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U.S. Supreme Court Cases

***MARVIN M. BRANDT REVOCABLE TRUST v. U.S.*, 134 S. Ct. 1257 (2014) –** *Abandoned railroad right-of-way granted under the General Railroad Right-of-Way Act of 1875 reverts to servient property owner because original grant to railroad was a mere easement.*

The General Railroad Right-of-Way Act of 1875 granted the railroads various rights-of-way over public land to try to encourage settlement of the West. In 1976 the United States gave a land patent to Melvin M. Brandt granting him title to a parcel of land that was subject to rights granted to a railroad under the 1875 Act. In 1996 the railroad was abandoned and tracks were torn up and removed in 2004. The U.S. sought to quiet title in itself over the abandoned railroad right-of-way; Brandt asserted that he enjoyed full title to the land without the burden of the abandoned easement. The district court and the court of appeals quieted title in the United States based on an implied reversionary interest.

HELD (8-1): RR Easement was terminated when the railroad right-of-way was abandoned, leaving Brandt with title that was unburdened by any easement. The United States government had previously argued, and the Court agreed, in *Great Northern Railway*, 315 U.S. 262 (1942) that grants to railroads under the 1875 Act were easements. The language of grants under the 1875 Act was inconsistent with a grant of a fee interest. Under common law, when an easement is abandoned, the servient owner is left unencumbered by the servitude. In the present case, the government advanced a stark change in position which the Court would not endorse.

Dissent (Sotomayor): The Court, resting its decision on *Great Northern Railway*, ignored earlier decisions that held that the United States retained a reversionary interest. Courts have long treated railroad rights-of-way as *sui generis* property rights not governed by the ordinary common law regime. *Great Northern* did not overturn the previous cases but simply held that the granted interest under the Act did not give a railroad company the right to drill on the land for minerals and oil. The majority decision could result in costs of hundreds of millions of dollars for American taxpayers because of conversion suits brought against the United States.

***McCULLEN v. COAKLEY*, No. 12-1168, 2014 WL 2882079 (U.S. June 26, 2014) –** *Statute making it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to an abortion clinic violated the First Amendment as it was not narrowly tailored to serve legitimate government interests.*

A Massachusetts statute made it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to an abortion clinic. The statute exempted four classes of individuals, including "employees and agents of such facilities acting within the scope of their employment." Petitioners challenging the constitutionality of the statute wished to distribute information and engage in "sidewalk counseling," so they sued the Massachusetts Attorney General to enjoin enforcement of the statute. The District Court denied the challenge holding ample other means existed to distribute the desired communications and the First Circuit affirmed.

HELD (9-0, 4 concurring in judgment only): The statute violated First Amendment guarantees. Public ways and sidewalks hold a special position in First Amendment case law because of their importance to discussion and debate. The fact that the statute established buffer zones only at clinics that performed abortions did not render the statute content-based, nor did fact that the statute exempted certain groups including clinic employees and agents, so the statute was not subject to strict scrutiny. The inevitable effect of restricting abortion-related speech does not change the fact that the statute was facially neutral. However, the statute was not sufficiently "narrowly tailored" to serve legitimate government interests. While the statute promoted public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways, the buffer zones put significant burdens on the petitioners' ability to carry out desired "sidewalk counseling." This burden was greater than needed to achieve the State's asserted interests. Existing ordinances already address most of the significant issues of obstruction. The State needed to consider alternatives that leave the sidewalks and public ways open for their "time-honored purposes."

Concurrence (Scalia, Thomas and Kennedy joining): Because Court held that the statute was not narrowly tailored, majority's holding that the statute was content natural was unnecessary, and if necessary, wrongly decided.

Concurrence (Alito): Statute unconstitutionally discriminated based on viewpoint.

***TOWN OF GREECE, N.Y., v. GALLOWAY,* 134 S. Ct. 1811 (2014)** – *Sectarian opening prayer at town meeting did not violate Establishment Clause.*

A New York municipality ("Town") had a practice of beginning monthly council meetings with a prayer led by a local cleric. For a period of roughly a decade, all but four of these prayers were led by Christian clergy, although the Town did not intentionally attempt to exclude non-Christians. Several residents and attendees of the meetings filed suit objected to the prayers' sectarian content, and alleged that the Town violated the Establishment Clause of the First Amendment, and sought to restrict prayers at Town meetings to "inclusive and ecumenical" ones that referred only to a "generic God."

HELD (5-4): Town's sectarian prayers did not run afoul of the Establishment Clause. The Supreme Court emphasized the long-standing tradition of legislative prayer in the United States dating back to the time of the Framers. Re-affirming *Marsh*, the Court held that the Town's prayer practice fit within that long-standing tradition because the prayers at issue were designed to elevate the proceedings and unite the council's members, and did not unduly proselytize or threaten damnation. Once a government invites prayer into its meetings, it cannot force the speaker to betray his or her conscience by enforcing a secular worldview. Additionally, so long as the government's policy is one of non-discrimination, the government does not need to go seeking out differing religious viewpoints. The Court indicated that only patterns of prayer that "over time denigrate, proselytize, or betray an impermissible government purpose" would be held to be unconstitutional. Finally, the Court rejected the argument that prayers before a local government's meetings were qualitatively different from those before Congress or a state legislature, finding that Town's council members did not treat any member of the public any

differently based on whether they participated or not in the prayer nor was there any indication of coercion.

Dissent (Breyer and Kagan, separately): Town "failed to make reasonable efforts to include prayer givers of minority faiths." Also (Kagan), town hall meeting was different than legislative session for which opening prayer was upheld in *Marsh;* town hall function was not only legislative, but also served as forum for "ordinary citizens to engage with and petition their government, often on highly individualized matter. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive—that they respect each and every member of the community as an equal citizen."

Other Notable Supreme Court Decisions:

***MICHIGAN v. BAY MILLS INDIAN COMMUNITY*, 134 S. Ct. 2024 (2014) –** *Suit to enjoin off-reservation casino barred by tribal sovereign immunity.*

The Indian Gaming Regulatory Act (the "Act") establishes the framework for regulating gaming activities on Indian lands, including by requiring certain kinds of gaming to be conducted only pursuant to an agreement with the surrounding state. The Act provides that a state may sue a tribe to enjoin such gaming activities if they occur "on Indian lands" and in violation of any such agreement. Pursuant to the Act, Michigan and the Bay Mills Tribe (the "Tribe") entered into such an agreement (the "Compact") in 1993, and the Tribe subsequently operated a casino on its reservation. In 2010, however, the Tribe opened another casino on land it had later purchased, which was located about 125 miles from its reservation. Michigan objected to the new facility, claiming that the new casino violated the terms of the Compact by not being located and operated on "Indian land," and sought an injunction in federal court pursuant to the Act. The trial court agreed with Michigan, but the Sixth Circuit reversed, ruling that tribal sovereign immunity prevented Michigan from suing the Tribe.

HELD: Indian tribes retain sovereign immunity, which may only be abrogated or diminished by unequivocal acts of Congress. The Act's language waiving an Indian tribe's sovereign immunity is limited to actions seeking to enjoin conduct "*on* Indian lands," but the basis of Michigan's complaint against the Tribe was that it was operating a casino *off* Indian lands. The Court found that the statutory language of the Act is clear, that its waiver of tribal sovereign immunity was narrowly and carefully drafted, and Michigan's suit was therefore barred by tribal sovereign immunity. The Court concluded that, in the absence of such express waivers of tribal immunity, the states "must resort to other remedies" against Indian tribes, "even if they would be less 'efficient.'"

***EPA v. EME HOMER CITY GENERATION, L.P.*, 134 S. Ct. 1584 (2014)** – *EPA's Transport Rule relating to cross-state air pollution upheld under* Chevron.

The Clean Air Act (the "CAA") contains a provision known as the "Good Neighbor Provision," which requires all states to prohibit sources of air pollution within their borders from emitting

pollutants that will "contribute significantly" to another state's failure to comply with the CAA. The purpose of the Good Neighbor Provision is to address the problem created when air pollution generated in one state causes another, "downwind" state to fail to meet its EPA-established air quality standards ("NAAQS"). The Transport Rule was an attempt to give meaning to the "contribute significantly" standard by creating a two-step test. First, it had to be determined whether the upwind state contributed at least 1% of a downwind state's total allowable air pollution budget under a NAAQS. If so, the required reductions would be based upon whether such emissions could be reduced cost-effectively using a complicated model developed by EPA. If they could not be reduced cost effectively, then under the Transport Rule that state would not have to take additional steps to curtail such emissions. At the same time it promulgated the Transport Rule, EPA handed down emissions budgets for each upwind state ("FIPS"). Both upwind and downwind state and local governments, as well as industry groups, challenged the Transport Rule and the FIPS.

HELD: EPA's interpretation of the "contribute significantly" language in the Good Neighbor Provision was entitled to *Chevron* deference, and its use of a cost-benefit analysis was a reasonable interpretation of the CAA's ambiguity. The Court frequently noted the challenges EPA faces in effectuating Congress' mandate to curb cross-state air pollution, and accordingly held that the Transport Rule's allocation of responsibility for reducing emissions among upwind states based on the relative cost-effectiveness of such reductions—rather than on some metric based on actual contributions—to be a reasonable interpretation and effectuation of congressional intent. Additionally, the Court held that the plain language of the CAA authorized EPA to hand down the FIPS to the upwind states immediately, rather than giving time to upwind states to file their own proposals for compliance with the new standards, and accordingly upheld the Transport Rule in its entirety.

***RILEY v. CALIFORNIA*, No. 13-132, 2014 WL 2864483 (U.S. June 25, 2014)** – *Cell phones do not qualify for the search incident to arrest exception to the Fourth Amendment.*

HELD: The search incident to arrest exception to the Fourth Amendment's warrant requirement does not apply to cell phones.

Applying the rationale of the search incident to arrest exception—specifically that the exception protects officer safety and prevents the destruction of evidence—the Court held that cell phones do not pose the same risks that justify the exception in other cases, and accordingly the exception does not apply to cell phones. The Court rejected arguments advanced by the United States and California that a search of a cell phone could alert the arresting officers to the arrested person's confederates rushing to the scene, and that "remote data wiping" could destroy important evidence contained on the phone. The Court noted that cell phones bear little if any resemblance to any other article that falls within the "search incident to arrest" exception to the Fourth Amendment's warrant requirement. The Court rejected requests to create carve-outs in favor of a bright-line rule: "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." However, the Court did leave open the possibility that warrantless searches of cell phones could be justified, depending

on the facts, under the "exigent circumstances" exception to the warrant requirement, or other exceptions.

***HARRIS v. QUINN*, No. 11-681, 2014 WL 2921708 (U.S. June 30, 2014)** – *First Amendment prohibits a state from requiring individuals who are not full public employees from contributing to a union to which they do not wish to belong.*

An Illinois law, the Public Labor Relations Act (the "Act"), contains a provision requiring those public employees who do not wish to join a union to nevertheless pay a certain amount of their wages to the appropriate union for collective bargaining and other similar services from which the non-union employee benefits (the "Fair Share Provision"). Several Illinois individuals who work as in-home care providers under a certain Medicaid program administered by Illinois and who did not belong to a union filed a class action challenging the Fair Share Provision, arguing that it violates their First Amendment rights by requiring them to support an organization they do not wish to support.

HELD: The First Amendment prohibits a state from requiring individuals who are not full fledged state employees from contributing to a union that they do not wish to join or support.

The Court distinguished the employees before it from those in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which the Court had held that a requirement that public employees who choose not to belong to a union must pay an "agency fee" to that union for collective bargaining activities and the like—but not for political activities—did not run afoul of the First Amendment. After questioning the holding of *Abood* generally, the *Harris* Court held that the employees before it differ from full fledged public employees in important respects, and so *Abood* is inapplicable, even setting aside its questionable foundations. Turning then to whether the Fair Share Provision violates the First Amendment as applied to these employees, the Court held that it did because the Fair Share Provision did not serve a "compelling state interest" that "cannot be achieved through means significantly less restrictive of associational freedoms," finding unpersuasive arguments that the provision promotes "labor peace" and the welfare of the in-home care providers.

***UTILITY AIR REGULATORY GROUP v. EPA*, 573 U.S. ---, No. 12-1146, 2014 WL 2807314 (June 23, 2014) –** *Clean Air Act does not authorize EPA to regulate greenhouse gas emissions from stationary sources generally so as to expand EPA's regulatory reach, but it may regulate such emissions from those sources that are already subject to CAA regulation for other pollutants.*

Determining that greenhouse gases ("GHGs") pose a threat to human health and the environment after *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA began taking steps to regulate their emission. The first issue in this case was whether the authorization to regulate GHGs from moving sources (cars, planes, etc.) also required or authorized EPA to regulate such emissions from stationary sources (factories, power plants, etc.) (the two sources of air emissions are subject to different regulatory regimes under the Clean Air Act ("CAA)). EPA concluded that the

CAA mandated such regulation of stationary sources. EPA found, however, that the regulation of GHGs from stationary sources would "radically" expand the current regulatory program by including tens of thousands of additional sources that had never before been regulated by the CAA. Nevertheless, because EPA believed it had no choice but to regulate GHGs from stationary sources, it developed the "Tailoring Rule" to phase-in the regulation of GHGs, and to relax the criteria that trigger regulation so that only major sources of GHGs would be regulated, in keeping with historic practices and interpretation of the Clean Air Act by EPA.

HELD: The CAA does not require EPA to regulate GHG emissions from stationary sources. Finding that the unambiguous terms of the CAA did not mandate that result, the Court likewise rejected EPA's argument that it was a reasonable interpretation of the CAA because it would greatly expand EPA's authority far beyond anything it had exercised in the past. The Court also held that the Tailoring Rule was an unreasonable interpretation by straying from the explicit text of the CAA. Nevertheless, the Court did uphold the agency's interpretation that the CAA authorized it to regulate GHGs from stationary sources that were *already* subject to permit and other regulatory requirements under the CAA.

8th Circuit Cases

***PETERSON v. CITY OF FLORENCE, MINN.*, 727 F.3d 839 (8th Cir. 2013)** - *Zoning ordinance that zoned the entire City for residential use, and thus prohibited the operation of an adult entertainment operation anywhere within the City, did not violate the First Amendment.*
In 2008, the City of Florence passed a zoning ordinance that prohibited the operation of a "sexually-oriented business" within 250 feet of any property zoned for residential use or any day care, school, park, or library. Also, such business had to operate in a commercially zoned area. However, all areas within the city were zoned for R-1 residential use. In 2010, Plaintiff opened The Juice Bar, an adult entertainment operation with nude dancers. Plaintiff was charged under the ordinance and forced to close. Plaintiff proceeded to sue the City of Florence seeking a declaration that the ordinance was unconstitutional. In 2011, the city then passed an ordinance abolishing all business and commercial zoning districts, leaving the entire city zoned as residential. The district court granted the City's motion for summary judgment.

HELD: Zoning ordinances did not violate the First Amendment as they were content-neutral, served substantial government interests, and reasonable alternative avenues existed. Zoning of the entire city as residential restricted all commercial and business uses and, thus, was content neutral. The zoning was narrowly tailored to serve the substantial interests of public health, safety and general welfare. The zoning ordinances also served the interests of improving the quality of the physical environment of the city and protecting property values. Furthermore, the limited infrastructure, staff, and resources of the city make it difficult to accommodate commercial or business establishments. "The Supreme Court has instructed [courts] not to take these interests lightly." "Any incidental burden on speech from the zoning scheme is therefore no greater than necessary to furthering the interest in keeping Florence residential." The Eighth Circuit acknowledged that it was an open question "whether, at least in the case of small municipalities, opportunities to engage in the restricted speech in neighboring communities may be relevant to determining the existence of adequate alternative channels." The court held that a

reasonable alternative exists to operate adult entertainment business as there are areas in the county where plaintiff can open the business; approximately 32% of areas in county zoned for commercial use (approximately 204 acres) were available to operate plaintiff's business.

Missouri State Cases

***CITY OF NORTH KANSAS CITY v. K.C. BEATON HOLDING CO., LLC,* 417 S.W.3d 825 (Mo. App. 2014) –** *Section 88.497 RSMo. does not grant third class cities the authority to condemn property for the public purpose of eliminating blight.*

As part of a redevelopment plan for a 57-acre area, the City of North Kansas City sought to condemn property on which a Burger King was operated. The City commissioned two blight studies. While the blight studies found no blighting factors on the Burger King property, the studies showed a preponderance of blight and therefore concluded the entire area was blighted. The City acquired all of the property in the area except for the Burger King property. The City offered fair market value for the property, but K.C. Beaton Holding Company, LLC, the owner, rejected the offer. The City filed a petition for condemnation, and K.C. Beaton moved to dismiss. At an evidentiary hearing, K.C. Beaton offered no testimony or evidence other than the City's master plan. The redevelopment area was referenced as a "planning area" in the master plan. The City acknowledged at the hearing that it did not have an actual physical plan for the redevelopment and it did not have a developer. The circuit court dismissed the City's petition, ruling that although the City complied with the requirements for blighting the property, the City did not have the authority under Section 88.497 RSMo. for the "public purpose" of eliminating blight. The City appealed, arguing it had legal authority to condemn the property under Section 88.497 RSMo. because that section grants the City the right to take property "for any other necessary public purposes," and the elimination of blight is a public purpose.

HELD: The City did not have the authority to condemn the Burger King property under Section 88.497 RSMo. for the purpose of eliminating blight. The court of appeals affirmed the dismissal of the condemnation petition, holding that while the elimination of blight is a "public purpose," the legislature did not intend to include it as a "necessary public purpose" in Section 88.497 RSMo. That statute provides in part that "[p]rivate property may be taken by the cities of the third class . . . for any other necessary public purposes." The court, strictly construing the statute, concluded that because Section 88.497 RSMo. was enacted before Article VI, § 21 of the Missouri Constitution, which grants the legislature authority to enact laws to allow non-charter cities to utilize eminent domain to eliminate blighted areas, it could not be said that the legislature intended to include blight as a public purpose in the prior-enacted Section 88.497 RSMo. The court recognized that Chapter 88 is the "Public Works" and blight is never mentioned in Chapter 88. The court also recognized that aside from Section 88.497 RSMo., there are "many comprehensive statutes which provide third class cities the tools to implement plans for the redevelopment of blighted areas."

***ST. LOUIS COUNTY v. RIVER BEND ESTATES*, 408 S.W.3d 116 (Mo. 2013) –** *Heritage value statutes held constitutional.*

St. Louis County condemned 15 acres of property owned by the Novel family, who previously lived on and had owned the property since 1904. The County and the Novels could not agree on the proper compensation, and the trial court appointed commissioners. The commissioners awarded the Novels $320,000.00 for the property and the Novels filed exceptions to the award, requesting a jury trial. Prior to the trial, the trial court sustained the Novels' motion for assessment of "heritage value" pursuant to Sections 523.061 and 523.039 RSMo. At the conclusion of the jury trial, the jury awarded the Novels $1.3 million. The trial court then added $650,000.00 in heritage value. The County appealed on several grounds, including that the heritage value statutes were unconstitutional.

HELD: The heritage value statutes, allowing an award of an additional fifty percent of just compensation for property owned more than 50 years by a single family, are constitutional. The County argued on appeal that the heritage value statutes violated the Missouri Constitution in the following three ways: (1) the General Assembly impermissibly altered the judicial definition of "just compensation" by permitting the addition of heritage value to fair market value, (2) the heritage value statutes require that the County expend public funds without a public purpose, and (3) the requirement in the statute that a judge compute heritage value invades the province of the jury to determine just compensation.

First, the court rejected the County's claim that the statutes were *ultra vires* and held that the statutes did not impermissibly alter the definition of "just compensation" because the definition is simply a "constitutional floor" that legislatures cannot go below, but can exceed. The court recognized that a legislature may compensate losses and damages beyond those traditionally included in its interpretation of "just compensation," including allowing for additional compensation for heritage value. Second, the court rejected the County's argument that any compensation paid beyond the constitutional minimum of "just compensation," including the added heritage value, serves no public purpose and is therefore unconstitutional because it uses public funds to confer a private benefit. The court used the "primary effect" test, and found that the primary object of the heritage value statutes was to compensate a class of persons whose property is acquired through eminent domain for the benefit of the public, and therefore the heritage value was legal, notwithstanding that it involves incidental expenses that, alone, may not be lawful. Third, the court held that although "just compensation" must be determined by a jury, the requirement that heritage value be determined by a judge is constitutional. Heritage value is outside of the definition of "just compensation," which is defined as fair market value, and therefore there is no constitutional mandate that a jury ascertain heritage value. The court noted that the County did not allege that this provision violated its right to a jury trial.

***BREHM v. BACON TOWNSHIP*, 426 S.W.3d 1 (Mo. 2014) –** *Party with no established ownership interest in a road lacks standing to challenge constitutionality of law governing when a road becomes legally established or abandoned.*

A property owner brought a declaratory judgment action against a city and township, alleging that a gravel road belonged to him, was not a public road, and the city had no right to remove a gate on the road without his permission. A 2011 judgment quieted title in the Missouri

Conservation Commission, and the trial court found that the road was a public road pursuant to Section 228.190.2 RSMo. because it was designated as such and had been allocated county aid road trust funds for at least five years. The property owner did not deny the quiet title judgment but argued that Section 228.190.2 RSMo. was unconstitutional under due process and was an unconstitutional taking. The trial court granted summary judgment because there was no evidence that the property owner owned any interest in the road.

HELD: Property owner that owned no interest in road had no standing to challenge the constitutionality of Section 228.190.2 RSMo. as applied to the road. The Court held that "constitutional considerations relating to due process could be implicated" had the sole basis of the public claim to the road been that it was a public road by virtue of the State privately listing it as a public road for five years without any notice to the property owner. However, the Court declined to reach the constitutional issues because the property owner had no "legally protectable interest" in the litigation as he had did not own the road. The property owner did not challenge the validity of the 2011 quiet title judgment, which explicitly quieted title in the Missouri Conservation Commission and gave the property owner only a license to use the road.

***HAUK v. SCOTLAND COUNTY COMMISSION*, 429 S.W.3d 459 (Mo. App. 2014) –** *Denial of a county health permit was abuse of discretion where each commissioner applied their own standard.*

Scotland County adopted an ordinance regulating the construction and operation of concentrated animal feeding operations ("CAFO"). The ordinance required a health permit for the operation of a CAFO. The setback guidelines required that "[n]o CAFO shall be located within two miles of a populated area." "Populated area" was defined as an "area having at least 10 occupied dwellings not on CAFO property, as measured in a straight line from the occupied dwelling to the nearest CAFO confinement building, confinement lot, or other confinement area." Hauk's application for a permit was denied because his proposed CAFO did not meet the setback requirements. In reviewing the application, one commissioner testified that he "attempted to find a balance between the health concerns of the residents and the operation of the CAFOs within the county." The commissioner drove to the site of the proposed CAFO and because there were several homes fairly close together, he decided that it was located in a populated area. The second commissioner acknowledged that the ordinance did not define the parameters of a "populated area" and he believed he had to "look back at the overall knowledge of our community and the density of population, the type of homes, the type of lifestyle that people live in areas such as this." His definition of "populated area" meant if there is a "cluster of homes" and the closest one is "less than two miles from that CAFO the CAFO can't be located in that area." He testified that the commissioners did not agree on the interpretation of the definition of "populated area." Hauk appealed the decision in the trial court as a non-contested case and the trial court found that the denial of the health permit was arbitrary, capricious, and an abuse of discretion because the commissioners "each applied their self-determined, unwritten standard to make the determinations." The trial court also found that this was a violation of equal protection. The County appealed.

HELD: The denial of the permit was an abuse of discretion. While the ordinance was a proper exercise of the County's police power, County did not apply it in a consistent and rational manner. The commissioners ignored the language of the ordinance and "each applied their self-determined, unwritten standard" to make their determination. The commissioners' decision was impermissibly based on their own purely subjective interpretations of the ordinance and personal observations. The court of appeals' holding did not reach the issue of equal protection because it affirmed on other grounds, however, the court noted that there did not appear to be evidence showing a violation of equal protection.

***CITY OF KANSAS CITY v. CHASTAIN*, 420 S.W.3d 550 (Mo. 2014) –** *Proposed ordinance was not a facially unconstitutional appropriation ordinance.*

Chastain submitted an initiative petition to impose an additional sales tax to construct a light rail system. The ordinance would impose additional sales taxes "for the benefit of the city," and the stated purpose of the sales taxes was to construct a light rail system. The ordinance mandated the imposition of two sales taxes, one for "capital improvements," and one for "transportation purposes." Aside from "capital improvements" and "transportation purposes," no particular project was mandated. The transportation and infrastructure committee recommended that the City Council not pass the ordinance. The City Council thereafter determined that the City was not required to place the election before the voters, and the City declined to place the ordinance on the ballot. The City filed a petition for declaratory judgment, seeking to have the proposed ordinance declared facially unconstitutional under Art. III, § 51 of the Missouri Constitution because the initiative was used for the appropriation of money. The trial court entered judgment for the City on the grounds that the proposed ordinance was an unconstitutional appropriation. Chastain appealed. After the Western District Court of Appeals affirmed, the Missouri Supreme Court granted transfer.

HELD: The proposed ordinance was not a facially unconstitutional appropriation of money because it did not appropriate money but rather "simply imposes additional sales taxes," and it "imposes no unfunded financial obligations on the city either expressly or through practical necessity." Article III, § 51 prohibits the appropriation of money by initiative, except that an initiative may appropriate revenues created by the initiative proposal. The Missouri Supreme Court stated that what this section prohibits – an initiative that either expressly or through practical necessity requires the appropriation of funds to cover the costs associated with the ordinance – was not present here. The court rejected the City's claim that the ordinance was an appropriation because the proposed sales taxes would only "help fund" a series of mandated transportation projects by financing bonds and securing federal matching funds. The ordinance itself did not mandate that the City spend any money, make any plans, or do anything at all other than impose two new sales taxes, and therefore it was not an appropriation ordinance. The court declined from expressing an opinion on the "ultimate merits" of Chastain's mandamus claim to require the City to place the ordinance on the ballot, and simply remanded to the trial court for further review. Judge Wilson's concurrence stressed that the opinion did not "suggest any view as to the merits or outcome of Chastain's Mandamus Petition," and expressed doubt that any city ordinance proposed pursuant to an initiative right reserved to the people in a city charter can violate Article III, § 51.

***BABB V. MISSOURI PUBLIC SERVICE COM'N*, 414 S.W.3d 64 (Mo. App. 2013) –** *City's Regulation of Solar Panels was Not Preempted and Section 89.110 Applies Only to Appeals from Boards of Adjustment.*

The Babbs applied for a special use permit to install a solar energy system at their home in Clarkson Valley. The City's Planning and Zoning Commission recommended to the Board of Aldermen approval of the permit, which was revised to reduce the number of panel upon recommendation of the Commission. The Board voted 6-0 to deny the permit, without setting forth reasons for denial. The Babbs filed suit seeking a declaratory judgment that the City's ordinance regarding solar energy systems was preempted by state statutory scheme regulating individual solar systems connected to utilities and a related tax credit program. The Babbs also alleged that the Board's denial of its special use permit was arbitrary, capricious, unreasonable and an abuse of discretion. The City argued that its ordinance was regulatory, not prohibitive, and not preempted. The City also argued the appeal of the denial was not timely under Section 89.110 RSMo. The Circuit Court ruled that the City's ordinance was preempted by state law and that the denial of the permit was an abuse of discretion. The City appealed.

HELD: The City's regulation of solar panels was not preempted and § 89.110 applies only to appeals from Boards of Adjustment. The Court held that City's regulation of solar energy systems was not preempted because the state statutes did not expressly prohibit local laws and the City's ordinance only imposed additional requirements. The Court held that the "use of reflective materials that shine bright sunlight into a neighbor's window, or the way the solar panels may appear from the street or a neighboring property" were of great concern to the City and that "[t]hese types of restrictions are within the police powers of the City."

However, the denial of the permit for the solar panel was still held improper. The Court, rejecting precedent to the contrary, disagreed with the City's argument that the Babbs' appeal was untimely under § 89.110 and that the Babbs should have sought judicial review under that section instead of § 536.150 RSMo. The Court held that § 89.110 RSMo. only applies to appeals from decisions of a Board of Adjustment, and here the Babbs appealed the decision of the Board of Aldermen. Therefore, the appeal was timely and the Court affirmed the Circuit Court's unappealed finding that the denial of the special use permit was arbitrary and capricious.

***BUSH v. CITY OF COTTLEVILLE*, 411 S.W.3d 860 (Mo. App. 2013) –** *Claims against City and Board of Adjustment under § 89.491 RSMo. and for private nuisance were properly dismissed.*

Plaintiff owned property adjacent to Aiello's property which was operating as a cigar bar. The cigar bar operated pursuant to various zoning permits and a setback variance granted by the City's Board of Adjustment (BOA). Plaintiff sued Aiello, the City, and the City BOA, alleging that the BOA wrongly granted the permits and variance to Aiello and that Aiello's property emits smoke, noise, light, and glare onto Plaintiff's property. The trial court dismissed all claims and plaintiff appealed.

HELD: Plaintiff failed to state a claim against the City or the BOA. Section 89.491 RSMo. provides a private cause of action against "[a]ny person who is alleged to be in violation of any standard, regulation, or ordinance which has been adopted by any county or city pursuant to chapter 64 or this chapter." However, claims under § 89.491 against the City and BOA could not stand because plaintiff cited no "standard, regulation, or ordinance" that the City or BOA had violated. Allegations that the "action of the BOA in approving the variance was arbitrary, capricious, and unlawful," and that the BOA "abused its discretion," were not sufficient. In a footnote, the court also acknowledged that plaintiff's petition was likely an untimely challenge to the BOA's decision under § 89.110 RSMo. and judicial review under § 89.110 was an exclusive remedy. Furthermore, plaintiff's private nuisance claims against the City could not withstand dismissal because a nuisance claim cannot be brought against parties that do not use or operate the nuisance-creating property.

Petition did state a claim against Aiello under § 89.491 and for private nuisance, as it sufficiently pled encroachment onto property by smoke, noise, light, and glare in violation of the ordinance and sufficiently pled resulting substantial impairment of use of property and loss in market value.

CITY OF LIBERTY, ET AL. v. STATE OF MISSOURI, **Case No. 13AC-CC00505 (Cole County Cir. Ct., October 17th, 2013) –** *Two bills both titled "An Act … related to telecommunications" violated Single Subject/Clear Title rule and Original Purpose rule of Missouri Constitution.*

In 2013, the General Assembly passed HB 331 and HB 345, both titled "An Act … relating to telecommunications." HB 331 contained provisions relating to right-of-way management, zoning and leasing of wireless facilities, railroad crossings utility facilities, and PSC regulation of telecommunications companies. HB 345 contained provisions relating to zoning and leasing of wireless facilities and attachments to municipally-owned utility poles. A group of six cities and two individuals sued the State, seeking to enjoin the effectiveness of the bills and declare the bills unconstitutional.

HELD: Both HB 331 and HB 345 violated the Single Subject/Clear Title requirement of Mo. Const. Art. III, § 23 and the Original Purpose requirement of Mo. Const. Art. III, § 23.

Under the Single Subject/Clear Title rule, no bill can contain more than one subject which is clearly expressed in its title. House Bills 331 & 345 violated this as the titles were underinclusive to contain the various areas that all of the provisions extended to. While the title of HB 331 was limited to "relating to telecommunications," the final bill additionally dealt with the regulation of all public utilities relating to right-of-way management and railroad crossings. Similarly, the final title of HB 345 was limited to "relating to telecommunications," and the bill additionally dealt with video service/cable services, which were beyond the scope of the bill's title.

Under the Original Purpose rule, no bill can be amended to change its "original purpose." The original purpose of HB 331 was to amend one statute relating to PSC regulation of telecommunications, however, the final bill included statutes relating to wireless services, which fell outside the regulatory authority of the PSC, and other non-telecommunications services not

germane to the original purpose. Conversely, HB 345 started with the original purpose of regulating the zoning and leasing of wireless services, but the final bill additionally regulated wired services to the exclusion of wireless services, making the additional regulation of wired services not germane to the original purpose of regulating zoning and leasing of wireless facilities.

The Circuit Court struck down both bills in their entirety, declining to sever and leave in place non-violating provisions of the bills. The Court applied the new severance standard set forth in *Mo. Roundtable for Life v. State*, 396 S.W.3d 348 (Mo. banc 2013), which states that when a bill is found to be in violation of the procedural requirements of Missouri Constitution, the entire bill must be invalidated unless the State can prove beyond a reasonable doubt the non-offending provisions would have passed without the offending provisions and the provisions in questions are not essential for the efficacy of the bill. The State did not meet the burden of severability in this case as the addition of the offending provisions through amendment suggested their import in the passage of the bills.

Plaintiffs were also able to secure an earlier interlocutory order denying several telecommunications companies and associations the ability to intervene in the case because the telecommunications industry had no unique interest in the litigation and the State could adequately defend the constitutionality of the bills.