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CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

REGIONAL CONVENTION AND SPORTS COMPLEX AUTHORITY,	)	
Plaintiff,	)	No. 1522-CC00782
vs.	)	Division No. 22
CITY OF ST. LOUIS,	)	
Defendant.	)	

ORDER AND JUDGMENT

The Court has before it Plaintiff Regional Convention and Sports Complex Authority's Motion for Judgment on the Pleadings, and Defendant City of St. Louis' Motion for Judgment on the Pleadings. The Court now rules as follows.

Plaintiff Regional Convention and Sports Complex Authority ("RSA") brought this action to declare invalid City Ordinance 66509, codified as Chapter 3.91 of the Revised Code of the City of St. Louis ("the Ordinance"). Plaintiff alleges that the Ordinance does not apply to its plan to construct and finance the proposed new professional sports facility in the "heavily blighted North Riverfront area" or that the Ordinance is too vague to be enforced and, therefore, void.

On or about May 1, 2015, Defendant City of St. Louis filed an Answer and Motion for Judgment on the Pleadings. On or about May 8, 2015, Plaintiff filed its own Motion for Judgment on the Pleadings. On or about June 12, 2015, Defendant filed an Amended Answer and Counterclaim, and an Amended Motion for Judgment on the Pleadings. The matters were argued and submitted to the Court on June 25, 2015.

A motion for judgment on the pleadings should be granted if there exists no material issue of fact and the moving party is

entitled to judgment as a matter of law based on the face of the pleadings. See Stephens v. Brekke, 977 S.W.2d 87, 92 (Mo.App. S.D. 1998). Where both parties file a motion for judgment on the pleadings, each party's right to a judgment must be determined from a consideration of that party's own motion and as though no motion had been filed by the other party. See Cammann v. Edwards, 340 Mo. 1, 10, 100 S.W.2d 846, 851 (1936).

Under section 527.120 RSMo, the stated purpose of a declaratory judgment action is to "afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." See Damon v. City of Kansas City, 419 S.W.3d 162, 182 (Mo.App. W.D. 2013). A declaratory judgment action is the proper vehicle for testing the validity of an ordinance. Section 527.020 RSMo.

In order to maintain a declaratory judgment action, a plaintiff must satisfy four requirements. First, the plaintiff must demonstrate a justiciable controversy exists which presents a real, substantial, presently-existing controversy as to which specific relief is sought, as distinguished from an advisory decree offered upon a purely hypothetical situation. See Northgate Apartments, L.P. v. City of N. Kansas City, 45 S.W.3d 475, 479 (Mo.App. W.D. 2001). Second, the plaintiff must demonstrate a legally protected interest consisting of a

pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief. Id. Third, the question presented by the petition must be ripe for judicial determination. Id. Fourth, the plaintiff, if he satisfies the first three elements, must demonstrate that he does not have an adequate remedy at law. Id.

Justiciable Controversy

First, Defendant argues that Plaintiff cannot show that a justiciable controversy exists. To demonstrate a justiciable controversy for the purpose of obtaining declaratory relief, a plaintiff is required to allege "some actual and justiciable interests susceptible of protection in the suit." Northgate Apartments, 45 S.W.3d at 479. Here, a substantial controversy exists over the validity of the Ordinance, which is a subject appropriately suited to an action for declaratory judgment. See Northgate Apartments, 45 S.W.3d at 481; State ex rel. City of St. Louis v. Litz, 653 S.W.2d 703, 706 (Mo.App. E.D. 1983).

Second, Defendant argues that Plaintiff does not have a legally protectable interest in the validity of the Ordinance. Plaintiff responds that it has a legally protectable interest because it is authorized by statute to plan, construct and finance the proposed new professional sports facility in the City of St. Louis, and the Ordinance directly impacts that authority.

A party whose rights are or may be injuriously affected by the enforcement of an ordinance may attack its validity in proper proceedings. Unverferth v. City of Florissant, 419 S.W.3d 76, 86 (Mo.App. E.D. 2013). The Court finds that Plaintiff, as the political subdivision authorized by statute to plan, construct and finance the proposed new professional sports facility in the City of St. Louis, has a personal stake in determining the validity of the Ordinance, which is the subject matter of this action.

Third, the Court finds that Plaintiff's claims are ripe. "Ripeness" is a tool of the court which is used to determine whether a controversy is ready for judicial review or whether, by conducting the review, the court is simply rendering an advisory opinion on some future set of circumstances, which the court is not permitted to do. Local 781 Int'l Ass'n of Fire Fighters, AFL–CIO v. City of Independence, 947 S.W.2d 456, 461 (Mo.App. W.D. 1997). An injury need not have occurred prior to bringing a declaratory judgment action because one of the main purposes of a declaratory judgment action is to resolve conflicts in legal rights before a loss occurs. See Ferguson Police Officers Ass'n v. City of Ferguson, 670 S.W.2d 921, 925 (Mo.App. E.D. 1984). Here, Plaintiff's claims are ripe in that a plan to construct and finance a new professional sports facility in the City of St.

Louis is being developed for consideration by the NFL and the validity of the Ordinance, which will be determined in this action, directly impacts submission of that plan to the NFL.

Fourth, since Plaintiff may be injuriously affected if the Ordinance is enforced prior to a determination its validity, and since section 527.120 RSMo affords Plaintiff the right to seek to have the validity of the Ordinance determined prior to the occurrence of any damages or losses, the Court finds that Plaintiff has no adequate remedy at law. See Northgate Apartments, 45 S.W.3d at 481.

Adjacency

Section 67.653.1(1) RSMo states that the Regional Convention and Sports Complex Authority (RSA) shall have the power:

> To acquire by gift, bequest, purchase, lease or sublease from public or private sources and to plan, construct, operate and maintain, or to lease or sublease to or from others for construction, operation and maintenance, convention centers, sports stadiums, field houses, indoor and outdoor convention, recreational, and entertainment facilities and centers, playing fields, parking facilities and other suitable concessions, and all things incidental or necessary to a complex suitable for all types of convention, entertainment and meeting activities and for all types of sports and recreation, either professional or amateur, commercial or private, either upon, above or below the ground, except that no such stadium, complex or facility shall be used, in any fashion, for the

> purpose of horse racing or dog racing, **and any stadium, complex or facility newly constructed by the authority shall be suitable for multiple purposes and designed and constructed to meet National Football League franchise standards and shall be located adjacent to an existing convention facility**…. (Emphasis added.)

In its Counterclaim, the City argues that the RSA lacks the statutory authority to construct and finance the proposed new professional sports facility because the proposed new professional sports facility is not "adjacent to an existing convention facility."

The precise and exact meaning of "adjacent" is determined principally by the context in which it is used and the facts of each particular case or by the subject matter to which it applies. See Heuer v. City of Cape Girardeau, 370 S.W.3d 903, 911 (Mo.App. E.D. 2012); City of St. Ann v. Spanos, 490 S.W.2d 653, 656 (Mo.App. 1973).

Webster's Third New International Dictionary defines "adjacent" as "not distant or far off… relatively *near and having nothing of the same kind intervening*: having a common border… immediately preceding or following with nothing of the same kind intervening…" (emphasis added).

"Adjacent" has commonly been interpreted by Missouri courts to mean "near or close at hand" and as "not necessarily meaning contiguous;" *i.e.*, not necessarily meaning touching each other or

immediately next to each other. See City of St. Ann, 490 S.W.2d at 656, which, after citing Webster's Third New International Dictionary, adds the following: "Applied to things of the same type, [adjacent] indicates either side-by-side proximity or lack of anything of the same nature intervening."

The Court, like the Court in City of St. Ann, finds that the phrases *"having nothing of the same kind intervening"* and *"lack of anything of the same nature intervening"* are significant. Therefore, "two buildings may be adjacent though separated by a walkway; two areas of land may be adjacent though separated by a stream or a road. But two areas of land *are not* adjacent when they are separated by a third area of land." See City of St. Ann, 490 S.W.2d at 656.

Defendant argues that the proposed location for the new professional sports facility, in the "heavily blighted North Riverfront area," is separated from the America's Center and the Edward Jones Dome "by a road" and is therefore not "adjacent to an existing convention facility." Plaintiff admits in its Answer to Defendant's Counterclaim that the proposed site for the new professional sports facility "is located on the other side of a road from the Edward Jones Dome, namely, across Broadway on the east and across interstate 44 on the northeast." See also the Supplement to Plaintiff's Motion for Judgment on the Pleadings

and Response in Opposition to Defendant's Amended Motion for Judgment on the Pleadings, which explains the location of the proposed new professional sports facility as follows:

> There is no property "of the same kind" between the America's Center and the proposed New Stadium complex east of the interstate. Moreover, Cole Street, bordering the Dome and America's Center on the north, runs east/northeast and is renamed Carr Street as it passes under the interstate. In the proposed stadium complex plans, Carr Street east of the interstate will be the southern border of the complex. There is no development possible between the northern border of the America's Center and the Dome (Cole Street west of the interstate) and the southern border of the proposed New Stadium complex (Carr Street east of the interstate).[1]

Pursuant to section 67.653.1(1), the RSA has authority to construct and finance not only a new stadium but also "parking facilities and other suitable concessions, and all things incidental or necessary to a complex suitable for all types of convention, entertainment and meeting activities and for all types of sports and recreation…." The proposed parking, concession and ticketing facilities are therefore part of the stadium complex.

1 At the hearing on each party's Motion for Judgment on the Pleadings, Plaintiff presented to the Court a drawing of the site of the proposed stadium complex to demonstrate the location of the site relative to the existing Dome and America's Center. The drawing included a proposed ticket kiosk in Baer Park, which is on Broadway directly across from the Dome and is owned by Plaintiff, and a bridge or walkway connecting the America's Center and the Edward Jones Dome with the new stadium and its "parking facilities and other suitable concessions."

Since the term “adjacent property” may include property that is located across intersections and roads, Broadway Apartments, Inc. v. Longwell, 438 S.W.2d 451 (Mo.App. 1968), and since there is “nothing of the same kind intervening”, the new professional sports facility, which is composed of both the stadium and its parking, concession and ticketing facilities, is “adjacent to an existing convention facility” as required by section 67.653.1(1) RSMo.

Validity of Ordinance

At issue is the validity of the City Ordinance 66509, which provides in part as follows:

> 3.91.020- Procedures.
>
> Before the City can act, by ordinance or otherwise, to provide financial assistance to the development of a professional sports facility, the following procedures must be fully implemented:
>
> > A.A fiscal note must be prepared by the Comptroller, received by the governing body, and made available to the public for at least 20 days prior to final action. The fiscal note shall state the total estimated financial cost, together with a detailed estimated cost, to the City, including the value of any services, of the proposed action, and shall be supported with an affidavit by the Comptroller that the Comptroller believes the estimate is reasonably accurate.
> >
> > B. A public hearing must be held by the governing body allowing reasonable opportunity for both proponents and opponents to be heard. Notice of the hearing shall be published three

consecutive times in two newspapers of general circulation, not less than ten days before the hearing.

3.91.030- Voter Approval Required.

No financial assistance may be provided by or on behalf of the City to the development of a professional sports facility without the approval of a majority of the qualified voters of the City voting thereon. Such voter approval shall be a condition precedent to the provisions of such financial assistance.

"**Financial assistance**" is defined in section 3.91.010.3 as "any City assistance of value, direct or indirect, whether or not channeled through an intermediary entity, including but not limited to, tax reduction, exemption, credit, or guarantee against or deferral of increase; dedication of tax or other revenues, tax increment financing; issuance, authorization, or guarantee of bonds; purchase or procurement of land or site preparation; loans or loan guarantees; sale or donation or loan of any City resource or service; deferral, payment, assumption or guarantee of obligations, and all other forms of assistance of value."

"**Governing body**" is defined in section 3.91.010.6 as "the entity which, or official who, proposes to take action to provide financial assistance to the development of a professional sports facility. For example, 'governing body' includes the Board of Aldermen, the Board of Estimate and Apportionment, the Treasurer,

the Comptroller, the Director of the Community Development Agency, and the Board of Commissioners of the Planned Industrial Expansion Authority."

The Ordinance, which has a purpose clause but no specific title, was enacted in 2002 pursuant to Article V of the Charter of the City of St. Louis, which specifically authorizes the adoption of ordinances directly by the people through the initiative procedure. Section 6 of Article V of the Charter states that "No ordinance adopted at the polls under the initiative shall be amended or repealed by the board of aldermen except by vote of two-thirds of all the members, nor within one year after its adoption." The Ordinance, which has no accompanying regulations, has never been amended or repealed.

In 1991, contemporaneously with execution of the agreement to construct the Edward Jones Dome, the RSA issued three series of revenue bonds to provide funds to finance the Dome ("RSA bonds"), with debt service payments to be made by the City of St. Louis, St. Louis County, and the State of Missouri. In 1993, consistent with section 67.657 RSMo, City voters approved a three-and-a-half percent (3½%) hotel/motel tax to support the City's payment obligations with respect to the RSA bonds.

Plaintiff alleges that the plan for the construction and financing of the proposed new professional sports facility

includes contributions by the City to the cost of the stadium complex consisting of the following:

> (i) the City causing the issuance of bonds[2] (the "City's New Stadium Bonds") with an annual debt service obligation of the City not in excess of six
>
> million dollars ($6,000,000)[3] less amounts owed as Preservation Payments on the RSA Bonds for the Dome (the "City's RSA Dome Bonds") with the proceeds of the City's New Stadium Bonds being used (A) to provide for the payment in full (defease) the City's RSA Dome Bonds and (B) as a lease payment to the RSA which it could use for the development and construction of the New Stadium or to provide for the purchase of the Dome from the RSA (which amount the RSA could use for the development and construction of the New Stadium);
>
> (ii) the City causing the donation to the RSA of land and related property at the site of the New Stadium;
>
> (iii) the City providing tax increment financing, transportation development financing, community improvement district financing, or other tax abatement or economic incentives deemed appropriate by the City,

2 Counsel for Plaintiff explained that the bonds referenced in the Petition would not be issued by the City but would be issued by RSA, with debt service payments to be made in part by the City of St. Louis.

3 Counsel for Plaintiff represented to the Court that the revenue from the existing City hotel/motel tax is sufficient to cover the City's debt service obligation on the proposed new bonds, that there is no commitment by the City to utilize general revenue if the revenue from the existing City hotel/motel tax is insufficient, and that the cost to the City would involve more than the revenue from the existing City hotel/motel tax only if that revenue was drastically reduced.

> in connection with the development of the New Stadium; and
>
> (iv) the City providing or allowing services and governmental approvals to the New Stadium routinely furnished by the City for the development, safety and security of real estate development sites in the City including, without limitation, police, fire, water, electricity, gas, and the issuance of building and occupancy and other permits or approvals.

Plaintiff alleges that the uncertainty regarding the validity of the Ordinance puts the St. Louis area in "imminent danger" of not having an NFL team and requests a declaratory judgment that the Ordinance is invalid and/or does not apply to the RSA's plan to construct and finance a new professional sports facility. Plaintiff does not challenge the process by which the Ordinance was enacted but argues that the Ordinance is void or does not apply to the RSA's plan to construct and finance the new professional sports facility because 1) the RSA statutes are a matter of state-wide policy concern and preempt the Ordinance; 2) the Ordinance is in direct conflict with the RSA statutes and other applicable statutes; and 3) the Ordinance is too vague to be enforced. Defendant responds that the Ordinance is valid and enforceable and, alternatively, that, to the extent any part of the Ordinance is declared invalid or unenforceable, it is severable.

Preemption

When a local law is not in harmony with a state law, the state law can preempt the local law in two ways. Borron v. Farrenkopf, 5 S.W.3d 618, 622 (Mo.App. W.D. 1999). First, when a state law completely regulates a given area of the law, that area of the law is said to be "occupied", which preempts any local regulation. Id. Second, if a local law either prohibits what state law allows, or allows what state law prohibits, the local law is in conflict with the state law and, therefore, preempted. Id. at 622. When a local law is preempted, it is invalid and unenforceable. Id. at 622.

State law occupies an area when it creates a "comprehensive scheme" in a particular area of the law and thereby leaves no room for local control. Borron, 5 S.W.3d at 624. See Union Elec. Co. v. City of Crestwood, 499 S.W.2d 480, 483 (Mo. 1973) (holding that, because the Public Service Commission has taken action to establish a comprehensive statewide plan with reference to what shall be done with respect to undergrounding of electric transmission and distribution lines of certificated electric utility companies in this state, municipalities do not have the right to impose their own requirements with respect to the installation of transmission facilities).

Plaintiff argues that sections 67.650 to 67.658 RSMo, entitled "St. Louis Regional Convention and Sports Complex

Authority" ("RSA statutes"), completely occupy the area of constructing and financing professional sports facilities in the Metropolitan St. Louis Area; *i.e.*, the regulatory scheme is "so pervasive" as to infer that the legislature left no room for local supplementation. See Connelly v. Iolab Corp., 927 S.W.2d 848, 853 (Mo. banc 1996).

Plaintiff has not identified any section of the RSA statutes that mandates the City's participation in constructing and financing a new professional sports facility. Section 67.653 RSMo merely authorizes the RSA to contract with cities and counties; section 67.657.2 RSMo merely authorizes the City to make gifts, donations, grants and contributions of money or real or personal property to the RSA; and section 67.653.3 merely authorizes the City and RSA to enter into contracts, agreements, leases and subleases with each other. Moreover, under section 67.657.1 RSMo, "Nothing contained in sections 67.650 to 67.658 shall impair the powers of any county, municipality or other political subdivision to acquire, own, operate, develop or improve any facility of the type the authority is given the right and power to own, operate, develop or improve."

Because section 67.657.3 RSMo authorizes, but does not require, the City to enter into agreements with the RSA, such as the agreement anticipated with regard to constructing and

financing the new professional sports facility, the Court finds that the RSA statutes do not provide a "comprehensive scheme" for constructing and financing a new professional sports facility in the Metropolitan St. Louis Area and, therefore, do not preempt the Ordinance.

A state law also preempts a local law that is in direct conflict or inconsistent with the state law. State ex rel. Teefey v. Board of Zoning Adjustment, 24 S.W.3d at 681 (Mo. banc 2000). Therefore, an ordinance that conflicts with a state statute is preempted by that statute. See Grant v. Kansas City, 431 S.W.2d 89, 93 (Mo. banc 1968) (holding that, in an action to enjoin a special election to amend the city charter by adding a section authorizing the city to levy and collect an earnings tax of 1%, the charter amendment violates state law, which authorizes cities to levy and collect for general revenue purposes an earnings tax not in excess of ½ of 1%, and is therefore invalid).

"That an ordinance enlarges upon the provision of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirements for all cases to its own prescriptions." Page Western, Inc. v. Community Fire Protection Dist. Of St. Louis County, 636 S.W.2d 65, 68 (Mo. banc 1982). An ordinance that is simply regulatory does not conflict with state law. Borron, 5 S.W.3d at 622.

To determine whether an ordinance conflicts with state law, the test is "whether the ordinance permits that which the statute forbids and prohibits, and vice-versa." Morrow v. City of Kansas City, 788 S.W.2d 278, 281 (Mo. banc 1990). If a statute does not specifically grant a right, but is silent on the question, then it may be permissible for the local government to establish prohibitions in that area. Miller v. City of Town & Country, 62 S.W.3d 431, 438 (Mo.App. E.D. 2001).

Plaintiff argues that, because the RSA statutes do not *require* a public vote before the City may provide financing for a new professional sports facility, the Ordinance prohibits without voter approval what the RSA statutes allow without a public vote. However, nothing in the RSA statutes expressly mandates that the City approve financing for a new professional sports facility without a public vote. Therefore, the Court finds that the Ordinance *in toto* does not directly conflict with the RSA statutes.

Plaintiff next argues that the Ordinance is preempted by sections 70.210-70.325 RSMo, entitled "Cooperation By Political Subdivisions Under Contract" ("intergovernmental cooperation statutes"). Plaintiff argues that the intergovernmental cooperation statutes require only the City's "governing body" to approve contracts and that, therefore, any local requirement of

voter approval of financing for a new professional sports facility is void.

Plaintiff misreads the intergovernmental cooperation statutes. Section 70.220.4 RSMo merely provides that "If any contract or cooperative action entered into under this section is between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, such contract or cooperative action shall be approved by the governing body of the unit of government in which such elective or appointive official resides." Section 70.300 states only that "Whenever the contracting party is a political subdivision of this state, the execution of all contracts shall be authorized by a majority vote of the members of the governing body."

The requirement in the intergovernmental cooperation statutes for approval by the governing body is limited to the specific situations identified in the intergovernmental cooperation statutes, none of which prohibit voter approval and, more importantly, none of which are applicable here. The Court, therefore, finds that sections 70.210-70.325 RSMo do not conflict with or preempt the Ordinance.

Plaintiff finally argues that, if the Ordinance *in toto* is not in direct conflict with the RSA statutes or the

intergovernmental cooperation statutes, the Ordinance does conflict with statutes that address types of financial assistance specifically identified in the Ordinance or contemplated by the Ordinance, as demonstrated by the definition of financial assistance in the Ordinance; *i.e.*, "any City assistance of value, direct or indirect, whether or not channeled through an intermediary entity."

Plaintiff alleges it will seek tax increment financing ("TIF"), which is addressed in section 99.835.3 RSMo, transportation development district ("TDD") financing, which is addressed in section 238.215 RSMo, and community improvement district ("CID") financing, which is addressed in section 67.1422 RSMo.

"That an Ordinance enlarges upon the provision of a statute by requiring more than the statute requires creates no conflict therewith, **unless the statute limits the requirements for all cases to its own prescriptions**." Page Western, Inc. v. Community Fire Protection District of St. Louis County, 636 S.W.2d 65, 68 (Mo. banc 1982). Any conflict between a statute and an ordinance must be resolved in favor of the statute. See City of St. Louis v. Doss, 807 S.W.2d 61, 63 (Mo. banc 1991).

Section 99.835.3 RSMo, in pertinent part, states: "No referendum approval of the electors shall be required as a

condition to the issuance of obligations pursuant to sections 99.800 to 99.865." To the extent the Ordinance requires a public vote before TIF may be utilized, the Ordinance directly conflicts with section 99.835.3 RSMo. See State ex rel. Hazelwood Yellow Ribbon Committee v. Klos, 35 S.W.3d 457 (Mo.App. E.D. 2000) (holding that a referendum that would require a two-thirds referendum vote for any tax increment financing ("TIF") by the city was correctly rejected by the City Clerk because it directly conflicted with the "no-referendum" language of the TIF statute).

The Ordinance requires the "approval of a majority of the qualified voters of the City" before any financial assistance may be provided for construction and financing of a new professional sports facility. To the extent the Ordinance requires a public vote before transportation development district (TDD) financing and community improvement district (CID) financing may be utilized, section 238.215 and section 67.1422, which require only a vote of the qualified voters of the applicable transportation development district and community improvement district repectively, directly conflict with the Ordinance.

The Court finds that section 99.835.3 RSMo, section 238.215 RSMo, and section 67.1422 RSMo limit their "requirements for all cases to [their] own prescriptions" and therefore preempt the portions of the Ordinance that require City-wide voter approval

before the City may provide tax increment financing ("TIF"), transportation development district ("TDD") financing, and community improvement district ("CID") financing.

Vagueness

Generally, an ordinance is presumed to be "valid and lawful" and is construed in such a manner as to uphold its validity. See Brunner v. City of Arnold, 427 S.W.3d 201, 221 (Mo.App. E.D. 2013).

This presumption of validity is even stronger where, as here, the ordinance was created by voter referendum because, "through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people." Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 827 (Mo. banc 1990). Therefore, "when courts are called upon to intervene in the initiative process, they must act with restraint, trepidation and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course." Id.

Nonetheless, this presumption of validity, which is based upon principles of due process found in the Fifth and Fourteenth Amendments to the United States Constitution and Article I,

Section 10 of the Missouri Constitution, is rebutted if an ordinance is so vague as to be unenforceable. See Opponents of Prison Site, Inc. v. Carnahan, 994 S.W.2d 573, 582 (Mo.App. W.D. 1999). This void for vagueness doctrine applies to civil as well as criminal matters. State ex rel. Casey's Gen. Stores, Inc. v. City Council of Salem, 699 S.W.2d 775, 777 (Mo.App. S.D. 1985) (holding that, where the board of alderman refused to issue a liquor license to Casey's General Stores based on a city ordinance prohibiting the issuance of a liquor license to a store "located outside the business district of the city", but the city had two separate business districts and the ordinance did not define or describe "the business district of the city", the ordinance was vague and unenforceable).

An ordinance which forbids or requires the doing of an act in terms so vague that people must guess at its meaning and would differ as to its application is void for vagueness. Lodderhose v. City of Ferguson, 837 S.W.2d 361, 362 (Mo.App. E.D. 1992) (holding that the enhancement of punishment provision in the City's progressive discipline guidelines was "unintelligible" because, as written, the guidelines could be interpreted in at least two ways and, therefore, did not furnish sufficient guidance for the court to glean, with any certainty, what was intended by the guidelines).

Moreover, an ordinance "incapable of rational enforcement" is void for vagueness. See St. Louis Cnty. v. McBride & Son, Inc., 487 S.W.2d 878, 879 (Mo.App. 1972) (holding that an ordinance prohibiting, except in authorized sanitary landfills, the dumping, accumulation or storage of trash, cans, refuse, garbage, junk, inoperative machinery or vehicles or other such waste material did "not advise of the circumstances under which it is intended to operate" and was therefore so vague, indefinite and uncertain as to be unenforceable).

The purpose of the Ordinance is clearly stated: "An ordinance establishing procedures and conditions for the provision of financial assistance to the development of a professional sports facility". In 2002, when the Ordinance was enacted via a City-wide vote, the voters clearly intended that they would have an impact upon, if not control over, whether the City participated in financing development of any new professional sports facility.

There is no uncertainty with what was intended when the Ordinance was presented to, and approved by, the voters of the City of St. Louis. However, the Ordinance provides no guidance on when, how or by whom the issue of the City's financial assistance to development of the proposed new professional sports facility will be submitted to a public vote. See State ex rel. Crow v. West Side Street-Railway Corporation, 47 S.W.959, 963 (Mo. 1898):

> If the terms in which a statue is couched be so vague as to convey no definite meaning to those whose duty it is to execute it ministerially or judicially, it is necessarily inoperative.

WHEN

Development is defined in Section 3.91.010.4 of the Ordinance as “any aspect of development, including without limitation design, construction, operation, maintenance, financing and site preparation”. The Court finds this definition too vague to be enforced.

To define development as “any aspect of development only confounds the uncertainty. Is an idea an “aspect of development”? May the City investigate the feasibility a new professional sports facility, conduct internal discussions regarding a new professional sports facility, meet with bankers, lawyers and non-governmental leaders within the City, scout potential sites, or conduct surveys without first obtaining voter approval?

HOW

Financial assistance is defined in section 3.91.010.3 of the Ordinance, in pertinent part, as “any City assistance of value, direct or indirect, whether or not channeled through an intermediary”. The Court also finds this definition too vague to be enforced.

First, financial assistance, as defined by the Ordinance, includes types of financing that are preempted by state law; *i.e.*, tax increment financing (TIF), transportation development district (TDD) financing, and community improvement district (CID) financing.

Second, financial assistance, as defined by the Ordinance, includes "any City assistance of value". May the City provide services, such as police and fire protection, that are routinely provided to all citizens, whether or not residents of the City, and businesses within the City to the new professional sports facility, which includes both the stadium and the parking, concession and ticketing facilitates, without voter approval? Defendant argues that police and fire protection are outside the scope of the financial assistance contemplated by the Ordinance; however, police and fire protection, both of which are provided by the City, are clearly "assistance of value".

Finally, and most importantly, though financial assistance, as defined by the Ordinance, may be provided to the new professional sports facility only after voter approval, what will be submitted to the voters to approve? The Ordinance provides no guidance. Compare section 67.657.4 RSMo, in which the legislature, when enacting the RSA statutes, set forth the ballot

measure in “substantially” the form that would be submitted to the voters for approval of an increase to the hotel/motel tax.

Here, will the ballot measure request the voters:

(a) To approve *carte blanche* financial assistance; e.g., “May the City provide that financial assistance which is necessary to develop a new professional sports facility in the heavily blighted North Riverfront area?”; or

(b) To approve a specific type of financial assistance; *e.g.*, “May the City donate land and related property in the heavily blighted North Riverfront area for development of a new professional sports facility?”, or “May the City provide tax increment financing, transportation development district financing, community improvement district financing or other tax abatement or economic incentives for development of a new professional sports facility?”; or

(c) To prohibit a specific type of financial assistance; *e.g.* “May the City provide that financial assistance which is necessary to develop a new professional sports facility in the heavily blighted North Riverfront area if, but only if, no general revenue funds are included in that financial assistance?”

WHO

Notwithstanding the lack of guidance on when development begins and how the ballot measure will read, the most glaring

deficiency in the Ordinance is the lack of guidance on who will determine the “when” and the “how”.

The Ordinance clearly directs the comptroller to prepare the fiscal note and the governing body, which is defined in the Ordinance, to conduct the public hearing but provides no direction or guidance on who will prepare the ballot measure for voter approval or when the ballot measure will be submitted to the voters for approval. Moreover, unlike with the fiscal note and the public hearing, the Ordinance provides no guidance in determining who was expected by the drafters when the Ordinance was prepared, or who was intended by the voters when the Ordinance was approved, to prepare the ballot measure and determine the date for its submission to a public vote. See State ex rel. Crow v. West Side Street-Railway Company, 47 S.W.959 (Mo. 1898) (holding a statute which required, prior to granting an application from a private entity to construct a street railway or railroad, that the privilege to use highways, roads and other public land be auctioned to the bidder who will give the largest percentage, but no less than 2% yearly, of the gross earnings derived from such use was too vague to be capable of practical operation and enforcement. Id. at 962:

> Again, the percentage is to be increased in each period of five years to correspond with the increase in the value of the land

> occupied and used. **But the act gives no intimation by whom or in what manner this increase is to be settled and determined.** (Emphasis added).

Assuming, *arguendo,* that the governing body, as defined in the Ordinance, was expected by the drafters and intended by the voters to prepare the ballot measure and determine the date for its submission to the electorate, unlike section 67.651(6) RSMo, which defines governing body as the board of alderman, the Ordinance names three officials and three entities as examples of the governing body.

If each of the listed officials and entities is a governing body under the Ordinance, in addition to confusion on which official or entity will act as the governing body to conduct the public hearing required under the Ordinance, who will determine, and how will it be determined, which governing body prepares the ballot measure for public vote and which governing body decides when the ballot measure will be submitted to a public vote?

If an entity is the appropriate governing body, several questions arise: (1) who will determine which entity is the governing body to prepare the ballot measure and which entity is the governing body to decide when the ballot measure will be submitted to the voters for approval; (2) how and by whom will any disagreement on which entity is the governing body to prepare

the ballot measure and which entity is the governing body to decide when the ballot measure will be submitted to the voters for approval be resolved; and (3) how and by whom will any disagreement within the entity on the language of the ballot measure and the date on which to submit the ballot measure to the voters for approval be resolved?

If an official is the appropriate governing body, several questions arise: (1) who will determine which official is the governing body to prepare the ballot measure and which official is the governing body to decide when the ballot measure will be submitted to the voters for approval, and (2) how and by whom will any disagreement on which official is the governing body to prepare the ballot measure and which official is the governing body to decide when the ballot measure will be submitted to the voters for approval be resolved.

Certainly, when the Ordinance was prepared, the drafters could not have expected, and when the Ordinance was approved, the voters could not have intended, that one official, who might support or might oppose providing financial assistance to a new professional sports facility, would determine the language and timing of submission to the voters of the ballot measure for the City's financial assistance to a new professional sports facility. See State ex rel. Casey's General Stores, Inc. v. City

Council of Salem, 699 S.W.2d at 778 (holding that an ordinance prohibiting the issuance of a liquor license to a store "located outside the business district of the city" where the city had two separate business districts was too indefinite to be valid because, in certain situations, the ordinance gave the board of aldermen wide discretion in deciding whether to issue a liquor license:

> That discretion might be exercised arbitrarily and could be subject to abuses for personal reasons, religious beliefs, or other factors not properly relevant.

The Court finds that, though each of the uncertainties in the Ordinance may be tolerable in isolation, "their sum makes a task for us which at best could be only guesswork." Johnson v. U.S., 135 S.Ct. 2551, 2560 (2015). Therefore, the Court finds Ordinance is void.

Severability

Defendant urges this Court, if it finds some of the provisions of the Ordinance invalid due to a conflict with state law or vagueness, to sever the offending portions of the Ordinance and find the remainder of the Ordinance intact and valid. Defendant cites section four of Ordinance 66509, as follows:

> If any provision of this ordinance or its application to any person, entity, or circumstance should be held invalid, in whole or in part, the invalidity does not affect the other provisions or applications of this ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are severable.

Generally, the unconstitutionality of a portion of a statute or ordinance does not render the remainder of the statute or ordinance invalid where enough remains, after discarding the invalid portions, to show the legislative intent and furnish sufficient means to effectuate that intent. State, on inf. of McKittrick v. Cameron, 342 Mo. 830, 835, 117 S.W.2d 1078, 1080 (1938); City of St. Louis v. St. Louis Transfer Co., 256 Mo. 476, 165 S.W. 1077, 1083 (1914). See also State ex inf. Barker v. Duncan, 265 Mo. 26, 45, 175 S.W. 940, 945 (1916),in which the Missouri Supreme Court said: “if after cutting out and throwing away the bad parts of a statute, enough remains which is good to clearly show the legislative intent, and to furnish sufficient details of a working plan by which that intention may be made effectual, then we ought not, as a matter of law, to declare the whole statute bad.”

It is clear the intent of the Ordinance is to provide the voters of the City of St. Louis with authority to approve the City’s financial assistance to development of a new professional sports facility. However, the fatal flaw in the Ordinance is not

in what it says but in what it doesn't say. Therefore, to render the Ordinance valid, the Court must add to, not strike from, the Ordinance to cure its vagueness.

Notwithstanding the severability clause of the Ordinance, the Court is not justified in "rewriting the Ordinance" even if the Court somehow could be sure that this is what the legislature would have done." State v. Hart, 404 S.W.3d 232, 245 (Mo. banc 2013).

Moreover, the purpose of the severability clause is not to empower this Court to reconstruct the Ordinance in accordance with its own opinion. See State ex rel. Crow v. West Side Street-Railway Corporation, 47 S.W.959, 963 (Mo. 1898):

> The courts cannot aid the defective phrasing of an act; we cannot add and mend and by construction make up deficiencies that are left there.

Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff Regional Convention and Sports Complex Authority's Motion for Judgment on the Pleadings shall be, and hereby is, GRANTED, Defendant City of St. Louis' Amended Motion for Judgment on the Pleadings shall be, and hereby is, DENIED, and Defendant City of St. Louis' Counterclaim shall be, and hereby is, DENIED. Judgment shall be, and hereby is, entered in favor of Plaintiff Regional

Convention and Sports Complex Authority and against Defendant City of St. Louis on Plaintiff's Petition for Declaratory Judgment. City Ordinance 66509, Chapter 3.91 of the Revised Code of the City of St. Louis, is hereby declared INVALID.

SO ORDERED:

_____
THOMAS J. FRAWLEY, Judge

Dated: _____