

# Selected Best Practices For Municipal Lawyers

*(Or Things We Wish We Could Always Remember)*

**MMAA Summer Seminar**

July 12, 2015



**G. KIMBERLEY DIAMOND & ERIN P. SEELE  
CUNNINGHAM, VOGEL & ROST, P.C.**

*legal counselors to local government*

333 S. Kirkwood Road, Suite 300

St. Louis, MO 63122

314.446.0800

*kim@municipalfirm.com; erin@municipalfirm.com*

*www.municipalfirm.com*

TABLE OF CONTENTS

	Page
Don't Pay Filing Fees .....	1
Statutes That Require Payment of Taxes .....	1
Refund of Taxes Paid to the City .....	2
Public Contract and Bidding Legal Requirements .....	2
Municipal Ethics Reminders .....	5
Police Powers Control Citation .....	9
Annexation Reminders .....	9
Sunshine Law and Required Notices .....	10
Ordinances Reminders .....	11
Determine Investment Authority for City Funds .....	13
Establish Financial Policy and Require Banking Contract .....	16
Financed Property Involved...Think First.....	18
Segregate Bond Funds .....	18
Careful Preparing Property Descriptions .....	19

## DON'T PAY FILING FEES

- A. Government attorney is exempt from paying filing fees** on new Missouri cases when e-filing. Missouri Court Operating Rule 27.02(b).
- "Government attorney," a lawyer who is using the electronic filing system in his or her capacity as a lawyer for the state of Missouri or one of its political subdivisions[.]”

<b>Case</b>		<a href="#">Help</a>
* Court Location	<input type="text" value="--Select--"/>	
* Case Category	<input type="text" value="--First select a court location--"/>	
* Case Type	<input type="text" value="--First select a case category--"/>	
* Style of Case	<input type="text"/>	
Filer Reference No.	<input type="text"/>	
<b>Filing Fee</b>		<a href="#">Help</a>
For new case filings and supplemental domestic relations motions to modify, please enter an amount in Filing Fee or check at least one box.		
Filing Fee+	\$	<input type="text"/>
+ The Total amount charged will be the Filing Fee plus a <a href="#">processing fee</a> assessed by the credit card vendor.		
<input type="checkbox"/> Exempt From Filing Fees by Section 514.040 RSMo		
<input checked="" type="checkbox"/> Government Filer -Exempt from Filing Fees		
<input type="checkbox"/> In Forma Pauperis		
<input type="checkbox"/> Fee Waived / Not Required (explain special circumstances in Notes to Clerk)		

## STATUTES THAT REQUIRE PAYMENT OF TAXES

- A. Subdivision Plat**
- Section 445.030 RSMo. - cannot be recorded “until all taxes against the same shall have been paid[;]”
- B. Participate in an Election**
- Section 115.342 RSMo. - disqualified from participating in election for which the candidate has filed if “delinquent in the payment of any state income taxes, personal property taxes, municipal taxes, real property taxes on the place of residence...”
  - HB63 (2015) - exempts §§ 115.307-115.405 RSMo. from applying to municipal elections, which includes § 115.342 RSMo.
  - SB104 (2015) (awaiting governor’s signature as of 7/13/2015) - repeals § 115.342 and reenacts such prohibition in §115.306 RSMo., which would apply to municipal elections.
- C. Elected or Appointed to Office**
- Sections 77.380, 79.250 RSMo. - “. . . No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office. . . .”

## REFUND OF TAXES PAID TO THE CITY

### A. No Authority Absent Express Statute To Refund Taxes

- See *Missouri American Water Co. v. Collector of St. Charles County*, 103 S.W.3d 266, 270 (Mo. App. 2003) (“Taxes voluntarily although erroneously paid ... cannot be refunded absent statutory authority.”) (emphasis added).

### B. Must Pay Under Protest Or No Refund Of Taxes

- *Adams v. Friganza*, 344 S.W.3d 240, 248 (Mo. App. 2011) (“Taxpayers who fail to protest property taxes under Section 139.031 providing for payment of taxes under protest cannot obtain refunds.”) (emphasis added).
- Mandatory Procedure:
  - Section 139.031 RSMo.:
    - The tax protester is not allowed to simply forego payment of the taxes; he or she must first pay the tax, indicating thereon that the payment is being made “under protest.”
    - Then, within 90 days of payment, the tax protester must file a lawsuit in the county in which the tax was paid.
    - If this procedure is not followed, the tax payment may be used by the taxing jurisdiction after the expiration of the 90-day period.
      - Check with City to ensure City is moving money from escrow and doing so properly and timely upon expiration of 90-day period or end of lawsuit.

### C. Exception - Sales Tax

- This statutory procedure does not apply to refund of sales tax.
  - Section 144.190 RSMo. (Generally, can file refund claim to Director of Revenue within 3 years from the date of overpayment).

## PUBLIC CONTRACT AND BIDDING LEGAL REQUIREMENTS

### A. Indemnification By City

- NO Authority for City Indemnification of private parties.
- **Arguments to avoid Indemnification:**
  - One Argument: Violates the constitution -- Cannot pay private debts - funds spent only for public purpose. Article 6, § 23; Article 6, § 25.
  - Better Argument: Agreements to indemnify are waivers of sovereign immunity and only the General Assembly may enact such waivers; **Use Op. Atty. Gen. No. 138-87, Webster, 12-18-1987** (“To agree to the underlined terms [defend, indemnify and hold harmless], is to waive the state’s sovereign immunity, that is, the legal prohibition against the state being sued in its own courts for damages from the torts of its officers and agents. *Only the legislature can waive this immunity.*”) (emphasis added).

## B. Contract Reminders

### 1. Public Contract Statute of Frauds

- **Section 432.070 RSMo.:** “No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.” (emphasis added).
- What This Means:
  - ***All contracts must be:***
    - Within City powers or otherwise expressly authorized by law,
    - Consideration wholly to be performed or executed subsequent to the making of the contract,
    - In writing, including the consideration,
    - Dated when made,
    - Signed by all parties, and
    - City authority to sign the contract must also be in writing.
  - These requirements “are mandatory ... and ... a contract made in violation of them is void rather than voidable.” *City of Fenton v. Executive Intern. Inn, Inc.*, 740 S.W.2d 338 (Mo. App. 1987).

### 2. Federal E-Verify Law - Service Contracts Over \$5,000

- **Section 285.530 RSMo.:** “As a condition for the award of any contract or grant in excess of five thousand dollars ... by any political subdivision ... to a business entity ... the business entity shall, by sworn affidavit and provision of documentation affirm its enrollment and participation in a federal work authorization program.” (emphasis added).
- What This Means:
  - All City contracts over \$5,000 **must** require from the contracting entity for **services:**
    - Affirmation of enrollment in E-Verify = “federal work authorization program;” and
    - Affirmation that it does not knowingly employ any person who is an unauthorized alien in connection with the contracted services.
  - Note: for repeat entities only need this affirmation on an annual basis if maintained in City files.
  - EXCEPTION: Does not apply to business entities that are merely providing goods or products. 15 CSR 60-15.020(6).

### 3. Immigration Status - Proof of Lawful Presence

- **Section 208.009 RSMo.:** “[A]t the time of application for any state or local public

benefit, an applicant who is eighteen years of age or older shall provide affirmative proof that the applicant is a citizen or a permanent resident of the United States or is lawfully present in the United States.” (emphasis added).

- “Public Benefit” = “any grant, contract, or loan provided by an agency of state or local government; or any retirement, welfare, health, disability, housing, or food assistance benefit under which payments, assistance, credits, or reduced rates or fees are provided.” (emphasis added).
  - “Affirmative Proof” = “documentary evidence recognized by the department of revenue when processing an application for a driver's license, a Missouri driver's license, as well as any document issued by the federal government that confirms an alien's lawful presence in the United States.”
  - Applicant may submit affidavits of lawful presence allowing for “temporary benefits” for 90 days.
- What This Means: You must require proof of status for all contracts and “benefits” that City grants.
    - Does NOT apply to: (1) any municipal permit, including business license, (2) contract with public utility providers and their customers, (3) secondary education public benefits as defined in § 173.1110 RSMo. or (4) unemployment benefits.
  - **Best Practice:**
    - Require copy of **driver’s license** of applicant/signer in file for all contracts/benefits.
    - Use affidavit of citizenship form only when person cannot provide written proof (e.g., driver’s license).

### C. Bidding Requirements

- No general statute requirement that City’s must use competitive bidding.
- **BUT some specific exceptions:**
  - Construction Management Services – § 8.679 RSMo.
  - Health and Life Insurance for Employees – § 67.150 RSMo.
  - Construction of Initial Waterworks – § 91.170 RSMo.
  - City Depository Services (3rd class cities) – § 95.280 RSMo.
  - Insurance Contracts – § 376.696 RSMo.
  - Contracts with officials and employees of political subdivision over \$500 per transaction or \$5000 per year – § 105.454/.458 RSMo.
  - Architectural, Engineering or Land Surveying Services (list of 3 on file) – § 8.291 RSMo.
  - Public Works Contracts? –§ 290.250(no, but see statutory confusion)
  - Federal and State Grants – See specific grant provisions and applicable law.
  - **LOCAL ORDINANCE** – governs other requirements.

### D. Bidding Policy Best Practices

- Flexibility is the key to ensure efficient use of resources.
  - Want to be able to waive bidding when in public interest to do so.

- Suggestions for purchasing ordinances:
  - Authorize city to accept bids, reject bids or to negotiate and modify bids, where appropriate;
  - Broad discretion in awarding bid -- “lowest, best, and most responsive”
  - Authorize city to waive technical deficiencies in bid; and
  - Allow City to waive bidding altogether, where appropriate.

#### E. No Standing For Successful Bidder

- **General Rule:** “[M]ultiple Missouri cases have held that a **disappointed bidder** competing for a government contract does not have a special pecuniary interest in the award of the contract to it, and therefore **generally lacks standing to challenge the award of the contract to another bidder**. *Pub. Commc’ns Servs., Inc. v. Simmons*, 409 S.W.3d 538, 546 (Mo. App. 2013) (*citing State ex rel. Johnson v. Sevier*, 98 S.W.2d 677, 679 (Mo. 1936); *State ex rel. Mid-Mo. Limestone, Inc. v. County of Callaway*, 962 S.W.2d 438, 441-42 (Mo. App. 1998); *Metcalf & Eddy Servs., Inc. v. City of St. Charles*, 701 S.W.2d 497, 499 (Mo. App. 1985); *La Mar Const. Co. v. Holt County, R-II School District*, 542 S.W.2d 568, 570-71 (Mo. App. 1976)).
- **Reasoning:** The Missouri Supreme Court has explained that:
  - “[t]his is so for two reasons: (1) Because the advertisement was not an offer of a contract, but an offer to receive proposals for a contract, and (2) because the statute requiring that contracts be let to the lowest and best bidder was designed for the benefit and protection of the public and not the bidders.” *Pub. Commc’ns Servs., Inc. v. Simmons*, 409 S.W.3d 538, 546 (Mo. App. 2013) (*citing Sevier*, 98 S.W.2d at 679).
- **Exception:** Generally, an unsuccessful bidder only has standing if the rejection of its bid was made “fraudulently, corruptly, capriciously, or without reason.” *See e.g., State ex rel. Mid-Missouri Limestone, Inc. v. County of Callaway*, 962 S.W.2d 438, 441 (Mo. App. 1998).
- **Change? Currently on appeal to Missouri Supreme Court:** *Byrne and Jones Enterprises, Inc. vs. Monroe City R-1 School District*, ED101588 (Nov., 12, 2014)
  - Because of School District’s right to reject any and all bids, “**rejection of a bid ... creates no vested interest or property right in the rejected bidder.**”
  - Bidding is designed “for the benefit and protection of public, not bidders.”
  - “Awarding the unsuccessful bidder his bid-preparation costs, when taken to its logical conclusion, serves only to hurt, not protect, the public. ... **We thus hold that the unsuccessful bidder may not recover its bid-preparation costs.**”

## MUNICIPAL ETHICS REMINDERS

#### A. Conflicts of Interests

- There are 3 main statutes describing prohibited transactions:
  - Section 105.452; Section 105.454; Section 105.458 RSMo.

- Generally, the statutes apply to an “elected or appointed official or employee” and members of any “governing body.”
- Generally, no appointed or elected official or employee shall:
  - Sell, rent or lease any property, or provide services, to the City in excess of \$500 per transaction or \$5,000 per year unless competitively bid and provided the bid is the lowest received;
  - Use or disclose confidential information in any manner with intent to result in financial gain for himself, his spouse, his dependent child, or any business within which he is associated;
  - Use decision making authority for the purpose of obtaining financial gain which materially enriches himself, his spouse or dependent children;
  - Perform any service, act or refrain from acting or attempt to influence a decision by reason of any payment, offer to pay, promise to pay or receipt of anything of actual pecuniary value;
  - Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit; or
  - Offer, promote, or advocate for a political appointment in exchange for anything of value to any political subdivision.
  - Perform any service for consideration one year after termination if such performance is to influence a decision to influence a decision
- **TIP: WHEN IN DOUBT - OFFICIALS SHOULD DISCLOSE AND RECUSE.**

## B. Financial Statements

- **Section 105.461 RSMo. – Interest in measure, bill, or ordinance to be recorded–financial interest statement.**
  1. The governor, lieutenant governor, any member of the general assembly, **or any member of the governing body of a political subdivision** who has a **substantial personal or private interest in any measure, bill, order or ordinance proposed or pending** before the general assembly or such governing body, **shall, before such official passes on the measure, bill, order or ordinance, file a written report of the nature of the interest** with the chief clerk of the house of representatives or the secretary of the senate or clerk of such governing body and such statement shall be recorded in the appropriate journal or other record of proceedings of the governing body. The governor shall make the governor's written report along with the governor's approval or disapproval of any bill or act of the general assembly describing the nature of the interest and such report shall be recorded in the journal of the house of representatives or of the senate.
  2. The governor, lieutenant governor, any member of the general assembly, or any member of the governing body of a political subdivision shall be deemed to have complied with the requirements of this section **if such official has filed, at any time before the official passes on such measure, bill, order or ordinance, a financial interest statement pursuant to sections 105.483 to 105.492 which discloses the basis for the official's substantial personal or private interest or interests that the official may have therein.** Any such person may amend the person's financial interest statement to disclose any subsequently acquired substantial interest at any time before the person passes on any measure, bill, order or ordinance, and shall be relieved of the provisions of subsection 1 of this section.

- Do not forget to check § 105.485 RSMo.:
  - Provides a procedure for filing financial disclosure statement.
  - Authorizes city to adopt its own procedures for filing.
  - If city passes its own requirements for filing disclosure statements per § 105.485.4 RSMo., the city is required to readopt such ordinance creating the policy at least biennially and file certified copy within 10 days' of adoption to the Missouri ethics commission.

### C. Nepotism

- **Art. VII, § 6 Mo. Const.** - “Any public officer or employee in this state who *by virtue of his office or employment names or appoints* to public office or employment any relative within the fourth degree, by consanguinity or affinity, **shall thereby forfeit his office or employment.**” (emphasis added).
- Applies equally to officers AND employees.
- Does not have to be a paid appointment.
  - *State ex rel. Attorney Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994) (overturned on other grounds).
- Even if the vote was unnecessary in order to make the appointment, if the official takes any action to make the appointment, it's a forfeiture.
  - *State ex rel. Attorney Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994) (overturned on other grounds).
- You cannot retroactively “fix” the violation.
  - Rescinding the appointment does not cure the violation.
  - Cannot resign and be reappointed either.
    - *State ex rel. Nixon v. Wakeman*, 271 S.W.3d 28 (Mo. App. 2008).
- Intent (or ignorance) is irrelevant.
  - *State ex rel. Attorney Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994) (overturned on other grounds).
- Self-executing v. self-enforcing.
  - Only self-enforcing if voluntarily resign.
  - Otherwise entitled to due process thru judicial determination (quo warranto).
  - Cases say “automatically lose right to hold office” and constitution itself says it is “forfeited” - but Supreme Court has said if they don't voluntarily resign, they have be judicially removed.
    - *State ex rel. Nixon v. Wakeman*, 271 S.W.3d 28 (Mo. App. 2008).
  - *State ex rel. Attorney Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994) (overturned on other grounds).
- **Degrees of Family Relation:**
  - A husband is related by marriage (affinity) to his wife's relatives in the same way that she is related to them by blood (consanguinity) and she to his family in the same

way, but the kindred of the spouses are not related to one another (*e.g.*, a brother of the husband is **not** related to a brother of the wife).

- Half relationship is the same as a whole relationship.
- Step relationship is the same as a blood relationship.
- A relationship by marriage (affinity) terminates if death or divorce occurs.

**First Degree**

Child                      Parents

**Second Degree**

Grandchild    Brother/Sister    Grandparents

**Third Degree**

Great Grandchild    Niece/Nephew    Aunt/Uncle  
Great Grandparents

**Fourth Degree**

Great, Great Grandchild    Grand Niece/Nephew  
First Cousin                      Great Aunt/Uncle  
Great, Great Grandparents

**D. Incompatible Offices**

▪ Two-Prong Test:

**1. Must be a public office:**

- Office must have some degree of permanency and continuity (not occasional or temporal);
- Officeholder must take an official oath of office;
- Created by constitution, legislature, or by a municipality or other body through authority conferred by the legislature; and
- Must possess a delegation of a portion of the sovereign power of government, exercised for the benefit of the public.
  - *State v. Hawkins*, 257 P. 411 (Mont. 1927) (*cited by State ex rel. Pickett v. Truman*, 64 S.W.2d 105 (Mo. 1933)).

**2. If both public offices, are they incompatible:**

- Turns on whether duties are “inconsistent, antagonistic, repugnant or conflicting.” *State ex rel. McGaughey v. Grayston*, 163 S.W.2d 335 (Mo. 1942).
- Primary test: whether one office is subordinate to the other in some aspect of performing its functions or duties, as where one has some supervision of the others, is required to deal with, control, or assist him. *State ex rel. Walker v. Bus*, 36 S.W. 636, 639 (Mo. 1896).

## POLICE POWERS CONTROL CITATION

### A. Police Powers Control

- **General Rule:** Other local governments are subject to city police powers unless expressly exempted. Missouri has long “accepted that the police powers of the city generally extend to all within its boundaries and unless an express statutory exception is extended to other state agents or agencies within it they are subject to the ordinances of the city.” *Bredeck v. Bd. of Educ. of City of St. Louis*, 213 S.W.2d 889, 893 (Mo. App. 1948) (School district subject to city health code regulations controlling sanitation of restaurants) (emphasis added); *see also Kansas City v. School District of Kansas City*, 201 S.W.2d 930, 933 (Mo. 1947) (“Generally, the police power affecting property and persons within the municipality’s corporate limits is reposed in City.”).
- **The exception to this rule** is where a statute “expressly and specifically” preempts other authority. *See on appeal, Smith v. Bd. of Educ. of City of St. Louis*, 221 S.W.2d 203, 205 (Mo. 1949) (“[T]here is nothing in the statutes relied upon by respondents that could be said to expressly and specifically give . . . [the school] the right to control the sanitary conditions of the school restaurants and their employees.”) (emphasis added); *c.f. Bd. of Educ. of City of St. Louis v. City of St. Louis*, 184 S.W. 975, 267 Mo. 356, 363 (Mo. 1916) (City’s building code preempted to extent specific statutory authority granted school “responsibility for the ventilating, warming, and sanitary condition of such building.”).
- **County Subject to Building and Safety Regulations and Corresponding Fees**
  - *Engelage et al. v. City of Warrenton*, 378 S.W.3d 410 (Mo. App. E.D. 2012) – affirmed that a county, like schools and other political subdivisions, are obligated to comply with city Building Codes and pay corresponding permit fees.
    - “the legislature here vested the city, and the city alone, with authority to protect public safety.”
    - “police powers of a city generally extend to all within its boundaries” and citing prior authority to find that “political subdivisions should be subject to a municipality’s police power”
  - City police powers preempted only if statute “expressly and specifically [gives] full duty to attend to these responsibilities” to another. *Id.*
- For more police power and zoning intergovernmental conflicts cases see: <http://www.municipalfirm.com/documents/IntergovernmentalConflictsHandout.pdf>.

## ANNEXATION REMINDERS

### A. St. Louis County Boundary Commission Review: §§ 72.40-423 RSMo.

- HB 511 (2015) – Repeals and enacts new § 72.401 RSMo. with new exception to Boundary Commission Review:
  - “Any annexation of property ... approved by majority of property owners residing thereon and by ordinance of any municipality **that is a service provider of both**

water and sanitary sewer within the municipality shall be effective as provided in the annexation ordinance” without commission review.

**B. Procedure for Annexation: §§ 71.014/.012 RSMo.**

- Verified petition no longer required;
- Notarized petition will now suffice; and
- Fact petition was not verified or notarized will not affect validity of an annexation.

**C. Roads - Only fee simple owners’ signatures required on petition.**

- *St. Louis County v. Peerless Park*, 726 S.W.2d 405, 410 (E.D. Mo. 1987) (“the area can include real property not covered by a fee interest, such as public property. **No signature on the petition is required...**”).

**D. Trash services needed in annexed area?**

- 2 year notice required if annexing or expanding solid waste collection services into area being served. § 260.247 RSMo.

## SUNSHINE LAW AND REQUIRED NOTICES

**A. Reminders for City Clerks**

- City Clerk does NOT have to:
  - answer questions.
  - “certify” records.
  - create records.§ 610.023 RSMo.
- **§ 610.015 RSMo:** A roll call vote is needed for every vote taken in closed session - including vote to adjourn.
- Request must be communicated in language that a reasonably competent custodian of records would understand.
  - *Anderson v. Village of Jackson*, 103 S.W.3d 190 (Mo. App. 2003) (“one seeking access to public records must communicate a request in language that a *reasonably competent* custodian of the records would understand. ... **The statute does not require that the custodian of public records perform more than to provide access to records for which access is sought.**”) (emphasis added).

**B. Closed Records**

- We all know that **§ 610.021 RSMo.** authorizes certain records to be closed.
- **§ 610.021(14) RSMo.** contains the general catchall for all other records protected from disclosure by law. Here are a few examples:
  - **HIV testing records** - § 191.656 RSMo.
  - **Tax returns** - § 32.057 RSMo.
  - **Qualification to carry a concealed weapon** - § 571.101.9 RSMo.

- **Many juvenile records** - § 211.321 RSMo.
- **Mental health treatment records** - § 630.140 RSMo.
- **Genetic information** - § 375.1309 RSMo.
- **Adoption records** - §§ 453.120/.121 RSMo.

### C. Notice Provisions

- Section 610.020.2 RSMo. - Notice “shall be given at least **twenty-four hours**, exclusive of weekends and holidays when the facility is closed ...”
- Non-Sunshine Notices:
  - Section 89.050 RSMo. - **15 day** hearing notice requirement for zoning regulations, restrictions or boundary changes generally.
  - Section 67.2725 RSMo. - **4 day** notice for meetings:
    - When vote of the governing body is required to implement a tax increase,
    - With respect to a retail development project when the governing body votes to:
      - utilize the power of eminent domain;
      - create a transportation development district or a community improvement district; OR
      - approves a redevelopment plan that pledges public funds as financing for the project or plan.
    - This does not apply to setting annual tax levy for real/personal property taxes.
  - Section 67.110 RSMo. - **7 day** notice and specific notice and hearing requirements for real/personal property taxes.

### D. Some Best Practices

1. Have a clear, strong **policy**; review periodically - it is their shield:
  - Section 610.028.2 RSMo.: “[A]ny member **or employee** of the public governmental body **who complies with a written policy** is not guilty of a violation of Sunshine Act or subject to civil liability for any act arising out of following the written policy of the agency.” (emphasis added).
2. Policy should close the records authorized to be closed under sunshine and provide opening by board action.

## ORDINANCE REMINDERS

### A. Ordinance Reminders and Cites

- Ayes and nays required - void if not recorded as roll call.
  - “... an **ordinance is not an ordinance** until the ayes and nays by which it is passed are entered upon the journal. A **vote is not a vote** until so recorded. ... The Journal is the one indispensable record of birth and existence. It is the **book of life** for all ordinances, and, unless their title to existence is clear in that book they must remain in limbo. Their lost is with the lost.” *City of New Franklin v. Edwards*, 23 S.W.2d 235 (Mo. App. 1929).
- Label ordinance “bill” - not necessarily required, but avoids a lawsuit.

- **Check to see if clerk:**
  - Forgot the effective date clause.
  - Changed ordaining clause from exact words of statute.
  - Failed to have signed by “presiding officer” if a 3<sup>rd</sup> class city (use two signature lines to avoid problem).
  - Failed to have attested by village clerk.
  
- **Cites:**
  - Section 79.130 RSMo. Ordinances--procedure to enact. (4<sup>th</sup> class).
  - Section 77.080 RSMo. Style of ordinances--procedure to enact (3<sup>rd</sup> class).
  - Section 80.110 RSMo. Trustees--passage of ordinances (Village and Townships).

## B. Ordinances v. Resolutions

- A resolution is not an ordinance. *Julian v. Mayor, Councilmen & Citizens of City of Liberty*, 391 S.W.2d 864 (Mo. 1965).
  
- “[G]enerally, it is a mere expression of the opinion or mind.... A resolution is not a law,” and “it need not be in any set or particular form.” (internal quotation marks and citations omitted); *State ex rel. Gove v. Tate*, 442 S.W.2d 541, 542 (Mo. 1969) (discussing a long line of cases differentiating between a “resolution” and an “ordinance” and quoting *Julian*, 391 S.W.2d at 867, in holding that “[a] resolution ‘will not suffice when action on the part of a municipality is required to be taken by ordinance’ ”); see *Layne v. City of Windsor*, 442 S.W.2d 497 (Mo. 1969).
  
- A resolution is ministerial in character rather than legislative, and it relates to the administrative business of the municipality. *Hannibal v. Winchester*, 391 S.W.2d 279 (Mo. 1965) (distinguished on other grounds); *Williams v. City of Kirkwood*, 537 S.W.2d 571, 574 (Mo. App. 1976); *Rice v. Huff*, 22 S.W.3d 774, 782 (Mo. App. 2000).
  
- Often times a resolution is used to formalize some action of the governing body that could have been undertaken by motion but for which the governing body desires written substantiation in a form other than the meeting minutes.
  
- An ordinance is a local law, duly enacted by proper authority that prescribes uniform and permanent rules of conduct relating to the City’s corporate affairs; Legislative act that continues until repealed.
  
- **Best Practice:** When in doubt, use an ordinance.

## C. Ordinances Required

- **Sample (not-exhaustive) of laws requiring ordinance approval:**
  - Approval of intergovernmental agreement. §§ 70.220; 70.230 RSMo.
  - Approval of agreement between city and elected or appointed official of another city. Sections 70.220; 70.230 RSMo.
  - Approval of plat. Section 445.030 RSMo.

- Annexation of territory. Sections 71.012/.015 RSMo.
- Change Name of Street or Avenue. Section 77.220 RSMo.
- Declaration of Necessity for Improvement. § 88.653 RSMo., third class and certain special charter cities.
- Compensation, appointment, and duties of 3<sup>rd</sup> and 4<sup>th</sup> class city employees generally. Sections 79.230, special counsel, 79.270, compensation all officers, 79.290, duties generally, 77.042 & 77.044, administrator, 77.480, officials generally.
- Consolidation of municipalities. Section 72.155 RSMo.
- Provide that Bonds should be issued. Section 77.180, third class cities; 95.370, fourth class cities.
- Collect License Taxes on Vehicles. Section 94.410 RSMo., cities 4,000 to 30,000.
- Require Building and Repairing of Sidewalks. Section 88.710 RSMo., fourth class city.
- Declare Street Grading Necessary. Section 88.917 RSMo.
- Set Penalties in Accordance with Statute. Section 79.470 RSMo.

## **DETERMINE INVESTMENT AUTHORITY FOR CITY FUNDS**

### **A. Constitutional Limitations and Guidelines**

- Article VI, Section 23: Cities may not own stock in corporation or association
- May not invest in mutual funds. MO Att. Gen. Op. 26-88.
- Corporate stock donated to a municipality must be disposed of in a reasonable period of time. MO Att. Gen. Op. 51-88.
- Article VI, Section 25:  
A city is not permitted to “lend its credit or grant public money or property to any private individual, association or corporation” (with certain exceptions)

### **B. Missouri Statutes address the following (See Legal Reference Guide below):**

- Deposit authority
- Collateralization
- Required agreements for demand and time deposits
- Depositary Contracts
- Security Pledge Contracts
- RFPs for deposit and investment of funds
- Investment authority
- Investment policy

### **C. Narrow Interpretation of Statutory Authority - MO Att. Gen. Op. 34-90 Cities, towns and villages. City funds. City parks. - Jan 23 (Missouri Attorney General Opinions (1990)):**

- “A municipal corporation ... is a creature of the legislature, possessing only those powers expressly granted or those necessarily or fairly implied in or incidental to express grants, or those essential to the declared objects of the municipality. [Citation omitted.] Any reasonable doubt as to whether a power has been delegated to a municipality is resolved in favor of nondelegation.” quoting *Anderson v. City of Olivette*, 518 S.W.2d 34, 39 (Mo.1975).

**D. Third and Fourth Class Cities appear to be limited to deposit of funds in financial institutions in accordance with the following:**

- Section 95.280 (third class) and 95.355 (fourth class)
- Section 67.025 FDIC 100% insured accounts OK; *e.g.*, CDARs
- Section 369.194. 1 deposit in insured savings and loan accounts OK
- Unclear statutory authority.
- No statutory authority for “investment.”
- However, investment not prohibited by statute.
- **Use Caution:** More conservative approach for statutory cities is to use demand and time deposit accounts only.

**E. Home Rule and Special Charter Cities:**

- Investment may be authorized by charter or statute, or both
- Investment must be consistent with Missouri Constitution
- Investment must not be prohibited by statute
- Special Charter: See Section 81.010, RSMo.
- Constitutional Charter: See Article VI, Section 19, MO Constitution and Section 82.010 RSMo.

**F. Attorney General Guidance on Investment of Public Funds**

- Savings and Loans **OK** - Specific statutory authority granted - MO Att. Gen. Op. 25-85
- Time Deposits such as CDs **OK** - Specific statutory authority granted - MO Att. Gen. Op. 164-75
- Mutual Funds and Money Market Funds **not** authorized for statutory cities - MO Att. Gen. Op. 64-95 (Not authorized by statute for school district; similarly not authorized for statutory cities).

**G. Investment Policy**

- Section 30.950.2, RSMo.
- Applies to: “Every political subdivision of this state which is responsible for the management and investment of public funds *and which has existing authority to invest such funds in a manner other than in depository accounts at financial institutions in this state...*”
- Example investment policy provided by State Treasurer.  
<https://www.treasurer.mo.gov/link/ModelInvestmentPolicy.pdf>

## Deposit and Investment of City Funds Legal Reference Guide<sup>1</sup> (Missouri)

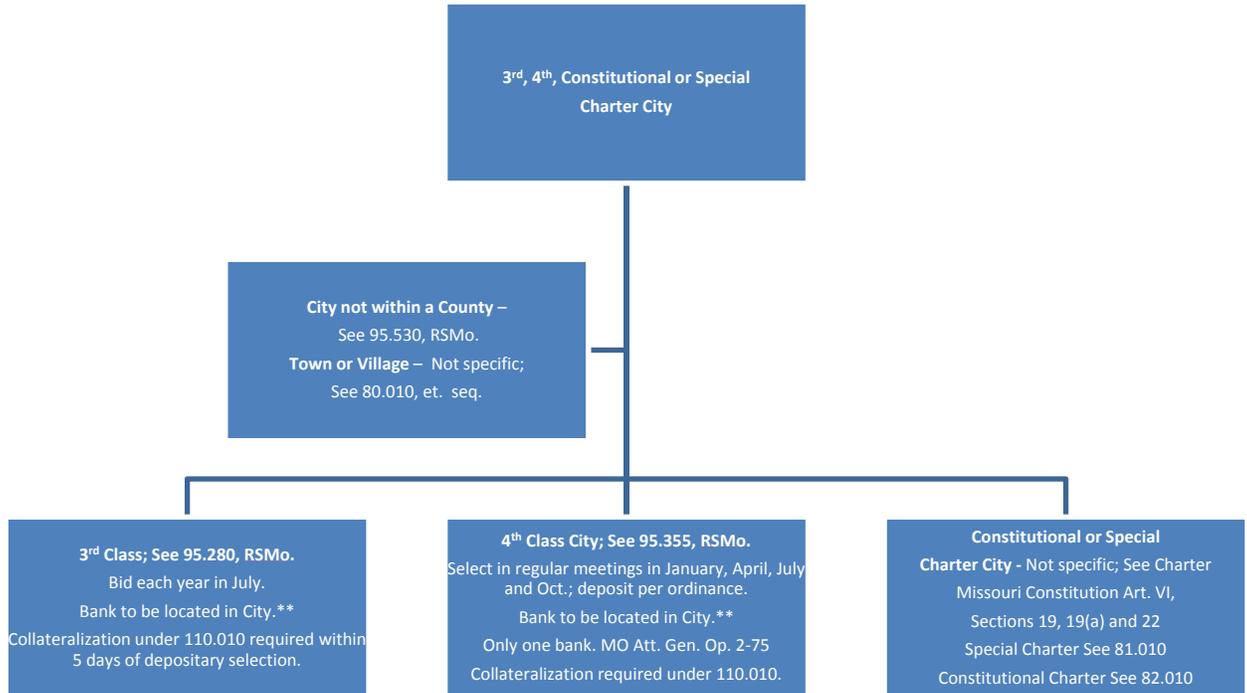
Reference <sup>2</sup>	Summary of Law
Article VI, Sect. 23	Cities may not own stock in a corporation or association
Article VI, Sec. 25	A city may not lend its credit or grant public money or property to private parties
Article VI, Sect. 19	Constitutional charter city powers
§30.250	Contract with depository, terms and conditions – cross referenced for cities from §30.270, through §110.010
§30.270	Security for safekeeping of funds - permitted collateral; rights on default – cross referenced for cities from §110.010
§30.950	<ul style="list-style-type: none"> <li>• Only for cities with existing investment authority</li> <li>• Requires investment policy for expanded investment options</li> <li>• Without an investment policy, investment limited to types authorized as of 1/1/1997</li> </ul>
§67.085	Authorizes investment of city funds not immediately needed in FDIC insured time deposit accounts at various banks, on certain conditions ( <i>i.e.</i> , CDARs); done through city depository bank
§81.010	Describes special charter cities
§82.010	Describes constitutional charter cities
§82.500	City treasurer in constitutional charter cities must give bond
§95.280	<ul style="list-style-type: none"> <li>• Authorizes deposit of funds by 3<sup>rd</sup> class cities</li> <li>• RFP guidelines for 3<sup>rd</sup> class cities</li> <li>• Rights and duties of parties to deposit contract as provided in §110.010</li> </ul>
§95.285	Requires collateralization of deposits by 3 <sup>rd</sup> class cities under §110.010 and §110.020
§95.355	<ul style="list-style-type: none"> <li>• Authorizes deposit of funds by 4<sup>th</sup> class cities and selection of depository</li> <li>• Requires collateralization under §110.010 and §110.020</li> <li>• Rights and duties of parties to deposit contract as provided in §110.010</li> </ul>
§110.010	<ul style="list-style-type: none"> <li>• Applies to 3<sup>rd</sup> and 4<sup>th</sup> class cities</li> <li>• May apply to charter cities</li> <li>• Requires deposits of city funds to be secured</li> <li>• See §30.270 for collateral type and rights and duties of the parties to depository agreement</li> </ul>
§110.020	Securities to be pledged as deposit collateral; value to be at least 100% of deposit, less FDIC insurance
§110.030	Advertisement for bids unnecessary if illegal for banks to pay interest on demand deposits (Note: 12 USC 371a prohibited interest on demand deposits until repealed in 2010)
§110.040	Describes when city can select a depository institution outside of territorial limits of city
§369.194.1	Authorizes deposit of city funds in savings and loan associations

<sup>1</sup> Reference guide does not cover special funds; list may not be exhaustive; for reference only.

<sup>2</sup> Section references (§) are Revised Statutes of Missouri; Roman numerals are Missouri Constitution.

# ESTABLISH FINANCIAL POLICY AND REQUIRE BANKING CONTRACTS

## A. Statutory Authority and Guidelines for Deposit of Funds



## B. Bank Qualifications

- Bank or Savings and Loan Association
- Location within city boundaries, if possible

## C. RFP for Bank Contracts

- RFP is required for third and fourth class cities under Sections 95.280-285 RSMo. and 95.355 RSMo., respectively.
- RFP for charter cities is per charter or ordinance, provided not contrary to Missouri Constitution, nor in violation of any applicable statute.
- 3<sup>rd</sup> Class Cities:
  - Annual in July
  - Notice published by the city clerk not less than one nor more than four weeks before the meeting, in some newspaper published in the city
  - Sealed proposals to be delivered to the city clerk, on or before the day of the meeting
  - Proposals to include the rate percent upon daily balances for the year next ensuing the date of the meeting (and such other information as requested in the RFP)
  - It is a misdemeanor for the city clerk or other person to disclose directly or indirectly the amount of any bid to any person before the selection of the depository

- 4<sup>th</sup> Class Cities:
  - Annual in January, April, July or October at regular meetings
  - RFP process and selection done per ordinance
  - Boards of aldermen may invest the moneys upon the terms and under the conditions provided by law for the loaning of county and school moneys *if there is no bank doing business in the city that can comply with the contract and collateralization requirements under Chapter 110.*

#### **D. Depository Contracts**

- Section 110.010 RSMo. implies a depository contract is required regardless of city type.
- Section 110.010 applies to 3<sup>rd</sup> and 4<sup>th</sup> class cities by virtue of their enabling statutes; likely applies to charter cities as well.
- Section 110.010.1(3) RSMo. – “The rights and duties of the several parties to the depository contract shall be the same as those of the state and the depository banking institution respectively under section [30.270](#).”

#### **E. Depository Contract Critical Terms**

- 90-day termination right on time deposit contracts;
- For time deposits, notice timing for withdrawals, rate of interest paid, term not to exceed five years;
- Provisions requiring that the depository shall:
- Safely keep such deposits;
  - Pay demand deposits on the city’s demand therefor; and
  - Pay time deposits only in accordance with the contract with the depository;
  - That such depository shall secure city moneys with the amount and character of securities provided for in § [30.270](#), such securities to be held at the expense of the depository;
  - Collateralization equal to 100% value of deposit, less amount of FDIC insurance.
- That in the event of any breach by bank, the city may without notice, advertisement or demand, and at public or private sale, convert into money the securities deposited, or as many of them as may be necessary to pay the whole amount of the city deposits in such depository.
- State Treasurer Form of Depository Contract:  
<https://www.treasurer.mo.gov/Banking/DepositoryContract2014.pdf>

#### **F. Custodial Contract Critical Terms**

- Collateral is required for city deposits under § 110.010 RSMo., regardless of city type.
- Parties: City, Depository Bank, and Trustee (custodian)
- Type of Collateral: securities of the character prescribed by . § [30.270](#) for the security of funds deposited by the state treasurer. Section 110.010.1
- Held by: at the option of the depository banking institution, the City’s fiscal officer or governing body, or by custodian. Section 110.010.2
- Terms of Custodial Contract: Trustee must surrender all or part of securities upon notice by the city that depository has breached the deposit agreement. Section 110.010.3
- Section 30.270 RSMo:

- That no item of security deposited by a depository under the terms of the contract shall be withdrawn without the written consent of the city;
- That the depository shall, at times specified by the city, render a statement showing the daily activity in the account;
- That in the event the depository shall default in any manner in performing any of the terms and conditions of the contract, or shall fail to keep safely the moneys of the city deposited with it, the city shall be authorized without notice, advertisement or demand, and at public or private sale, to convert into money the securities deposited, or as many of them as may be necessary to pay the whole amount of the city deposits in such depository.
- State Treasurer Form of Custodial Contract:  
<https://www.treasurer.mo.gov/link/SampleCustodialContractRevOct2013.pdf>

### **FINANCED PROPERTY INVOLVED ... THINK FIRST...**

- A. Applies to property that is financed through debt that is exempt from federal.
- B. Failure to observe federal tax laws regarding use of property financed through tax-exempt financing can jeopardize tax-exempt status.
- C. No “private business use” arrangement with a private entity *or the federal government*
  - Examples:
    - Sale of all or a portion of the facilities to private entity
    - Lease of all or a portion of the facilities to private entity
    - Management contract for use of facilities
    - Special legal entitlement or economic benefit
- D. Management Contracts:
  - *E.g.*, private business managing bond-financed public swimming pool
  - May be permitted if certain requirements met (*e.g.* compensation structure)
- E. Special Economic Benefit:
  - No general public use
  - For example, municipal utility serving only one business
- F. Special Legal Entitlement:
  - *E.g.*, municipal parking lot for only one private business
  - Exceptions:
    - Incidental uses of not more than 2.5% of the facilities (*e.g.* vending machine, kiosk)
    - General public use (*e.g.* public parking lot)
- G. Not considered private business use if use is by:
  - A state or local government
  - The general public

## SEGREGATE BOND FUNDS

- A. See covenants in financing documents.
- B. Tax laws, if tax exempt.
- C. Case by case requirements - need to know.
- D. Bond funds must be deposited and used in accordance with transaction documents and applicable IRS and SEC rules.
- E. Bond funds must be kept separate and not commingled with other city funds. *Section 108.180 RSMo.* Violation of this statute is a misdemeanor, punishable by fine and/or imprisonment. *Section 108.190 RSMo.*

## CAREFUL PREPARING PROPERTY DESCRIPTIONS

- A. SB809: <http://www.senate.mo.gov/14info/pdf-bill/tat/SB809.pdf>
- B. Applicable Statute: Section 327.272, RSMo. (Emphasis added).  
<http://www.moga.mo.gov/mostatutes/stathtml/32700002721.HTML>

### **Practice as professional land surveyor defined.**

327.272. 1. A professional land surveyor shall include any person who practices in Missouri as a professional land surveyor who uses the title of "surveyor" alone or in combination with any other word or words including, but not limited to "registered", "professional" or "land" indicating or implying that the person is or holds himself or herself out to be a professional land surveyor who by word or words, letters, figures, degrees, titles or other descriptions indicates or implies that the person is a professional land surveyor or is willing or able to practice professional land surveying or who renders or offers to render, or holds himself or herself out as willing or able to render, or perform any service or work, the adequate performance of which involves the special knowledge and application of the principles of land surveying, mathematics, the related physical and applied sciences, and the relevant requirements of law, all of which are acquired by education, training, experience and examination, that affect real property rights on, under or above the land and which service or work involves:

- (1) The determination, location, relocation, establishment, reestablishment, layout, or retracing of land boundaries and positions of the United States Public Land Survey System;
- (2) The monumentation of land boundaries, land boundary corners and corners of the United States Public Land Survey System;
- (3) **The subdivision of land into smaller tracts and preparation of property descriptions;**
- (4) The survey and location of rights-of-way and easements;
- (5) Creating, preparing, or modifying electronic or computerized data relative to the performance of the activities in subdivisions (1) to (3) of this subsection;

- (6) Consultation, investigation, design surveys, evaluation, planning, design and execution of surveys;
- (7) The preparation of any drawings showing the shape, location, dimensions or area of tracts of land;
- (8) Monumentation of geodetic control and the determination of their horizontal and vertical positions;
- (9) Establishment of state plane coordinates;
- (10) Topographic surveys and the determination of the horizontal and vertical location of any physical features on, under or above the land;
- (11) The preparation of plats, maps or other drawings showing elevations and the locations of improvements and the measurement and preparation of drawings showing existing improvements after construction;
- (12) Layout of proposed improvements;
- (13) The determination of azimuths by astronomic observations.

2. None of the specific duties listed in subdivisions (5) to (13) of subsection 1 of this section are exclusive to professional land surveyors unless they affect real property rights. For the purposes of this section, the term "real property rights" means a recordable interest in real estate as it affects the location of land boundary lines.

3. Professional land surveyors shall be in responsible charge of all drawings, maps, surveys, and other work product that can affect the health, safety, and welfare of the public within their scope of practice.

4. Nothing in this section shall be construed to preclude the practice of architecture or professional engineering or professional landscape architecture as provided in sections [327.091](#), [327.181](#), and [327.600](#).

(L. 1969 S.B. 117, A.L. 1981 S.B. 16, A.L. 1999 H.B. 343, A.L. 2010 H.B. 1692, et al., A.L. 2014 S.B. 809)

**C. Current Interpretation by Surveying Licensing Board:**

<http://pr.mo.gov/boards/apelsla/Position%20Paper.pdf>

**G. Kimberley Diamond & Erin P. Seele  
Cunningham, Vogel & Rost, P.C.**

*legal counselors to local government*  
333 S. Kirkwood Road, Suite 300

St. Louis, MO 63122

314.446.0800

314.446.0801 (fax)

*kim@municipalfirm.com*

*erin@municipalfirm.com*

*www.municipalfirm.com*

---

**NOTICE & DISCLAIMER**

These seminar materials and the related presentation are intended for discussion purposes and to provide those attending the seminar with useful ideas and guidance on the topics and issues covered. The materials and the comments of the presenters do not constitute, and should not be treated as, legal advice regarding the use of any particular technique, device or suggestion, or its legal advantages or disadvantages. Although we have made every effort to ensure the accuracy of these materials and the presentation, neither the attorney presenting this seminar nor Cunningham, Vogel & Rost, P.C. assumes any responsibility for any individual's reliance on the written or oral information presented.