



Governor Signs Right-of-Way Bill

SB 369 generally reduces cities' ability to control their own property - the right-of-way, and prohibits fees to cover long-term damage to streets. It is very much a taking of public property for private use.

While the Governor states that past right-of-way fees imposed by cities would be passed on to consumers, the new law will require all taxpayers to pay for long term road repairs that result from the slicing and dicing done by companies. We believed that this cost should be absorbed by the businesses, not the taxpayers. If the businesses chose to pass it along to customers, as is the case with some taxes and overhead costs, then at least the average taxpayer is not stuck with rebuilding streets disturbed by companies installing wire.

The Governor pointed out that cities can still regulate construction and charge permit fees, yet the bill greatly limits their scope. Performance bonds are nearly eliminated, leaving the public stuck with problems, and cities cannot even seek reference checks from other municipalities when evaluating companies planning to excavate.

Articles regularly appear in publications outlining the strategy of telcom companies going to state and federal legislators to strip local governments of controls. (See article on page 3.) New laws and regulations basically result in favored positions for industry and place a greater burden on taxpayers.

Due to the negative impacts on citizens and cities, the League and many mayors had asked the Governor to bring both sides together to work out differences, but now the matter will end up in the courts — and in the wallets of the taxpayers.

We appreciate the high level of participation shown by many of our members on this issue. It has been a major area of interest to the League and our various consortiums over the last 18 months as more and more companies started tearing up the right-of-way. This will continue to be the case as we try to deal with the construction, finance and related issues affecting our right-of-way. The League is currently working on a model right-of-way ordinance dealing with management issues such as construction, permits and related fees.

Legislative Affairs Committee Appointed

President Virginia Bira has announced the appointment of the 2001 Legislative Affairs Committee. This group will review past legislative issues and new proposals and make recommendations to the membership on legislative priorities for the 2002 session. The priorities adopted by the membership will be presented to senators and representatives from St. Louis City and County at our annual Legislative Breakfast that will be held on November 3.

Members invited to serve are:

Mayor Joe Adams, University City, Chairman
Mike Herring, City Administrator, Chesterfield
Councilmember Judy Pass, Creve Coeur
Allen Gill, City Manager, Ferguson
Alderman Arthur Robinson, Greendale
Councilmember Paul Ward, Kirkwood
Alderman Denise Lizenby, Lakeshire
Mayor Bob Dody, Overland
Mayor Lesa Meierotto, Pasadena Hills
Councilmember Skip Lowry, St. John
Alderman Scott Middelkamp, Shrewsbury
Chairman Mike Perry, Twin Oaks
Chairman Carmen McClendon, Uplands Park
Alderman Dan Michel, Valley Park
Councilmember Dotty DeLassus, Webster Groves
Alderman Bob Godwin, Woodson Terrace

If any member has suggestions of legislative issues for the Committee to consider, please contact the League office at 314-726-4747.

Welcome To . . .

Officials and staff of the following municipalities that recently joined the League: Frontenac, Grantwood Village, Kinloch and Wellston. Regular membership now stands at 84 municipalities plus St. Louis City and County. In addition, the League has 18 Associate Members, all of which are listed in our Municipal Officials Directory.

Municipal Zoning Decisions Cannot be Arbitrary

Lenette Realty requested that the City of Chesterfield rezone three parcels owned by it. Part of the property was zoned residential and the other part had a restricted commercial zoning. Lenette requested rezoning to a higher commercial use that would permit retail stores. The City Planning Department recommended approval of the rezoning. The city's planning commission, however, voted to deny the rezoning petition and it was unanimously defeated by the City Council. Lenette challenged the denial and the Circuit Court found that the refusal to rezone was arbitrary, capricious and unreasonable.

Zoning ordinances are presumed to be valid and the challenging party bears the burden of proving the unreasonableness of maintaining the existing zoning. Any uncertainty about the reasonableness of a zoning regulation must be resolved in the government's favor. First, the court determines whether the challenging party has presented sufficient evidence to rebut the presumption that the present zoning is reasonable. If the presumption has been rebutted, the court then determines whether the government's evidence establishes that the reasonableness of the zoning is fairly debatable. The initial determination of whether there is sufficient evidence to rebut the presumption of validity is made by balancing the private detriment to the challenging party against the public interest in retaining the existing zoning. The challenger must show that the private costs of failure to rezone outweigh the benefit that the general public enjoys by retaining the existing zoning designation.

In measuring an owner's private detriment, the court should use a "reasonable use" standard, not a "highest and best use" standard, as any landowner whose property was in any way diminished in value due to a zoning restriction could overturn the zoning ordinance. This would clearly circumvent the principles of comprehensive zoning schemes. Here, Lenette's proposed use of the property was a reasonable commercial use, consistent with the uses of surrounding properties and, therefore, sufficient to support the trial court's judgment. Lenette was not required to have a land use expert testify to make a submissible challenge to the zoning; an appraiser and a developer both testified to Lenette's private detriment. While the reasons given by the city for denying the rezoning was the proposed development was "too dense and too intense," these were insufficient reasons for denying the rezoning. Although adjacent property owners objected to the rezoning, Missouri law is clear that the interests of neighboring homeowners do not constitute the public interest as a whole. Given the lack of proof of public interest and the campaign against the zoning change, it is reasonable to infer that city officials were swayed by the anti-competitive outcry of area business owners.

The alleged public interests advanced by the city were pretextual and Lenette demonstrated that its private detriment far exceeded any public interest. The city advanced no public interest to support the current zoning and, therefore, failed to carry its burden of establishing that the refusal to rezone was fairly debatable. Unlike the Chesterfield Village case cited in our last Newsletter, the court upheld the trial court denial of damages and attorney's fees to Lenette.

Appeals Court Rules that MoDOT Alone Controls Advertising Along State Roads

In an ongoing struggle over the authority for bus shelter advertising in MoDOT right-of-way, the Missouri Court of Appeals overturned a circuit court ruling granting such authority to cities. The County League and the MML had filed an amicus brief in this case.

MoDOT entered into an agreement with Bi-State granting the transit agency the right to erect bus shelters with advertising signs on state highway rights-of-way in St. Louis County. Bi-State contracted with Wall USA to construct and maintain the shelters for Bi-State and the right to install the advertising on the shelters. MoDOT issued permits for bus shelters to be erected on state right-of-way in the cities of Ballwin and Sunset Hills. Both cities issued citations to Wall for violating their respective sign ordinances. Wall filed suit against the cities contending that MoDOT has exclusive jurisdiction over advertising signs on the state highway right-of-way. Both Wall and the cities filed motions for summary judgment. The trial court granted summary judgment for Ballwin and Sunset Hills, but the Court of Appeals reversed in Wall USA v. City of Ballwin et al., No.E.D.79366(Mo.App.E.D.2001).

Both the Missouri Constitution and Section 227.220 RSMo confer jurisdiction on MoDOT over advertising with the state right-of-way. Moreover, MoDOT's jurisdiction over advertising within the state right-of-way is exclusive. Municipalities do not have concurrent jurisdiction with MoDOT. Section 71.288 RSMo and Section 226.500-.600 RSMo give municipalities jurisdiction over advertising within 660 feet of the state highway rights-of-way, but not within the rights-of-way. The cities of Ballwin and Sunset Hills did not have the authority to regulate advertising on the bus shelters within the state rights-of-way. MoDOT has the authority to issue permits for the advertising signs for those shelters and its jurisdiction over the advertising signs within the state highway rights-of-way was exclusive.

The cities are considering an appeal to the Missouri Supreme Court.

The two preceding articles were submitted by Dudley McCarter, City Attorney for Creve Coeur.

Federal Pre-emption of State and Local Regulations Continues to Grow

There is an ongoing trend of federal pre-emption of state and local laws and regulations in an effort to appease businesses. This was reported in the June issue of Governing magazine. The article cites recent actions by states to restrict bank surcharges on ATM transactions. Many interstate banks are now considering asking Congress to supercede this authority now in state control. Other recent examples of Federal action include the Securities Market Enhancement Act, which pre-empted state oversight of mutual funds, to the Telecommunications Act of 1996, which authorizes the FCC to pre-empt any local ordinance that discourages competition in the telecommunications industry, and outlaws bans on cell towers.

The basic view from the business community is that it is easier to deal with one set of governmental regulations, from the federal level, than 50 state governments and many municipalities. In addition, it increases the probability that big business will get two other things that it wants: a relatively weak regulatory standard and tax breaks. The article mentions a situation in the late 1980's whereby many entities were advocating food labeling. Food manufacturers were concerned about a significant number of proposals being considered in state legislatures. The manufacturers came together to support one uniform labeling law that was passed in 1990. Following passage of this bill, the industry successfully lobbied Congress to simply require listing ingredients in relation to daily allowances, with no information included about the potential health impacts.

On another front, the article mentions a case where an American company sued a Mexican town for refusing to allow the dumping of a toxic material. The company appealed the decision under the North American Free Trade Agreement (NAFTA) claiming its right to do business was being "expropriated" by the local ban. A NAFTA arbitration panel agreed and ordered Mexico to pay the company \$16.7 million. In another similar case, a Canadian firm is considering suing the U.S. for \$970 million due to a California decision to phase out MBTE in gasoline. The MBTE was leaking from underground tanks and contaminating drinking water.

State and local officials need to continually be aware of these potential shifts in federal policy and local officials must also focus on state policies that pre-empt local oversight, such as the recent ROW legislation enacted in Missouri. Your representatives should be alerted to the impacts that such special interest legislation could have, both intended and unintended. The National League of Cities, state municipal leagues and the County League continue to fight these battles on behalf of America's cities and taxpayers, with help from municipal officials, to present the local perspective to state and federal

League Expresses Concern over Five Year Regional Transportation Funding Plan

On July 25, East-West Gateway's Board of Directors approved \$3.4 billion in spending over the next five years on the region's transportation infrastructure. The plan's strength is that growth in spending provides additional money for long overdue road repairs. While supporting the plan, the League's Transportation Committee expressed concerns about its shortcomings:

- There is discussion of a new downtown bridge, rebuilding of Highway 40/64, improving Highway 141 north to Olive, and other projects, but no funds are available through 2006 and little thereafter.
- The major state highways in St. Louis County (Lindbergh, Olive, Manchester, Gravois, Telegraph, St. Charles Rock Road, Natural Bridge) are crumbling, their curbs and sidewalks missing or in decay, and the lack of a center lane along many stretches adds to traffic congestion. Few funds are earmarked for any of these state highways.
- Many of these state-owned roads in St. Louis County are forced onto the City of St. Louis at the City limits, resulting in unfair treatment of the City when compared to other areas of the state where MoDOT maintains even very minor roads.
- St. Louis County, with 52% of the region's population, 54% of the region's jobs, 50% of the region's deficient bridges, and 56% of the region's traffic, continues to receive only about 42% of the funding from state and federal sources. After years of this discriminatory treatment, it is no wonder that our state highways in the County are dangerous to use, give our communities a bad image, and result in unnecessary congestion. The years of decay have now increased costs exponentially as many roads need complete rebuilding. As local officials know, repairs now are much less expensive than complete rebuilding later. MoDOT's past lack of preservation will likely result in a major tax increase and, even then, our roads in the City and County may not receive a fair share of needed funding.
- Funding too many new freeways in other counties seems to have increased traffic jams, according to East-West Gateway. It reports a major jump in congestion since 1994. Now we are trying to find the money to relieve the new congestion at the same time many roads and bridges are in need of repair. We are becoming less sustainable, which results in more decay, higher taxes, and/or more congestion. While many other states consider creative ways to move people and goods (for example, special high speed car pool lanes, reversible lanes, state support for transit, toll roads), Missouri officials seem to lack creativity in their approach to transportation challenges.

League Secures Representation on Regional Water Resource Advisory Council

East-West Gateway recently received a water quality planning grant from the Missouri Department of Natural Resources. One of the requirements for grant recipients is to establish a Regional Water Resources Advisory Council to advise Gateway's Board and inform regional leaders about water quality and water resource issues.

The League asked to be represented on this Advisory Council, as municipalities represent over 650,000 people in the County. Topics such as control of stormwater runoff, natural designs along creeks, stormwater taxes and fees and related issues come under the purview of this group. In consultation with MSD, many stormwater controls are designed and built by cities at municipal expense.

We appreciate Gateway's willingness to include municipal representatives on the Advisory Council.

Reminder: Future League Meetings

September 20 (week earlier due to Yom Kippur)

October 25

November 15 (week earlier due to Thanksgiving)

Legislative Breakfast—Saturday, November 3

Missouri State Treasurer Meets with League Members

Seeking input on a number of ideas, State Treasurer Nancy Farmer recently led a discussion with 25 League members. The informal exchange was designed to revisit the idea of allowing funds to be invested in a pool in order to maximize returns.

She also outlined bond bank programs in other states that are designed to secure competitive bond financing, even for small municipalities. Both topics led to a lively discussion on public investment topics.

Treasurer Farmer also mentioned that city generated checks do not always get deposited by recipients and may find their way back to the Unclaimed Property Fund. Cities can check to determine if the State has any of your city property by logging on to www.showmemoney.com.

Lastly, she encouraged cities to assist employees with educational savings accounts by allowing payroll deductions. Cities and citizens can call 1-888-414-MOST (6678) or log on to www.missourimost.org for complete information.

League President Virginia Bira thanked Treasurer Farmer for seeking comments from mayors, city administrators, and finance officers on methods that could maximize the return on public dollars.

