UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WINDHOVER, INC., and JACQUELINE GRAY,	)	
Plaintiffs,	)	Cause No. 07-CV-881
v.	)	
CITY OF VALLEY PARK, MO.	)	
Defendant.	)	

MOTION FOR AN ORDER CONSOLIDATING TRIAL ON THE MERITS WITH HEARING ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs Windhover, Inc. and Jacqueline Gray ("Plaintiffs"), by and through their attorneys, hereby move this Court pursuant to Fed. R. Civ. P. 65(a)(2) for an order advancing and consolidating trial on the merits of this action with the hearing on Plaintiffs' Motion for a Preliminary Injunction and in support thereof state as follows.

I. BACKGROUND

Plaintiffs filed their original Petition in this matter in the Circuit Court of St. Louis County ("Circuit Court") on March 14, 2007. The Petition sought the invalidation of two anti-immigrant ordinances that had been enacted by the Defendant, the City of Valley Park, Missouri. The Petition challenged Ordinance No. 1721 (the Landlord Ordinance) and Ordinance No. 1722 (the Employer Ordinance).[1]

[1] Ordinances Nos. 1721 and 1722 are the successors to City of Valley Park Ordinances Nos. 1708 and 1715. Ordinances Nos. 1708 and 1715 also restricted the ability of landlords and employers to rent to and employ certain individuals. On March 12, 2007, a Missouri court permanently enjoined Defendant from enacting Ordinances Nos. 1708 and 1715. *Reynolds v. City of Valley Park*, No. 06-CC-3802 ("*Reynolds I*").

Meanwhile, on April 5, 2007, another group of plaintiffs filed a petition in the Circuit Court against the City of Valley Park. *Reynolds v. City of Valley Park,* No. 07-CC-1420 ("*Reynolds II*"). The *Reynolds II* petition differs from the Petition in this case in that it challenges only the Landlord Ordinance (not the Employer Ordinance) and relies more heavily on state law. On April 5, 2007, the *Reynolds II* court entered a temporary restraining order as to the Landlord Ordinance. On April 25, 2007, the TRO was extended by agreement of the parties pending a final hearing on the merits scheduled for September 13, 2007.

On April 12, 2007, Plaintiffs filed an Amended Petition in the Circuit Court and on April 19, 2007, filed a Motion for a Preliminary Injunction. On May 1, 2007, the City filed a Notice of Removal from the Circuit Court and on May 4, 2007, Plaintiffs filed a Motion to Remand this cause to the Circuit Court. On May 21, 2007, after briefing of the matter, this Court denied Plaintiffs' Motion to Remand. The Court later ordered the City to file a response to Plaintiffs' Motion for a Preliminary Injunction. The City filed a response on June 1, 2007. Plaintiffs' Reply is due June 14, 2007.

II. ARGUMENT

Federal Rule of Civil Procedure 65(a)(2), entitled *Consolidation of Hearing With Trial on Merits,* states in part:

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

Consolidating a preliminary injunction hearing with the trial on the merits "can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the merits and will be presented in such

form as to qualify for admission" at trial and would avoid repetition of evidence. *See* Fed.R.Civ.P. 65(a)(2) advisory committee's notes (1966 amendment). Not surprisingly, the Court of Appeals for the Eighth Circuit favors consolidation. *See West Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1229 (8th Cir. 1986) ("[t]his [Rule 65(a)(2)] procedure is a good one, and we wish to encourage it").[2]

Plaintiffs argue that the Landlord and Employer Ordinances are barred by principles of *res judicata*; improperly seek to regulate federal immigration law and are preempted by federal law; and because of their discriminatory purpose and effect, violate the Equal Protection Clause. Accordingly, much of the evidence that Plaintiffs will attempt to discover in support of their Motion for a Preliminary Injunction will also be central to the trial on the merits. Consolidation would permit this Court to reach a final conclusion while conserving judicial resources and would also facilitate a more rapid resolution of the issues in both the district and appellate courts.

A. Developing an Adequate Record for the Rulings

In order for this Court to make an informed ruling on Plaintiff's Motion for a Preliminary Injunction, Plaintiffs will require discovery with respect to several issues. As set forth below, the issues that require inquiry will be relevant not only to the preliminary injunction hearing but will also be relevant to the trial on the merits.

---

[2] In *West Pub. Co.*, an appeal of an order granting a preliminary injunction, the Eighth Circuit panel noted that during oral argument the parties gave the Court the impression that most of the evidence was presented during the preliminary injunction hearing. 799 F.2d at 1229. Encouraging future courts to make better use of Rule 65(a)(2), the Court observed that "[i]f this is true, the case could have been tried with little additional effort, and the result could have been one appeal instead of two, with a final resolution of the case instead of a provisional one." *Id.* at 1229-30.

1. Operative Valley Park Ordinances

In ruling on Plaintiffs' Motion for a Preliminary Injunction, this Court must consider which Ordinances, or versions of the Ordinances, are at issue. To date, the City has presented at least three separate versions of Ordinance 1722. Without some discovery regarding the City's passage of, amendments to and distribution of the Ordinances, this Court will be unable to reach an appropriate conclusion regarding the need for a preliminary or permanent injunction.

Ordinances 1721 and 1722 both purport to have been passed by the City Council on February 5, 2007 and to have been signed by the Mayor on February 14, 2007. (*See* Exs. A and B, Pl.'s Pet. for Prelim. Injunc. Exs. D and E, respectively.) Notably, the original Employer Ordinance contained the following language: "A complaint which alleges a violation *solely or primarily* on the basis of national origin, ethnicity or race shall be deemed invalid and shall not be enforced." (Ex. B, Sec. Four B.(2), emphasis added.)[3] However, the City now contends that the Valley Park Employer Ordinance passed on February 5, 2007 did not contain the "solely or primarily" language.

[3]That statement mirrors language found in a similar anti-immigrant ordinance enacted by the City of Hazleton, PA, which was the subject of a recent federal trial in the Middle District of Pennsylvania. *Lozano v. City of Hazelton*, No. 06 CV 01586 (M.D. Pa 2006). The court in the *Hazelton* case entered a TRO on October 31, 2006 and then ordered that the trial be advanced and combined with a hearing on the plaintiffs' motion for preliminary injunction pursuant to Fed R. Civ. P. 65(a)(2). *Id*., Docket No. 36 (Nov. 1, 2006). The Hazleton ordinance was challenged in part on equal protection grounds because, among other things, like the Employer Ordinance here, it expressly contemplated that national origin, ethnicity or race could be a factor in the lodging of a complaint regarding an alleged violation of the ordinance. In response to the equal protection challenge, in the middle of trial in March 2007, Hazleton amended its ordinance to remove the language "solely or primarily." It should be noted that lead counsel for the City in this matter, Kris Kobach, is also lead counsel and trial counsel for the defendant in the *Hazleton* case.

On May 31, 2007 (approximately six weeks after Plaintiffs filed their petition for injunctive relief, attaching what they understood to be the enacted Employer Ordinance), City counsel Eric Martin sent Plaintiffs' counsel Daniel Hurtado an email stating that the executed and attested to Ordinance 1722 that Plaintiffs had presented to the Court in their Motion for a Preliminary Injunction was merely a "draft" and that the "passed ordinance" did not contain the phrase "solely or primarily" in the relevant provision. (*See* Ex. C., Martin Corresp. 1) Mr. Martin subsequently faxed what purported to be the correct ordinance. (*See* Ex. D., Martin Corresp. 2) It was neither dated nor signed by the Mayor or the City Clerk. Later that day, upon Mr. Hurtado's inquiry, Mr. Martin faxed what purported to be an executed version of the new Ordinance 1722. (*See* Ex. E., Martin Corresp. 3) The new version did bear the signature of the Mayor and the City Clerk, and indicates that the Mayor and City Clerk signed it on February 14, 2007, the same date they purport to have signed the version of Ordinance 1722 attached to the Plaintiffs' court filings. The new version of Ordinance 1722 also differed from the one attached to Plaintiffs' filings in that it was to become effective only upon the termination of any then existing injunction in *Reynolds I*. Accordingly, as of May 31, 2007, there were at least two extant versions of Ordinance 1722, both of which purported to have been passed on February 5, 2007, and both of which purported to have been signed by the Mayor and City Clerk on February 14, 2007.[4]

[4] The original Ordinance 1722 was to become effective from its passage (February 5, 2007) and upon its approval by the Mayor (February 14, 2007). However, on February 11, 2007, the City Council amended Ordinance 1722 (via Ordinance 1724) to provide that it would not become effective until the termination of any injunction in *Reynolds I*. That amendment necessarily implies that the version of Ordinance 1722 submitted by the Plaintiffs in their Motion for a Preliminary Injunction is the ordinance actually passed on February 5. If the new version of Ordinance 1722 – which already contains the reference

In light of this confusing state of affairs, Plaintiffs filed a Motion to Complete the Record, submitting the exhibits to the Amended Petition that had been filed in state court. The City objected to Plaintiffs' motion because those exhibits included the signed and attested to version of Ordinance 1722 that the City now contends is merely a draft. Attached to the City's opposition brief was yet a *third* version of Ordinance 1722 that it contended was the correct one, and which bears the signature of the Mayor and the City Clerk. (*See* Ex. F., Def. Opp. to Pls.' Mot. to Consol. Ex. A) The third version also deletes the words "solely and primarily" and appears substantively the same as version two; however, it is clearly a different document and, while it purports to have been passed on February 5, 2007, there is no date for the signature of the Mayor and the City Clerk. Yet a *fourth* version of Ordinance 1722 is posted on the City's public website. (*See* Ex. G, City of Valley Park website, *available at* http://www.valleyparkmo.org/docs/Ordinances/ordinance%201722.pdf, last visited June 14, 2007.) The website version embodies the February 11, 2007 amendment regarding when Ordinance 1722 would become effective, but it retains the "solely or primarily" language that the City now says was never enacted.

What appears to have happened here – and it seems that discovery will be required to get to the bottom of it – is that the City wants to change its ordinance in the same way that Hazleton changed its ordinance during the mid-March trial in the Middle District of Pennsylvania. The City is attempting to re-write the history of Ordinance 1722. Without discovery, Plaintiffs, and presumably the Court, have no way to determine which version of Ordinance 1722, if any, was properly enacted by the City.

---

to the termination of the injunction in *Reynolds I* – were the ordinance actually passed on February 5, then Ordinance 1724 would have been superfluous.

2. Purpose and/or Motivation Behind Passage of Ordinances

This Court must also consider the City's purpose in enacting the Ordinances, both with respect to whether the Ordinances attempt to regulate federal immigration law and whether they stemmed from racial animus toward Valley Park's Mexican immigrant community. For example, the Ordinances were purportedly enacted to combat a host of ills imposed on the community of Valley Park by "illegal immigration."[5] One of the ills Valley Park cites is the fiscal hardship "our hospitals" are subjected to: yet there are no hospitals in Valley Park. Plaintiffs will therefore seek discovery regarding the basis of this and other as-of-yet unsubstantiated allegations.

3. Discriminatory Effect of Ordinances

Plaintiffs will also seek to discover evidence regarding the discriminatory effect of the Ordinances, including evidence that Hispanics were deterred from living in Valley Park and that employers and landlords were compelled to discriminate against employees and tenants on the basis of their race and/or national origin. This evidence is relevant to Plaintiffs' Motion for a Preliminary Injunction and will also assist this Court in arriving at a proper ruling at a trial on the merits.

4. Use of Federal Databases & Verification of Immigration Status

Plaintiffs also anticipate that at both the hearing and at trial the parties will direct significant attention to programs that are part of the federal government's current efforts

---

[5] Ordinance No. 1722 proclaims:

> "[i]llegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributes to other burdens on public services, increasing their costs and diminishing their availability to legal residents and diminishes our overall qualify [sic] of life and provides concerns to the safety and security of the homeland."

(Ex. B, Sec. Two C.)

to enforce immigration laws. The City argues in its Response to Plaintiffs' Motion for a Preliminary Injunction that it will be able to verify immigration status as required by the Ordinances using federal verification systems. (Def. Mem. in Resp. to Pl. Mot. for Prelim. Inj. at 12-14.) Plaintiffs intend to elicit and/or submit evidence regarding both the nature and reliability of the information contained in those systems, including evidence that they are not capable of revealing that a non-citizen is not lawfully in the United States and evidence that the City does not have access to these systems. More generally, Plaintiffs will also seek to introduce evidence regarding the process the City would implement in order to verify immigration status under both Ordinances.

B. The Need for an Expedited Determination

Consolidation will not just conserve judicial resources but will allow for an expedited final determination, which is crucial to the parties. Moreover, while there is a risk that the Ordinances subject to challenge in this matter may become enforceable against Plaintiffs, in light of the fact that Ordinance 1721 is subject to a temporary restraining order in the *Reynolds II* litigation (until September 13, 2007) and because Ordinance 1722 does not become effective under its own terms unless and until the injunction in *Reynolds I* is dissolved, the need to hold a hearing on Plaintiffs' motion for a preliminary injunction is not as urgent.

Nevertheless, as long as the Ordinances stand, Plaintiffs risk lost business due to the delays imposed by the Ordinances, necessitating an expedited trial schedule. More significantly, because of the subject matter of the Ordinances and the animus that inspired their passage, Plaintiffs risk lower property values and a smaller pool of potential tenants, employees, contractors and others purportedly covered by the Ordinances. Plaintiffs are

also subject to potential enforcement action by the City, which could result in losing the ability to conduct business within Valley Park. Finally, an expedited trial would minimize Plaintiffs' risk of violating federal and state anti-discrimination laws under the Ordinances.

III. CONCLUSION

In sum, the parties will require discovery in order to permit the Court to make an informed ruling on Plaintiffs' Motion for a Preliminary Injunction. There is a significant likelihood that the ordinances will become enforceable before a trial were conducted under a normal schedule; however, there is no immediate emergency as enforcement of the Landlord Ordinance is subject to the Temporary Restraining Order in *Reynolds II*, and under its own terms, the Employer Ordinance does not become effective unless the permanent injunction in *Reynolds I* is dissolved. It is in the parties' and this Court's best interests for the Court to make its ruling with a full record, while conserving resources that would otherwise be extended with two separate hearings.

WHEREFORE, Plaintiffs respectfully request that this Court advance and consolidate a trial on the merits with the hearing on Plaintiffs' request for a preliminary injunction in early October 2007.[6]

[6] Plaintiffs have proposed a discovery and trial schedule, attached as Exhibit H to this motion.

Respectfully submitted,

_/s/ Daniel J. Hurtado_____
Jenner & Block LLP
Daniel J. Hurtado (admitted *pro hac vice*)
Gabriel A. Fuentes (admitted *pro hac vice*)
330 North Wabash Avenue
Chicago, Illinois 60611-7603
(312) 923-2645
(312) 840-7645 facsimile
dhurtado@jenner.com

Anthony E. Rothert, #518779
American Civil Liberties Union
of Eastern Missouri
454 Whittier Street
St. Louis, Missouri 63108
(314) 652-3114
(314) 652-3112 facsimile
tony@aclu-em.org

Fernando Bermudez, #39943
Green Jacobson & Butsch P.C.
7733 Forsyth Blvd., Suite 700
St. Louis, Missouri 63105
(314) 862-6800
(314) 862-1606 facsimile
Bermudez@stlouislaw.com

Omar C. Jadwat (admitted *pro hac vice*)
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad St., 18th Fl.
New York, New York 10004
(212) 549-2620
(212) 549-2654 facsimile
ojadwat@aclu.org

Jennifer C. Chang (admitted *pro hac vice*)
American Civil Liberties Union Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, California 94111
(415) 343-0770
(415) 395-0950 facsimile
jchang@aclu.org

Mexican American Legal Defense
and Educational Fund
Ricardo Meza*
Jennifer Nagda*
rmeza@maldef.org
11 E. Adams; Suite 700
Chicago, Illinois 60603
(312) 427-0701
(312) 427-0691 facsimile

* Mr. Meza and Ms. Nagda are not admitted to practice before this Court but anticipate filing motions for leave to appear *pro hac vice*.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on Defendant's counsel of record, listed below, by operation of the Court's ECF/CM system on June 14, 2007.

Eric M. Martin
109 Chesterfield Business Parkway
Chesterfield, MO 63005-1233

Kris W. Kobach
Professor of Law, UMKC School of Law
5100 Rockhill Road
Kansas City, MO 64110

Michael M. Hethmon
IMMIGRATION REFORM LAW INSTITUTE
1666 Connecticut Avenue
Suite 402, NW
Washington, DC 20009

_/s/Daniel J. Hurtado