IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

ST. LOUIS COUNTY, MISSOURI,	)	
	)	
and	)	
	)	
CHARLIE A. DOOLEY, individually and in his capacity as County Executive of St. Louis County, Missouri,	)	
	)	Cause No. 04CV32913
Plaintiffs,	)	
	)	
v.	)	
	)	Division No. I
STATE OF MISSOURI,	)	
	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COME NOW Plaintiffs St. Louis County, Missouri and Charlie A. Dooley, and in reply to Defendant State of Missouri's Motion to Dismiss, offer the following suggestions of law:

A. Introduction.

Plaintiffs St. Louis County and Charlie A. Dooley, both individually and in his capacity as County Executive of St. Louis County, have filed their Petition for Declaratory Judgment. The Petition alleges in Count 1 that by enacting the concealed carry law, particularly Section 571.~~010~~ 101 R.S.Mo., the State of Missouri has required the County to expend its own funds to meet the cost of performing the acts required by the statute, and that the State has not appropriated or disbursed State funds to reimburse the County for such costs. Thus, the State has imposed an "unfunded mandate" upon the County in violation of the Hancock Amendment, Mo. Const. Art. X, Sections 16 and 21. Plaintiffs ask the Court to declare Section 571.101 unconstitutional.

In Count 2, Plaintiffs allege that while Sec. 571.101 authorizes a fee from an applicant for a concealed carry endorsement, by operation of Sec. 50.535 the fee is inadequate to fund the new activities required of the County by Sec. 571.101, in violation of the aforementioned sections of the Constitution. Count 2 asks the Court to declare Sec. 571.101 unconstitutional and void and unenforceable within St. Louis County.

To maintain a declaratory judgment action, there must be a justiciable controversy presenting a real, substantial, presently-existing controversy; a legally protected pecuniary or personal interest of the plaintiff directly at issue which is subject to immediate or prospective consequential relief; an issue ripe for judicial determination; and no adequate remedy at law. Kinder v. Holden, 92 S.W.3d 793 (Mo. App. 2002). All four elements are present in this case. As with all petitions for declaratory judgment, this Court must review the Petition by construing it favorably toward the Plaintiffs, and accept all alleged facts as true, giving the Petition the benefit of every reasonable inference. City of St. Louis v. Milentz, 887 S.W.2d 709 (Mo. App. 1994).

B. The case should not be dismissed for lack of ripeness.

The first reason proffered by the State for dismissal of the Petition is the purported lack of ripeness for a claim under the Declaratory Judgment laws. The issue is not ripe for adjudication, it is said, because Plaintiffs have not pled that the State has compelled or threatened to compel the County to implement the concealed carry application process. The State has not, though, suggested what authority it possesses to compel the County to implement the process. Certainly there is nothing in the concealed carry statutes providing for State enforcement of the law against a local government not following its strictures. Further, while it is true that "[j]usticiability contemplates a real, substantial, presently existing controversy which is

admitting of specific relief," Westphal v. Lake Lotawana Assn., Inc., 95 S.W.3d 144, 151 (Mo. App. 2003), just because there is no allegation in the Petition claiming the State has not moved to compel the County to implement the application process does not permit the conclusion that there exists no present controversy among the parties. A controversy is very alive, rising from the obligations of counties to process concealed carry applications that were imposed by the State with the enactment of the challenged statute. Notwithstanding Plaintiffs' claim that Section 571.101 is unenforceable in St. Louis County as against the Constitution, there are several mandatory tasks required of the County at present, for example:

> "If the said applicant can show qualification as provided by sections 571.101 to 571.121, the county or city sheriff *shall* issue a certificate of qualification (Sec. 571.101.1) and "A certificate of qualification ... *shall* be issued ... if the applicant (meets the set out criteria)" (Sec. 571.101.2);"
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> "The sheriff *shall* request a criminal background check;" "the fingerprints *shall* be forwarded to the Federal Bureau of Investigation for a national criminal record check;" "[t]he sheriff *shall* issue the certificate within forty-five calendar days;" (Sec. 571.101.5);
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> "if the applicant is found to be ineligible, the sheriff is required to deny the application, and notify the applicant in writing...;" "Upon receiving any additional documentation, the sheriff *shall* reconsider his or her decision and inform the applicant within thirty days...;" the applicant *shall* further be informed in writing of the right to appeal" (Sec. 571.010.6);
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> "the sheriff *shall* keep a record of all applications;" the sheriff shall report the issuance of a certificate of qualification to the Missouri uniform law enforcement system" (Sec. 571.101.8).

While not exhaustive of all the requirements imposed upon the County by the concealed carry law, each of the above and every other obligation incumbent upon the County by the law carry a cost to the County that must be paid for from its general revenue. If not relieved of the obligations by this Court, the County would suffer financial loss if it begins processing applications. The County does not agree with the State that the obligation to follow a valid law begins at the point an agency with enforcement authority moves to compel compliance. Neither can the County presume that the State, upon enacting the concealed carry law, intended that the County begin processing applications only after the State has issued a threat commanding compliance. To the contrary, when the General Assembly has overridden a gubernatorial veto to enact a statute, the County must presume that the State intended the law to apply upon its effective date. In light of the County's claim that the obligations are unconstitutional, a present controversy between the parties exists.

Further supporting the argument that this case is ripe for decision, the County notes that compliance with its statutory obligations would subject the County to the risk of a Hancock challenge by a taxpayer objecting to the imposition of an unfunded mandate upon the County (and thus its taxpayers).[1] Such a lawsuit would further exposse the County to the risk of attorneys fees being assessed. Yet the alternative – simply disregarding State statute – would be inappropriate for a political subdivision of the State (and would subject the County to a risk of a mandamus action). Clearly, the constitutionality of the statute at issue needs to be ruled upon by the courts.

The second reason proffered by the State to support its lack-of-ripeness argument is that the County has not pled whether it has designated a local police chief within the County to

[1] Plaintiffs urge the Court to take judicial notice of such lawsuit pending against Moniteau County.

process the applications. As the Supreme Court noted in Brooks v. State of Missouri, 128 S.W.3d 844, 850 (Mo. banc 2004), "sheriffs of first-class counties have the option to 'designate one or more chiefs of police of any town, city or municipality within such county to accept and process [concealed-carry permit applications and then] reimburse such chiefs of police, out of the moneys deposited into the [sheriffs revolving fund] for any reasonable expenses related to accepting and processing such applications.'" It was observed that "In theory, this provision allows some sheriffs to defer most, if not all, of their increased activities and costs under the Act." Id. at 850. This is because Sec. 50.535 R.S.Mo., provides that Sheriff's Revolving Fund moneys may "only be used by law enforcement agencies for the purchase of equipment and to provide training" (Sec. 50.535.2), but that when the sheriff of a county of the first classification designates a local police chief to accept and process applications, such local police chief may be reimbursed from the Fund (Sec. 50.535.3). Accordingly, Plaintiffs argue, designation by the Superintendent of Police of a local police chief to process applications would relieve St. Louis County of the unjustified and unconstitutional expense.

This provision does not help the County alleviate its costs in any way, and does not help solve the problem of the unfunded mandate. St. Louis County is not a county of the first classification whose application processing official is empowered to designate a local police chief to accept and process applications. Under to the Missouri Constitution, Article VI, Section 18(a), counties that were originally first class counties but which have adopted a charter are a separate class of counties outside of the classification system established under section 8 of Article VI. See Berry v. State, 908 S.W.2d 682, 684 (Mo. banc 1995) ("the 1995 constitutional amendment specifically creates a separate class of charter counties 'outside of the classification

system established under section 8 of this article [VI].'"[2] This distinction among the different kinds of counties is not to be ignored as meaningless, and a court may construe the distinction is not intended by the General Assembly only to avoid absurd results. See also Leiser v. City of Wildwood, 59 S.W.3d 597 (Mo. App. 2001), where the court interpreted a statute as applying to a charter county when the actual language of the statute referred to "county of the first classification." However, this was done to "effect the intent of the legislature and to avoid an illogical and absurd result." Id. at 604. The court believed the words "of the first classification" in Sec. 72.424 were "improvidently included." Id. It was plain to the court that the General Assembly could not have intended to include the language in the statute, which if included would lead to an absurd result.

This is not true of Sec. 50.535, and no absurd result will occur if the language of Sec.50.535.3 is construed literally, there being fourteen counties of the first classification in this state to which the statute applies as drafted. That St. Louis County is not one of the fourteen does not mean the General Assembly intended charter counties to be among those that may designate local police chiefs to receive reimbursement from the Fund for processing concealed carry applications. Nor is there anything in the language of Brooks to indicate the Supreme Court's view that charter counties, in addition to first-class counties, possess the Sec.50.535 ability to use the Fund to reimburse local police chiefs for processing costs. St. Louis County is simply not authorized by Section 50.535 to designate a local police chief to process applications.

C. The Petition should not be dismissed upon the grounds that Plaintiffs did not plead the County's costs exceed those permitted for reimbursement.

The first sentence in Paragraph 9 of the Petition alleges that "*From its General Revenue*

[2] In their Petition, Paragraph 1, Plaintiffs allege that St. Louis County is a charter county, and the State has admitted this fact in its Answer (Paragraph 1).

Fund, and not from the Sheriff's Revolving Fund, the County will incur a cost of approximately $73.09 for each application submitted in connection with the conceal carry law" (emphasis added). This allegation makes it plain that the $73.09 does not include any costs of training and equipment, and is inclusive only of items for which the County may not be reimbursed from the application fee deposited in the Sheriff's Revolving Fund. Giving the Petition the broad reading to which it is entitled, Plaintiffs have not failed to state a claim.

D. The Petition should not be dismissed based on the argument that the declaration Plaintiffs seek is unavailable.

In Paragraph V of its Motion to Dismiss, the State asserts that the relief sought by Plaintiffs is not available to them, but it does not argue the Petition should be dismissed for this reason. Nor should the Petition be dismissed on this ground. "The prayer is not part of the petition, and the court may disregard it in granting relief." Chance v. Public Water Supply Dist. No. 16, 41 S.W.3d 523, 526 (Mo. App. 2001). In fact, it has been held that "[t]he prayer of the petition may be disregarded in determining what relief is authorized by the facts pleaded. So long as plaintiffs allege facts showing that they are entitled to some relief, it is immaterial whether they are entitled to any or all of the relief they prayed for." Livingston v. Webster County Bank, 868 S.W.2d 154, 155 (Mo. App. 1994).

The Plaintiffs' Petition sets out facts that, if proven, will permit the conclusion that Sec. 571.101 violates the Hancock Amendment in that St. Louis County will inevitably incur costs associated with processing concealed carry applications, for which costs the State has neither provided funds to reimburse the County nor enacted a statutory mechanism to enable the County to recover the costs. As noted by the Brooks court, id. at 849, it cannot be presumed that increased costs result from an increased mandated activity. Nor, however, should the case be

disposed of before proof of increased costs affected by an unfunded mandate. Id. Because Plaintiffs have undoubtedly pled facts, which if true, establish an unfunded mandate by reason of the concealed carry law, they should be given the opportunity to present evidence to prove them. If they succeed, the Court can declare the law unconstitutional as to St. Louis County or fashion some other remedy. Or, an amendment to the Petition can be effected if the Court believes one to be necessary; but, there is no reason to dismiss the case at its outset.

It should be noted further that the prayers at the end of each count of the Petition ask for "such other relief as is available and deemed just and proper by the Court." The case should be allowed to proceed, and if the Plaintiffs are entitled to relief, the Court can make such rulings as are called for.

E. All of the parties to the suit have standing.

St. Louis County and the County Executive as a County official possess the attributes necessary for standing to challenge the constitutionality of the concealed carry law with regard to the claim of an unfunded mandate. According to the Supreme Court in Arsenal Credit Union v. Giles, 715 S.W.2d 918, 920 (Mo. banc 1986), "The rationale of the standing requirement is to assure that there is a sufficient controversy between the parties so that the case will be adequately presented to the court." See also Ryder v. St. Charles County, 552 S.W.2d 705, 707 (Mo. 1977) ("Only those adversely affected by the statute in question have the requisite standing.") The County Government, as an entity, will bear all of the expenses of processing concealed carry applications, and as alleged in the Petition, $73.09 for each application will not be recoverable from the application fee, and the State has not provided funding or reimbursement for the County for such costs. This meets the prerequisites of standing to challenge the constitutionality of a

statute as set out by the Supreme Court in Arsenal Credit Union, because the County is adversely affected unlike any other entity.

Further, the County is best positioned to develop and present the facts needed to demonstrate the unconstitutionality of the law. No taxpayer knows better than does the County the extent to which the County will bear unfunded costs as the result of the law. In fact, without obtaining detailed information from the County, a taxpayer might not even know facts exist on which to base a claim of an unfunded mandate. Because the purpose of the Hancock Amendment is to protect taxpayers, it would not make sense to require a taxpayer to engage in pre-lawsuit discovery and bear litigation costs just to find out if the taxpayer even has a claim. The County should be allowed to proceed to challenge the constitutionality of a statute aggrieving it. See Home Builders Ass'n. v. City of Wildwood, 107 S.W.3d 235 (Mo. banc. 2003).

In addition, Plaintiffs urge the Court not to overlook the plain invitation of the Supreme Court in Brooks to counties to seek their own individualized relief against an unfunded mandate. Citing City of Jefferson v. Mo. Dept. of Natural Resources, 916 S.W.2d 794 (Mo. banc 1996), the Court noted that "proof of increased costs must be shown by each city or county affected by an unfunded mandate ..." Brooks, id. at 849. This suggests that the Supreme Court expects local governments to have standing to challenge the Hancock Amendments with regard to unfunded mandates, and indeed, to file them. By filing this lawsuit, St. Louis County and the County Executive do no more than accept the Supreme Court's invitation. This Court should hold that the County and the County Executive have standing to pursue the claim that the County, and not just its taxpayers, suffer adversely from unconstitutional mandates imposed by the State.

G. Neither the St. Louis County Sheriff nor the Superintendent of Police are indispensable parties, and so their not being named as parties to the lawsuit does not merit dismissal.

The Petition is not defective for having failed to include an indispensable party. Prefacing its argument, the State takes note of the Petition's allegation that it is the Superintendent of Police who would process concealed carry applications, rather than the County Sheriff. This is due to the delegation of authority to County officials designated by the County Charter to perform various county functions, the authority so to delegate which derives from the constitutional grant of such authority to charter counties. The State has indicated that it does not seek to dispute which officer, Sheriff or Superintendent of Police, is the proper officer to process the applications. Nonetheless, argues the State, at least one of the said officers, and maybe the Director of Justice Services, should have been named as a party because whichever officer processes the applications has an interest at stake in the litigation.

Nothing could be further from the truth. While not clear, it appears that the State believes the Superintendent of Police should have been named as defendant, and that the State itself has no interest. See *Defendant State of Missouri's Motion to Dismiss*, page 9 ("Plaintiffs' failure to name any of the parties with a real interest at stake, relying instead to proceed only against a party with no interest, is grounds for dismissal under Rule 55.27(a) and Rule 52.04.") It is true that "when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration." Sec. 527.110 R.S.Mo. and Rule 87.04. See also Eastern Missouri Laborer's Dist. Council v. City of St. Louis, 951 S.W.2d 654 (Mo. App. 1997). However, Plaintiffs' claim is that the State has required the County to bear the expenses of concealed carry applications without reimbursement from the State or from the application fee. There is no claim that the Superintendent of Police is doing anything violative of the

Hancock Amendment that this Court must order him to stop doing. Rather, the claim is against the one party that has fomented the issue – the State of Missouri, through the enactment of the concealed carry law.

Second, it is not alleged in the Petition (because the same is not the case) that the Superintendent of Police has accepted applications, or has indicated that he will begin to accept them. Because the Superintendent of Police has done nothing to cause the County to require relief from his actions, he is not an indispensable party to this lawsuit.

For all of the above reasons, the State's Motion to Dismiss should be overruled and the case be allowed to proceed.

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A copy of the foregoing was faxed this 7th day of June, 2004 to Jeremiah W. (Jay) Nixon, Attorney General, and to Paul C. Wilson, Deputy Chief of Staff and Assistant Attorney General, and to Alana M. Barragan-Scott, Chief Counsel and Assistant Attorney General, at fax number 573-751-8796.

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