunt and Missouri law both grant organizational standing to sue in a representative capacity only if "**neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit**." *Mo. Growth Ass'n, 941 S.W.2d at 621 citing Hunt.* (emphasis added). The HBA cannot satisfy this third requirement because the HBA's claims sought and obtained monetary relief that requires the individual members and their specific escrows and circumstances to be before the court. Moreover, such representational standing does not apply to corporate entities such as the HBA. *Citizens for Safe Waste Management v. St. Louis County*, 810 S.W.2d 635,

639 (Mo.App. 1991)(denying representational standing, where as here, association was a separate corporate entity). (LF 139).

Similarly, the court of appeals erred as a legal matter because the HBA's claims require individual members as a matter of the express statutory language because §89.410.4 specifically requires participation of individual members in granting standing only to "owners and developers." Just as the non-profit association, school districts, and political entities were not a "taxpayer" for purposes of standing under the Hancock Amendment, case cited above, and heirs are not a "personal representative" for purposes of the Missouri survival statute, the HBA is not an "owner or developer" under §89.410– the individual whose "participation" is required by §89.410.4. If the HBA has standing here, then every local, regional and federal taxpayer union, association and organization will have standing to assert Hancock amendment challenges (and seek legal fees) anywhere in the state against any state or local enactment as long as at least one Missouri taxpayer is among its members. This clearly contradicts the language and results of the decisions of this Court cited above.

Federal courts also agree that a representative association cannot sue where the statute specifies members they may sue. In *McCabe v. Trombley*, 867 F. Supp. 120 (N.D.N.Y. 1994), for example, the court denied standing to a union to represent ERISA plan participants because the statute allowed only a "participant, beneficiary, fiduciary, or the Secretary of Labor" to sue. *See id*. at 124. The court noted, "[s]tanding for employee organizations is not mentioned in the statute, and this court cannot substitute its will for the will of Congress." *Id.; see also Comms. Workers of Am., AFL-CIO v. Anzaldua*, 80 F.

Supp. 2d 631 (W.D. Tex. 1999) ("[T]he appropriate forum to obtain standing to bring ERISA claims on behalf of association members is the legislative branch"; even the fact that the labor union "negotiated a benefit plan on behalf of its members" was not sufficient to give the union standing). Because the statute specifies those entities that have standing to sue, federal courts have stated that the *Hunt* analysis is unnecessary. *See Comms. Workers of Am., AFL-CIO,* 80 F. Supp. 2d at 634.

Additionally, the relief available for a violation of §89.410 demonstrates that the HBA is not an appropriate party to sue for a purported violation of the statute. Section 89.410 allows an aggrieved owner or developer only to recover repayment of funds held in escrow plus interest and costs, including attorneys' fees. *See* § 89.410.4, App. A. No other remedy is granted. The remedial scheme reflects the Missouri General Assembly's intent that a cause of action should lie only when an owner or developer seeks to develop property, provides construction guarantees for that development, and subsequently claims a *specific* denial of rights granted as to those *specific* funds. This Court cannot override the expressed intention of the Missouri General Assembly. *See Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841 (Mo. 1995) ("There is no room for construction even when a court may prefer a policy different from that enunciated by the legislature.") The HBA does not own property in the City, does not have a proposal to develop property as §89.410 anticipates, nor has it paid any funds into a maintenance or construction escrow. It is not entitled to standing or relief.

Finally, the fact that the HBA seeks declaratory or injunctive relief, relief not available under §89.410 for a violation of that section, does not help HBA obtain

standing to sue Wildwood for enacting Ordinance 675. The HBA's entire case depends solely on §89.410 and it expressly sought and obtained relief under §89.410.4. As discussed above, that statute specifies the only relief available for a claimed violation of its provisions. The Missouri Declaratory Judgment Act does not permit a party to use a declaratory judgment action to evade such a statutory limitation on relief available for a purported violation of that statute. *Adkisson v. Dir. of Revenue*, 891 S.W.2d 131 (Mo. 1995) ("The declaratory judgment act is not an appropriate remedy where a different specific statutory method of review is provided and that method is adequate.").

Here, the Legislature has given aggrieved parties an adequate method for gaining review of Wildwood's ordinance: If an owner or developer is aggrieved by a city's actions alleged to be in violation of §89.410, that owner or developer may sue to recover funds held in escrow, interest, and costs. *See* §89.410.4.

The only relief granted in §89.410 is specific relief to specific owners and developers who are actually aggrieved by the holding of funds in violation of the statute. Missouri law should not be expanded to grant representational standing contrary to the language of a statute limiting standing only to the member owners and developers. Moreover, even if so expanded, the HBA did not meet the elements of common law representational standing because it did in fact seek (and obtain) monetary relief and other claims dependent on individual member claims. The judgment should be vacated for lack of HBA standing.

## VII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ORDERING DECLARATORY AND INJUNCTIVE RELIEF TO THE HBA AS TO ALL ESCROWS INCLUDING "FUNDS DEPOSITED PRIOR TO AUGUST 28, 1999" BECAUSE SUCH RELIEF IS IMPROPERLY RETROACTIVE AND RETROSPECTIVE IN VIOLATION OF THE STATUTE AND ARTICLE I, §13 OF THE MISSOURI CONSTITUTION IN THAT RETROSPECTIVE APPLICATION OF NEW ESCROW REQUIREMENTS TO FUNDS ACCEPTED PRIOR TO THE PROSPECTIVE LEGISLATIVE CHANGE WOULD IMPAIR AND ABROGATE EXISTING RIGHTS AND CONTRACTS BETWEEN WILDWOOD AND DEVELOPERS EXECUTED PRIOR TO AUGUST OF 1999.

The trial court's judgment declared that "the amendments to Section 89.410 R.S.Mo., enacted in Senate Bill 20, apply to all escrow deposits held by the City of Wildwood on August 28, 1999." (LF 1150). The trial court then ordered Wildwood to "return all escrow amounts now held by the City in excess of those authorized by Section 89.410 … including such funds deposited prior to August 28, 1999." (LF 1150). As a result, the application of statutory provisions retrospectively and so as to impair existing rights and contracts violates Article I, §13 of the Missouri Constitution's prohibition. *In re Marriage of Haggard*, 585 S.W.2d 480 (Mo. 1979); *Hoyne v. Prudential Sav. & Loan Ass'n*, 711 S.W.2d 899 (Mo.App. 1986) The trial court's judgment improperly applies a prospective statute retrospectively and in so doing also applied the statutory changes in

violation of Art. I, §13 to impair escrow contracts that had established previously lawful requirements.

First, with regard to §89.410's application, this Court presumes that statutes operate prospectively. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo. 1993). Two exceptions are: (1) where the legislature manifests a clear intent that the statute act retroactively, and (2) where the statute is solely procedural or remedial and does not affect the substantive rights of the parties. *Jones v. Mo. Dep't of Soc. Servs*, 966 S.W.2d 324 (Mo.App. 1998). Neither is applicable here.

Neither the trial court nor the HBA offered anything in the statute that indicates a legislative intent to apply to escrows and agreements *previously* accepted. Section 89.410.3 specifically states that the "regulations shall provide" for the escrow requirements. It is undisputed that Wildwood promptly passed its new ordinance establishing "regulations" enacting the new "thirty-day" release period, five percent maximum retention, and other provisions for actual construction bonds enacted in §89.410. Nowhere does the statute authorize, nor could it authorize, the City to pass regulations that abrogate binding contracts by changing the terms of such contracts.

Furthermore, §89.410 is not merely procedural; it affects substantive rights because, when it added restrictions on the terms of cities' ordinances and escrow agreements it took away or impaired a vested right acquired under existing law, created a new obligation, created a new cause of action, and imposed a new duty. *Id*. at 328. Accordingly, the trial court erred in applying the statute retrospectively even to "such funds deposited prior to August 28, 1999," the effective date of the act.

The retrospective application also violates the Missouri Constitution's prohibition against impairment of existing contracts. It is undisputed that the escrows held pursuant to agreements entered into prior enactment of SB 20 were subject to different terms, and that some of those agreements even included assigned agreements dating back to St. Louis County's prior jurisdiction. (LF 908; LF 643, 647, Vujnich Aff.). The contract rights of both the City and developer are altered by the court's acceptance of the HBA's interpretation of the statute because under its view, neither the developer nor the City are legally permitted to continue under the prior agreed terms which authorized the developer's bond "in lieu" of completion of the improvements. Thus, both parties to the agreement would have vested rights destroyed by retrospective application.

Both the City and the developer had, prior to SB 20, agreed on specific provisions regarding release, retention, maintenance and other terms that have now been changed. (*See* LF 636, Vujnich Dep. at 30-31). These agreements were established by the developer so that the developer could avoid the otherwise applicable statutory obligation in §89.410.2 for compliance "precedent to the approval of the plat." But, when the trial court broadly applied the amendments to §89.410 retrospectively to pre-existing subdivisions escrows (and, as a result, to the pre-existing lawful agreements corresponding thereto) and declared subsections (A)(1) and (2), (D)(1) and (2), and (F)(1) - (3) of §1005.080 "void," the court invalidated and eradicated that accommodation to the developers. That is, subdividers in the City who have not yet completed all subdivision infrastructure are now immediately obligated to complete all required improvements because the agreements and guarantee regulation have been invalidated.

Simply put, the court has rewritten the existing contracts (even those not before it) and stripped from the City and the developers, including developers who are not HBA members, (*Compare* LF 920, list of current agreements, *to* LF 927, list of HBA members) and thus not represented, of their *contractual* rights to complete the improvements over a period of years under the binding terms of their agreements.

The trial court's application of the statute to impair or abrogate the existing contracts is unconstitutional. In *Planned Indus. Expansion Auth. v. Southwestern Bell Tel. Co.*, 612 S.W.2d 772 (Mo. 1981), the Missouri Supreme Court held that a statute that altered the property rights of the parties involved retroactively violated the Missouri Constitution's prohibition in Art I, §13 on laws "impairing the obligation of contracts or retrospective in its operation." The Court held that the effect of the invalid law resulted in a "substantial prejudice to the City [and] its many residents." *Id*. at 776. The fact that a municipality was one of the parties whose rights had been retroactively altered did not affect the court's analysis.

The trial court's judgment grants relief in violation of the prospective application of the statute, and if enforced, the statute violates the constitutional prohibition on retrospective application to alter contract rights. The relief granted in the summary judgment as to retrospective application should be vacated.

## VIII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT RELIEF INVALIDATING ENTIRE SECTIONS AUTHORIZING DEVELOPER ESCROWS AND ORDERING UNNAMED FUNDS HELD "IN EXCESS OF THOSE AUTHORIZED BY SECTION 89.410 R.S.MO." BECAUSE THE REMEDY INVALIDATES THE SAME PROVISIONS AUTHORIZING A SUBDIVIDER TO POST BONDS AND PROVIDES NO ADEQUATE BASIS TO APPLY THE JUDGMENT TO ACTUAL ESCROWS IN THAT NO ACTUAL FACTS OF ANY SPECIFIC ESCROW AGREEMENT WERE IN CONTROVERSY AND NO GUIDANCE IS PROVIDED AS TO EACH INDIVIDUAL REMEDY REQUIRED.

As described in Points VI and VII above, and incorporated herein, the remedy of the trial court imposes a general monetary demand as to all escrows without dealing with any specific application necessary to fulfill the judgment. The retrospective application applied to all specific escrows without the facts of any specific escrow places the City in an impossible position. Is the City required to breach or disregard the underlying agreements even though they involve entities who are not parties to the case or even HBA members? Must new agreements be signed, and what is to be done if the developer refuses or does not want to invalidate the prior agreement? What is an amount held "in excess of those authorized by Section 89.410"? For example, if the City had continued its practice of actually releasing funds prior to the time a "category of

improvements" is complete, would that escrow still be in violation of the court's interpretation that the original bond amount is limited to "actual cost," and if so, how would the City remedy that? If an escrow for a developer was released after August of 1999 and before the trial court's judgment, does the City owe interest to that developer even if the amount held is *actually* not enough to complete the improvements?

The prospective relief is also incomprehensible. Given that the trial court declared as void the provisions that authorized the optional escrows "in lieu" of completion prior to plat approval, is the city bound to require completion of all improvements until a new ordinance reauthorized the *optional* construction escrows? Here, there is both a statutory remedy for interest and attorneys fees for the actual developer and owner if in any specific case the City actually did fail its statutory obligations. The trial court's ambiguous remedy is an invitation to every builder in the City to threaten lawsuits based on a judgment that the city cannot possibly honor without violating existing contractual terms.

As noted above, judgment is so amorphous because there is no actual "owner or developer" before the court and no actual controversy subject to the interest, release, and other specific requirements of the statute that require application to specific disputes. The relief granted by the trial court shall be vacated.

## CONCLUSION

**WHEREFORE**, for the reasons stated above, the City requests that this Court reverse the trial court's grant of summary judgment, dismiss the Second Amended Petition or remand for entry of summary judgment in favor of the City, and order that the City receive its attorneys' fees and costs, and such other relief as the Court deems proper.

Respectfully submitted,

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## CERTIFICATE PURSUANT TO RULE 84.06(c) AND (g)

I, Daniel G. Vogel, hereby depose and state as follows:

1. I am an attorney for Appellant City of Wildwood.

2. I certify that the foregoing Brief of Appellant City of Wildwood contains 21,517 words and 1,885 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 2002 word processing software.

4. I further certify that the accompanying 3 ½" disk containing a copy of the foregoing Brief of Appellant has been scanned for viruses and is virus-free.

_____

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was hand-delivered on this _____ day of November, 2002, to:

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