IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WINDHOVER, INC. AND JACQUELINE GRAY,	)	
Plaintiffs,	)	Cause No. 07-cv-881 ERW
v.	)	
CITY OF VALLEY PARK, MISSOURI,	)	
Defendant.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR DECLARATION THAT VALLEY PARK ORDINANCE NO. 1722 IS INOPERATIVE

Plaintiffs submit this memorandum as their reply in support of their motion for a declaration that Ordinance No. 1722 is inoperative. (Doc. # 50.) Defendant has not filed a written response to the Motion. Instead, Defendant's counsel advised this Court at the August 10, 2007 status hearing, "I'll deliver our response orally right now." (Transcript of August 10, 2007 Status Hearing, attached as Ex. A, at 20.) Counsel further indicated, "We don't anticipate submitting a written answer unless we find that there is more information that we need to submit, but I can't imagine what that would be." *Id.* at 29. Plaintiffs' Motion was filed on August 9, 2007, so Defendant's response was due no later than the end of the day on August 16, 2007. (E.D.Mo. L.R. 4.01.)

Meanwhile, this Court authorized Plaintiffs to take discovery limited to the issue of whether a putative amendment of Ordinance No. 1722 -- Ordinance No. 1736 -- was lawfully enacted. (Doc. # 56.) That discovery has now been completed in the form of limited document production and a deposition of the City of Valley Park pursuant to Fed. R. Civ. P. 30(b)(6).

After having completed that discovery, it is Plaintiffs' position that their Motion for Declaration should be granted because: (1) Defendant has not placed a cognizable response to the Motion in the record; and (2) Ordinance No. 1736 was not lawfully enacted, and therefore Ordinance No. 1722 has not been amended to make it immediately effective.

I. Plaintiffs' Motion Should be Considered On Its Merits Without Consideration Of Defendant's Arguments.

Counsel for Defendant announced to this Court that he would not file a written response to Plaintiffs' motion for declaration that Ordinance No. 1722 is inoperative. (Ex. A at 20.) The local rules require, however, that an opposition be filed in writing:

> [E]ach party opposing a motion shall file, within five (5) days after being served with the motion, a memorandum containing any relevant argument and citations to authorities on which the party relies. If any memorandum in opposition requires consideration of facts not appearing in the record, the party shall file with its memorandum all documentary evidence relied upon.

(E.D.Mo. L.R. 4.01(B).) Defendant has not filed a memorandum in opposition to Plaintiffs' Motion and the time for doing so has expired.

To the extent this Court is willing to consider Defendant's oral response to the Motion in lieu of the memorandum mandated by the Rule, there is no documentary evidence on file to support Defendant's opposition. Defendant's response to the motion was as follows:

> [N]umber one, ... the plaintiffs' motion is moot, and our one exhibit is the exhibit we have presented to the Court this morning, which is a signed, certified, sealed copy of the ordinance which was passed, and if the plaintiffs continue to struggle to come up with some rationale as to why this ordinance is not what it says it is, then we will -- I'll indicate here that the Board of Aldermen will be advised to consider passing the ordinance again at the regularly-scheduled meeting on Monday, the 20th of August, if there is really any question as to the veracity of this ordinance.

(Ex. A at 20-21.) It appears that Defendant does not deny that Plaintiffs' Motion was meritorious when filed, *i.e.,* that Ordinance No. 1722 is not by its own terms effective until and unless the permanent injunction in the *Reynolds I* matter is lifted. But Defendant contends that the Motion is now moot because of Defendant's subsequent action purporting to amend Ordinance No. 1722, or that it might become moot because Defendant might consider further action on August 20, 2007 to amend Ordinance No. 1722. Neither point supports denial of the pending Motion.

First of all, there is no documentary evidence in the record that supports Defendant's contention that Ordinance No. 1722 has been amended. Documentary evidence relied upon in opposition to a motion must appear in the record. (E.D.Mo. L.R. 4.01(B).) Ordinance No. 1736, which Defendant alleges moots Plaintiffs' Motion, was purportedly passed and signed prior to 7:30 p.m. on August 9, 2007. (Transcript of Rule 30(b)(6) Deposition of City Clerk, attached as Ex. B, at _____.)[1] At that time, the City Clerk had also prepared a certification. (*Id.* at __.) Inexplicably, Defendant attached only an unsigned, uncertified copy of what purports to be Ordinance No. 1736 to the motion for summary judgment it filed in the wee hours of August 10, 2007. (Def's Memorandum in Supp. of Mot. for Summary Judgment, Doc. # 54, Ex. A thereto.) The unsigned, uncertified copy of the alleged ordinance remains the *only* copy of the purported ordinance in the record. Reliance on such an unofficial document is particularly inappropriate here, where Defendant has over the past few months presented several different versions of what purported to be Ordinance No. 1722, yet which claimed on their face to have

[1] Plaintiffs have not yet received a copy of the deposition transcript from the court reporter, despite having requested it on an expedited basis. Plaintiffs will seek leave to supplement this filing with the deposition transcript when it is received, along with the appropriate page citations.

been passed and signed by the Mayor on the same date. (*See*, *generally*, Mot. to Consolidate, Doc. # 38; Ex. B at __.)

Counsel's representation that he will "advise" Defendant's Board of Alderman "to *consider* passing the ordinance again" (emphasis supplied) is far too attenuated to serve as a basis for denying Plaintiffs' Motion. Plaintiffs' Motion is not rendered moot by a claim that counsel will give certain advice, which might or might not be heeded, that an amendment to Ordinance No. 1722 be considered. Further, even if the amendment is considered again, it is not a foregone conclusion that it will pass if this time it is considered in compliance with the Missouri Sunshine Law. That is particularly true in this case. The immigration ordinances at issue here have been a source of great controversy among the residents of Valley Park as well among the aldermen themselves. Accordingly, a public discussion of proposed Ordinance No. 1736, an ordinance that will simply perpetuate the controversy rather than allowing the matter to take its course in the Missouri Court of Appeals, could very well result in the ordinance not being passed.

Despite all of those considerations, the purported passage of Ordinance No. 1736 on August 9, 2007 occurred with less than 24-hour notice (in violation of the Sunshine Law), with no members of the public present (other than a single reporter), and with no debate or discussion. (Ex. B at __.) Since that time, a motion has been filed by certain plaintiffs in the *Reynolds I* matter against the Board of Aldermen seeking to have them held in contempt for purportedly passing Ordinance No. 1736. (Motion for Contempt, Ex. C.) It is reasonable to assume that a

pending contempt action, along with potential public opposition, would at least give the Board occasion to consider the wisdom of passing the Ordinance No. 1736.[2]

In any event, Defendant has failed to properly mount any opposition to Plaintiff's Motion in the manner prescribed by the Rules. This Court should not indulge Defendant's efforts to deny Plaintiffs relief while circumventing the Rules. If this Court grants Plaintiffs the relief their Motion seeks and Defendant subsequently validly amends the ordinance and properly puts the amended ordinance in the record, then this action can proceed at that time.[3] The only "harm" that Defendant would incur by the granting of Plaintiffs' Motion is a consequence of its refusal to play by the rules. In contrast, if the Motion is denied, Plaintiffs may be forced to litigate the validity of an ordinance that was never lawfully enacted.

II. Purported Ordinance No. 1736 Was Not Lawfully Enacted And Is Subject To Being Declared Void.

As explained above, the only opposition to the granting of Plaintiffs' Motion is Defendant's claim that the Motion is rendered moot by a new ordinance that purports to amend Ordinance No. 1722 to become immediately effective. Because the ordinance upon which Defendant relies was not lawfully enacted and, thus, has not effectively amended Ordinance No. 1722, this Court should grant Plaintiffs' Motion.

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[2] Valley Park's Rule 30(b)(6) witness, who was the City Clerk, could not explain the existence of several versions of Ordinance No. 1722, several of which purport to have been signed by the Mayor on the same day (February 14, 2007), and one of which purports to have been signed by the Mayor on February 20, 2007. (Ex. B at ___.) Thus the question remains open as to whether Ordinance No. 1722 was ever lawfully enacted in the first place. If not, then there would be no existing ordinance that Ordinance No. 1736 could purport to amend. Valley Park would have to try to enact an entirely new ordinance.

[3] If the Defendant successfully and lawfully amends Ordinance No. 1722 or enacts a new ordinance, an additional question will arise as to whether Defendant's Motion for Summary Judgment should be stricken because it is directed to an ordinance that is not the same ordinance that is the subject of the Plaintiffs' Amended Petition. It may be appropriate at that point for the Plaintiffs to seek leave to amend their complaint to address the new ordinance.

A. Missouri's Sunshine Law Authorizes Invalidation of an Ordinance for Failure to Comply with the Law's Requirements.

In Missouri, "The Sunshine Law declares it is the public policy of this state to make actions of public governmental bodies open, and to achieve that end the law must be liberally construed, whereas exceptions to it are to be strictly construed." *Kansas City Star v. Shields*, 771 S.W.2d 101, 104 (Mo.App. 1989)(*citing* Mo.R.S. § 610.011.1). The voiding of legislation is an appropriate – and statutorily provided for – remedy for non-compliance with the Sunshine Law.

> Initially, the Sunshine Law (which was adopted in 1973) had no teeth. … [While] [t]he lack of public notice of a special meeting would undoubtedly deprive the public of an opportunity to seek injunctive relief against holding such a meeting without proper notice[,] … injunctive relief [was] the only remedy [that] ha[d] been provided by the General Assembly to implement the Sunshine Law.

Id. at 104. The legislature later gave the Sunshine Law some bite, "add[ing] to § 610.027 the remedies of civil fines and the voiding of legislation. These remedies were added to beef up and to deter violation of the already stated public policy of the law, as spoken loudly and clearly in the General Assembly, to open the business of government to the people." *Id.* (*citing Cohen v. Poelker*, 520 S.W.2d 50, 52-53 (Mo. banc 1975)). Accordingly, Missouri law specifically authorizes the voiding of an ordinance for failure to comply with the Sunshine Law.

B. Defendant Did Not Provide Sufficient Notice Under the Sunshine Law Given That There Was No Emergency.

In ordinary course, notice must be provided "at least twenty-four hours, exclusive of weekends and holidays when the facility is closed, prior to the commencement of any meeting of a governmental body…" (Mo.R.S. § 610.020.2.) There is an exception: "When it is necessary to hold a meeting on less than twenty-four hours' notice …, the nature of the good cause justifying

that departure from the normal requirements shall be stated in the minutes." (Mo.R.S. § 610.020.4.)

Defendant has asserted that Ordinance No. 1736, which it claims renders Plaintiffs' Motion moot, was passed at an August 9, 2007 special meeting of the Board of Alderman and signed by the Mayor that evening. (Ex. B at __.) It is undisputed that there was not 24-hours' notice of the meeting. The notice of the 6:30 p.m. meeting was prepared by the City Clerk at about 11 a.m. the same day. (*Id.* at __.) It was sent to only one reporter and not posted on the Internet or elsewhere. (*Id.* at __.)

The City Clerk prepared the minutes of the meeting from her notes and with the assistance of counsel. (*Id.* at __.) According to the minutes, the following explanation for the emergency meeting was provided:

> The City Attorney stated that this meeting was called to order by the Mayor in order to change the effective date of Ordinance 1722[,] which was called into question through a motion filed in Federal Court on Thursday, August 9, 2007 by attorneys representing Jacqueline Gray. Due to a pending hearing on Friday[,] August 10, 2007[,] it was the suggestion of Counsel for the City to consider amending Section 7 or [*sic*] Ordinance 1722 to clarify the effective date for the pending litigation.

(August 9, 2007 Meeting Minutes, Ex. D hereto.) No other reason for an emergency meeting is provided in the minutes.[4]

The purported Ordinance No. 1736 should be declared void because there was no emergency justifying the invocation of the Sunshine Law's emergency procedures. The policy underlying the Sunshine Law (*i.e.,* public notice and public input) outweighs any interest Defendant had in adopting the ordinance without the required 24-hours public notice.

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[4] The minutes also fail to reflect the location of the meeting, which is required to be included. (Mo.R.S. § 610.020.1.)

In essence, the Defendant's argument is that the filing of Plaintiffs' Motion on August 9, 2007 seeking a declaration that Ordinance No. 1722 is inoperative created an emergency requiring Defendant to pass Ordinance No. 1736 immediately and in a manner depriving the public of notice and the opportunity to be heard. That argument borders on being frivolous for at least two reasons: (a) under local rules, Defendant had seven calendar days to respond to the Motion; and (b) Defendant had long been on notice that Plaintiffs asserted that Ordinance No. 1722 was inoperative under its own terms. Each of those facts is independently sufficient to void Ordinance No. 1736.

As discussed above, Defendant's response to the Motion was not due until the close of business on August 16, 2007. Although there was a hearing scheduled for August 10, 2007, the purpose of the hearing was scheduling, not consideration of Plaintiffs' Motion. (Doc. # 49.)[5]

Plaintiffs' filing also did not create an emergency because Defendant had long known of Plaintiffs' position that Ordinance No. 1722 is inoperative. Plaintiffs asserted the same in their Amended Petition filed in state court on April 12, 2007, prior to this case being removed. (Amended Petition, Doc. # 36, ¶ 23, n. 2.)[6] Plaintiffs again notified Defendant of their position on April 19, 2007 in their Motion for Preliminary Injunction. (Mot. for Prelim. Inj., Doc. #1-2, at 3 n. 2.) Finally, and most importantly, counsel for Plaintiffs communicated directly with Defendant's counsel on July 24, 2007 regarding Plaintiffs' position that Ordinance No. 1722 is

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[5] It is impossible to reconcile Defendant's apparent claim that the passage of Ordinance No. 1736 was somehow necessary in advance of the August 10, 2007 hearing with Defendant's failure to provide this Court or opposing counsel with a certified and signed copy of the purported ordinance in advance of the hearing, or its failure to even notify opposing counsel that a meeting was being held, that a meeting was held, or that the ordinance was putatively passed and signed, until the 2:00 p.m. court hearing the next day.

[6] Indeed, Defendants *admitted* the allegations in the paragraph that included Plaintiffs' assertion that Ordinance No. 1722 is inoperative.

not currently effective and asked Defendant's counsel to state its position on the matter. (*See* Mot. for Declaration, Doc. # 50,at 6 and Exs. 5-7.)

Moreover, even if Defendant had lacked notice of the Plaintiffs' position, and even if the Board of Aldermen did not have time to try to pass Ordinance No. 1736 in advance of the Court's consideration of this Motion, that would not create an emergency. To our knowledge, the City has never attempted to enforce any of its immigration ordinances, and Ordinance No. 1736 would not make Ordinance No. 1722 enforceable until at least December 1, 2007. The City would be in precisely the same substantive position if it considered and enacted Ordinance No. 1736 in accordance with the ordinary procedures set forth in the Sunshine Law rather than using the emergency procedures. Defendant's counsel's desire to avoid this Court ruling on a meritorious motion does not constitute "good cause" for departing from the Sunshine Law's requirement of public input and public deliberation.

Accordingly, there were no exigent circumstances that justified undermining the democratic process that the Sunshine Law is designed to protect.

CONCLUSION

Plaintiffs, as Missouri citizens, have standing to enforce the state's Sunshine Law. *See, State ex rel Missouri Local Gov. Retirement Sys. v. Bill,* 935 SW 2d 659 (Mo. App. 1996). The Sunshine Law is designed to promote open meetings. *Kansas City Star v. Shields*, 771 S.W.2d at 105. Where, as here, the public was deprived of statutorily required notice and the opportunity to be heard, and the "emergency" used to justify departure from the notice requirements was a sham, Ordinance No. 1736 is subject to being declared void. Accordingly, Plaintiffs respectfully submit that this Court should grant Plaintiffs' Motion for a declaration that Ordinance No. 1722 is currently not effective.

Dated: August 20, 2007

Respectfully submitted,

/s/ Daniel J. Hurtado

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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 August 20, 2007.

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