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' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pending before this Court are: (1) the Defendant City of Valley Park's (the "City") omnibus motion for summary judgment on Plaintiffs' preemption claims, equal protection claim, due process claim, state law claim and preclusion claim;[1] and (2) Plaintiffs' cross-motion for summary judgment based on issue preclusion. On October 5, 2007, the Court granted Plaintiffs' Motion for a Continuance Pursuant to Rule 56(f), directed the parties to complete fact-discovery no later than October 22, 2007, and provided that any supplemental briefs on the pending motions for summary judgment are to be filed by October 26, 2007. Fact-discovery has now largely been completed,[2] and Plaintiffs respectfully submit this Supplemental Memorandum.

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[1] The only claim not challenged in the City's Motion for Summary Judgment is Plaintiffs' claim under the Missouri Sunshine Law.

[2] The October 19, 2007 deposition of Alderman Randy Helton was partially taken but was continued because Mr. Helton forgot his eyeglasses and was unable to read the exhibits. To accommodate Mr. Helton's work schedule, the completion of his deposition has been scheduled for the evening of November 2, 2007. Plaintiffs anticipate that Mr. Helton's testimony will be consistent with the testimony of the other aldermen and will not require any additional submissions to the Court. Plaintiffs reserve the right, however, to seek leave to bring Mr. Helton's additional deposition testimony to the Court's attention if it bears uniquely on the pending motions for summary judgment. Further, on October 12, 2007, after it became clear that the aldermen would not be able, or would not be allowed, to answer

This Memorandum demonstrates the following: (1) that the City's newly asserted interpretation of Ordinance 1722 excludes the Plaintiffs from being subject to the Ordinance and therefore raises the possibility that the remainder of this case is moot; (2) in the alternative, if Plaintiffs, who do not have and are not required to have a business license, *are* subject to Ordinance 1722, that further supports the conclusion that Ordinance 1722 is not a "licensing law" so as to be exempt from IRCA's preemption clause; (3) new discovery further supports Plaintiffs' claim of conflict-preemption; (4) new discovery further supports Plaintiffs' equal protection claim; and (5) new discovery further supports Plaintiffs' due process claim.

I. PLAINTIFFS ARE ENTITLED TO A DECLARATION THAT THEY ARE NOT SUBJECT TO ORDINANCE 1722.

Under the City's interpretation of Ordinance 1722 the ordinance does not apply to, and cannot place any obligations on, either of the Plaintiffs in this case.

Plaintiffs brought this case in the belief that they were subject to obligations under the housing and employment ordinances that were in effect at the time of filing. The housing ordinance has, of course, been repealed; and the employment ordinance that is now before the court is Ordinance 1722, as amended by Ordinance 1736. In its Reply, the City responds to Plaintiffs' conflict preemption argument by claiming that "Ordinance 1722 extends only to employment relationships involving a '*business entity*'…. 'Business entity' is limited in section 3 of the ordinance to business entities that require a business license, unless expressly exempted by law." (Def. Reply at 20 (emphasis in original).) In addition, the City claims that the term "business entity" cannot include individuals acting in a private capacity. (*Id.* at 21 & n.5.)

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questions regarding the enforcement and implementation of Ordinance 1722, Plaintiffs filed a motion seeking a modification of the Court's October 5, 2007 Order to permit the Plaintiffs to take a deposition of the City under Fed. R. Civ. P. 30(b)(6) regarding the topic of the enforcement and implementation of Ordinance 1722. That motion is fully briefed and pending before the Court.

Under that interpretation of the Ordinance, Plaintiffs are not subject to the ordinance because they do not possess a business license and do not intend to obtain such a license. (Ex. A, Declaration of Jacqueline Gray, ¶ 3. (Therefore, they also are not required to sign an affidavit under the ordinance, *see* Ordinance 1722, § 4-A.) Indeed, as a landlord, Windhover, Inc. (and by extension Ms. Gray) is not required to obtain a business license, nor is it expressly exempted from obtaining a business license. (*See* Ex. B, Valley Park municipal code, Chapter 605: Business Licenses and Regulations.)

Accordingly, Plaintiffs seek a declaration confirming that the Ordinance does not apply to Windhover, Inc., or to Jacqueline Gray. The issuance of a declaration is appropriate in these circumstances because even though the City has now advanced an interpretation of the ordinance that excludes Plaintiffs from its scope, the City has also made other statements indicating that it plans to subject Plaintiffs to the ordinance. (*See*, *e.g.,* Ex. C, Transcript of May 16, 2007 Motion Hearing, at 33:16-17 ("they are under an immediate obligation to file an affidavit by the City"); Def. Mem. in Supp. of MSJ at 25 ("Plaintiffs, as employers, would suffer injury if their claims were valid"); Def. Stmt. of Uncontroverted Facts, Docket No. 55 ("Plaintiff Windhover, Inc. . . . is subject to Ordinance 1722."). In addition, in the absence of a declaration by this Court, the City could re-interpret the ordinance to again subject Plaintiffs to imminent injury. On the other hand, if the court declares that Plaintiffs are not subject to the ordinance, the remainder of the issues in this case would be moot.

II. IF ORDINANCE 1722 DOES APPLY TO PLAINTIFFS, THAT REINFORCES PLAINTIFFS' PREEMPTION CLAIMS.

If the City backs away from its interpretation of Ordinance 1722 as stated in its Reply, or if the Court finds that interpretation unsustainable, Plaintiffs' express and conflict preemption arguments will be further strengthened.

As Plaintiffs have already explained, Ordinance 1722 cannot reasonably be considered a "licensing law" (or similar to a licensing law), and therefore it is expressly preempted under 8 U.S.C. § 1324a(h)(2). (*See generally* Opp. at 7-9.) Indeed, even after many amendments, Ordinance 1722 does not purport to be a licensing law (or similar to a licensing law) on its face. Its title and its extensive "findings and declaration of purpose" make no reference to licensing or licenses. It does not require or provide standards for the licensing of any particular business activity (other Valley Park ordinances do that). It refers to no other licensing provisions and it has not been codified within the City's licensing provisions. Its goal is clearly to set forth a general prohibition on the employment of undocumented workers, not to impose particular conditions as part of specific licensing or "fitness to do business" requirements. On those grounds alone, and as explained in Plaintiffs' prior submissions, it is plain that the ordinance is preempted under § 1324a(h)(2).

If entities such as Plaintiffs, which neither possess a license, plan to apply for a license, or are required to obtain a license, are subject to Ordinance 1722, then it is even clearer that the ordinance cannot be considered a "licensing or similar law." In those circumstances, the ordinance's reach is universal and its prohibitions are not even remotely connected to licenses.[3]

Moreover, if Plaintiff Gray is subject to the ordinance's prohibitions then, contrary to Defendant's arguments, even under the City's reading of the federal law, there is plainly a

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[3] Not only would the prohibitions of Ordinance 1722 apply to businesses and individuals who were not subject to any licensing requirement, but non-licensing penalties triggered by a violation of those prohibitions could also apply to such entities. In testimony regarding the construction and application of the earlier landlord ordinance, the City Attorney previously explained that in the absence of an applicable penalty provision, entities that violate a prohibition in the municipal code are typically subject to a general penalty provision, which could provide penalties up to $500 and/or imprisonment for 90 days. (*See* Ex. D, Transcript of March 1, 2007 Court Proceedings at 77, 65-68.) If Ordinance 1722's prohibition on the employment of unauthorized aliens can be enforced using such penalties – a question that is still unresolved in the current record – then the ordinance is expressly preempted under 8 U.S.C. § 1324a(h)(2) for that reason as well.

conflict between federal law's exception for domestic workers and the ordinance's application to all situations where one person "works" for another. (*See* Opp. at 10; *cf.* Def. Reply at 20.)

III. DISCOVERY REINFORCES PLAINTIFFS' CLAIM OF CONFLICT-PREEMPTION.

Plaintiffs have previously noted that federal law provides certain carefully considered and limited opportunities for state or local governments to participate in immigration-related activities and that the City's immigration scheme does not fall within any of those limited areas. (Opp. at 16-17.) In particular, we noted the lack of any Congressional creation of a system for local authorities to verify work authorization status of workers employed by businesses within their municipalities. (*Id.*)

The City has failed to produce any evidence that such a system exists or is available to the City. Defendant has instead produced documents indicating that the City has enrolled in the Systematic Alien Verification for Entitlements (SAVE) system, and that it has obtained a username for the Basic Pilot (now e-Verify) system. Neither system can provide determinations of work authorization status as envisioned under § 5-E of the ordinance.

Using SAVE to try to determine the work authorization status of workers in Valley Park would violate the City's Memorandum of Understanding ("MOU") with the federal government. According to that document, Valley Park is participating in the SAVE system "for the purpose of verifying the *immigration status* of *alien applicants* for commercial licenses, sewer lateral program assistance and other licenses and/or benefits issued by [Valley Park]." (Ex. CC, Plfs' Dep. Ex. 21, emphases added.) Accordingly, the MOU requires the City to "obtain a written release from each applicant … authorizing the release of DHS-CIS information"; and the City certified that it "fully understands that this MOU does not permit it to use SAVE for the purpose of complying, or assisting any person or entity to comply, with the employment eligibility

verification requirements of … 8 U.S.C. section 1324a." (*Id.*) Because the ordinance calls on the City not to verify the immigration status of alien applicants for licenses, but rather to determine the work authorization status of non-applicant workers where complaints have been made against their employers, any attempt to use SAVE to enforce Ordinance 1722 would violate the MOU that the City has entered into.

Similarly, the City cannot use the Basic Pilot system to enforce the Ordinance. Although the City apparently has a username for the Basic Pilot interface, it has not yet signed the MOU that the federal government requires of all program participants. In any event, in law and in practice Basic Pilot participants may only use the program to verify their own employees, not the employees of other entities. *See* Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA"), § 402(c)(2)(A), Pub. L. No. 104-28, Div. C (Sept. 30, 1996), codified as amended at 8 U.S.C. § 1324a note (an entity's election to participate in Basic Pilot applies to *its* hiring); Ex. E at 4 ¶ 12 (sample Basic Pilot MOU providing that participant "agrees that it will use the information it receives from the SSA or [DHS] pursuant to the Basic Pilot and this MOU only to confirm the employment eligibility of newly-hired employees after completion of the Form I-9"); ¶ 8 ("should the Employer use the Basic Pilot procedures for any purpose other than as authorized by this MOU, the Employer may be subject to appropriate legal action and the immediate termination of its access"); ¶ 13 ("any person who obtains [certain Basic Pilot information] under false pretenses or uses it for any purpose other than as provided for in this MOU may be subject to criminal penalties").[4] Further, while Ordinance 1722 requires the City to share the results of any federal verification with the relevant business entity, the Basic Pilot

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[4] These and other provisions also confirm that employers cannot use the Basic Pilot system to reverify employees, as Ordinance 1722 requires in some circumstances. *Compare* Ordinance 1722 §§ 5(B)(2) & 4(B)(5) *with* Ex. E at 4 ¶ 8 ("The Employer agrees not to use Basic Pilot procedures for reverification, or for employees hired before the date this MOU is in effect.").

program prohibits such information-sharing. *See id.* at 4 ¶ 12 (employer shall ensure that information received through Basic Pilot "is not disseminated to any person other than employees of the Employer who need it to perform the Employer's responsibilities under this MOU").

IV. DISCOVERY REINFORCES PLAINTIFFS' EQUAL PROTECTION CLAIM.

Plaintiffs demonstrated in their Opposition to the City's Motion for Summary Judgment that Plaintiffs have sufficiently alleged "state action" in connection with their equal protection claim because Plaintiffs allege that a city government has enacted an ordinance that will, and is intended to, induce employers and residents of Valley Park to engage in discriminatory conduct. (Opp. at 20-24.) The question of state action is largely a fact question because, if there is sufficient evidence to raise an inference that Ordinance 1722 was motivated by a discriminatory purpose and is intended to have a discriminatory effect, then that evidence also would give rise to an inference of state action.

Plaintiffs also demonstrated that they have "standing" to assert an equal protection claim because, as this Court has already ruled, they have Article III standing, and because: (1) they are in a better position as a prudential matter to represent Hispanic immigrants who may be discriminated against by employers and prospective employers as a result of Ordinance 1722 (Opp. at 17-18); and (2) Plaintiffs are entitled under the law to assert an equal protection claim in their own right based on being targeted because of their association with (contracting of) Hispanic workers. (*Id.* at 19-20.) As to prudential standing, the City has chosen not to depose or take any significant discovery of the Plaintiffs, and thus has no basis to argue that Plaintiffs are not in a better position to pursue this litigation than dispersed Hispanic immigrants who may be

fearful of coming forward or who may be deterred from even seeking employment in Valley Park.

As to "associational" standing, the City concedes that Plaintiffs may as a matter of law assert an equal protection claim based on discrimination against the Plaintiffs themselves because of their association with Hispanic workers. But the City asserts that the occurrence of such discrimination is "conjectural" or "hypothetical," and therefore Plaintiffs do not have standing to assert a claim for that kind of discrimination. (Def. Reply at 35-36.) The authority the City relies on all deals with "injury-in-fact" sufficient to confer Article III standing. But this Court has already held, and the City successfully argued in resisting remand of this case to state court, that Plaintiffs have Article III standing sufficient to give rise to federal jurisdiction. The City is judicially estopped from now arguing otherwise. We do not understand the City to also be asserting that Plaintiffs lack standing to assert their conflict-preemption claim and due process claim. The City should not be permitted to pick and choose in that regard.

In any event, the discovery that the Court permitted under Rule 56(f) reinforces an inference that the enactment of Ordinance 1722 was motivated by a discriminatory purpose and will have a discriminatory effect.

A. Ordinance 1722 Was Motivated By A Discriminatory Purpose.

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), sets forth factors relevant to a determination of discriminatory intent. These factors include: the extent to which the impact of the official action "bears more heavily on one race than another;" the "historical background of the decision" including the events leading up to the action; and the legislative and administrative history, including "contemporary statements" of the decision makers. *Id.* at 267-68 (internal quotations and citations omitted). The evidence discussed below

suggests a deliberate effort by the City of Valley Park to target individuals of Mexican descent. It also reveals a process in which Ordinances were enacted or amended with limited (if any) discussion or comment, and quite possibly without review by some aldermen. Moreover, as part of that process, correspondence from an extremist hate group was presented to the aldermen to consider in conjunction with the proposed ordinances. Finally, the evidence includes contemporary statements by the Mayor indicating outright bias and discrimination. Taken as a whole, this evidence is sufficient to establish discriminatory intent.

Plaintiffs showed in their Opposition that the City's Mayor first formed the idea of enacting an illegal-immigration ordinance after a Mexican family (who turned out to be legal immigrants, though the Mayor did not know one way or the other at the time) moved into his neighborhood. (Opp. at 24-25 and citations to the record.) The Mayor referred to his displeasure about the perceived tendency of Mexican immigrants to live together with their extended families, describing the additional relatives as "Cousin Puerto Rico and Taco whoever moving in." (*Id.*) When asked why his lawyers did not want him to speak to reporters about the immigration ordinances, the Mayor responded that they were concerned that he would say words like "wetbacks" and "beaners." (*Id.*) When the Mayor learned of the anti-immigrant ordinances in Hazleton, Pennsylvania, he saw that as a way to address his concerns about Mexican immigrants moving into Valley Park. (*Id.*)

The foregoing statements by the Mayor were initially reported in a February 28, 2007 issue of the Riverfront Times by reporter Kristen Hinman. (Ex. F, Oct. 16, 2007 Whitteaker Dep. at 114; Ex. G, Plfs' Dep. Ex. 2.) In its briefing, the City has tried to back away from the statements of the Mayor reported in the Riverfront Times by insulting Ms. Hinman as having published a "vulgar hit piece." (Def. Mem. in Supp. of MSJ at 27.) But as Plaintiffs pointed out

in their Opposition, the Mayor affirmed under oath on April 26, 2007 that nothing in Ms. Hinman's article was falsely attributed to him: "Q: As you sit here today, do you remember anything specifically in the Riverfront Times article of February 28th, 2007 that you -- that was attributed to you that you believe was definitely false?" A: Not that I can remember." (Opp. at 25 and Ex. K at 97.) In his October 16, 2007 deposition, given another chance under oath to repudiate the statements attributed to him in the Riverfront Times article, the Mayor expressly reaffirmed the testimony cited above from his April 26, 2007 deposition. (Ex. F, Oct. 16, 2007 Whitteaker Dep. at 127-128.)

Moreover, recent discovery has revealed that, at a March 5, 2007 meeting of the Board of Aldermen, in the wake of demands for the Mayor's resignation that resulted from the Riverfront Times article, the Mayor made a public statement in which he apologized for his statements in the Riverfront Times article, and stated "[m]any of my comments, I thought, were off the record." (Ex. F, Oct. 16, 2007 Whitteaker Dep. at 88-90; Ex. H, Oct. 11, 2007 Walker Dep. at 41-43; Ex. I, Oct. 17, 2007 Brust Dep. at 26-27, 33; Ex. J, Oct. 19, 2007 Carroll Dep. at 48-50; Ex. K, Plfs' Dep. Ex. 33.) The Mayor read from a written statement that was prepared by the City Attorney. (Ex. F, Oct. 16, 2007 Whitteaker Dep. at 90.)[5] In making the public apology, the Mayor did not deny making the statements attributed to him, but apologized for them, and complained only that he thought he was making the comments off the record. (*Id.* at 88-90.)[6]

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[5] At Mr. Whitteaker's deposition, his counsel indicated that the City possessed the written statement of apology and would produce it promptly. (Ex. F, Oct. 16, 2007 Whitteaker Dep. at 127.) Subsequently, the City Attorney has indicated that the statement cannot be located and must have been discarded at the March 5, 2007 board meeting. (Ex. L, Oct. 23, 2007 email from E. Martin to F. Bermudez.)

[6] In a March 14, 2007 article in the Riverfront Times, Ms. Hinman indicated that the Mayor had given her three separate interviews, and that "at no time did he indicate that he wished to say anything off the record." (Ex. K, Plfs' Dep. Ex. 33.) But it does not matter whether the Mayor believed he was making comments "off the record." The salient point is that he made them.

To be sure, on "cross," the Mayor's own counsel tried to lead him into denying that he made the statements, but the Mayor instead wound up again confirming that he made them. With respect to the quote attributed to the Mayor: "You got one guy and his wife that settle down here, have a couple of kids, and before long, you have Cousin Puerto Rico and Taco whoever moving in[,]" the Mayor's counsel asked him:

> Q: "Did you say those words?"
>
> A: "No. That's just ridiculous that something like that could come out in print in her article."
> Q: "Why do you say it's ridiculous that it could come out in print?"
>
> A: "I just believe that the reporter was on a mission to just have a nasty article that would maybe provoke different individuals and make a good controversial story which would, in turn, have a lot of people picking up that paper."
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> Q: "Opposing counsel asked you about what [was] on the record and off the record. Did you, did you say those comments to [the reporter] off the record and just think that she wouldn't print them?"
>
> A: "Yes."

(Ex. F, Oct. 16, 2007 Whitteaker Dep. at 115.)

Indeed, all of the aldermen who were asked about the Mayor's public apology on March 5, 2007 testified that he did not deny having made the statements attributed to him, but contended only that he thought he had made them off the record. (Ex. H, Oct. 11, 2007 Walker Dep. at 41-43; Ex. I, Oct. 17, 2007 Brust Dep. at 26-27, 33; Ex. J, Oct. 19, 2007 Carroll Dep. at 48-50.)

The Mayor and several of the aldermen further confirmed that one of the reasons for enacting the immigration ordinances was the reason that was publicly articulated by the City Attorney:

> This ordinance arose after several landscaping and tree-trimming companies purchased single and multi-family housing in the

> Valley Park (area) and warehoused their employees in the units -- four men for a two-bedroom (apartment), four units to an (apartment) building. . . . Drinking, noise and fights in these dwellings brought demands for police services, and our municipal court had increased instances of uninsured drivers of both commercial and non-commercial vehicles with foreign drivers licenses (primarily from Mexican states) even though the drivers had admitted being here over (six) months.

(Ex. M, Plfs' Dep. Ex. 5; Ex. F, Oct. 16, 2007 Whitteaker Dep. at 81-86; Ex. N, Oct. 8, 2007 Drake Dep. at 32-35; Ex. O, Oct. 8, 2007 White Dep. at 34-41; Ex. P, Oct. 19, 2007 Helton Dep. at 14-17.) In his October 16, 2007 deposition, the Mayor tried to dance around the fact that the allegedly "warehoused" employees were Hispanic immigrants. (*See, e.g.,* Ex. F, Oct. 16, 2007 Whitteaker Dep. at 82-86.) Yet the implication is obvious. The Mayor acknowledged at least that a resident told him that the "warehoused" men were Hispanic. (*Id.* at 85.)[7]

The City contends that, even if discriminatory intent can be attributed to the Mayor, it cannot be attributed to the aldermen. (Def. Mem. in Supp. of MSJ at 27.) Even if that were true -- and it is not -- the City offers no reason for thus letting the City off the hook. It is not disputed that the immigration ordinances are the Mayor's brainchild and that he is the one who pushed them through the Board of Alderman to enactment, and has sought to keep them alive. (Ex. Q, Plfs' Dep. Ex. 1 at 2; Ex. J, Oct. 19, 2007 Carroll Dep. at 16-17; Ex. P, Oct. 19, 2007 Helton Dep. at 10-11; Ex. F, Oct. 16, 2007 Whitteaker Dep. at 50-51, 60-64 (testimony regarding correspondence with U.S. and state senators lobbying for support for the immigration ordinances).) The highly controversial immigration ordinances were first presented to the Board of Aldermen in the "Friday packets" -- the packets of proposed ordinances and other materials that are distributed to the aldermen for their consideration prior to the semi-monthly Monday

[7] Moreover, Ray's Tree Service, owned by Ray Thompson, and which hires some 30 Mexicans every year through a federal program, is most assuredly the employer referenced in the statement by the City Attorney. Mr. Thompson stated in the press that he has been harassed over the past few years by residents who resent the presence of Hispanic workers. (Ex. G, Plfs' Dep. Ex. 2 at 5.)

board meetings -- without discussion at prior board meetings, and with little discussion in the board meetings at which they were passed. (Ex. R, Oct. 8, 2007 Pennise Dep. at 50-51; Ex. O, Oct. 8, 2007 White Dep. at 12; Ex. J, Oct. 19, 2007 Carroll Dep. at 8; Ex. P, Oct. 19, 2007 Helton Dep. at 6-9.) In other words, for the most part, the aldermen were simply rubber-stamping the Mayor's discriminatory agenda.

That said, the aldermen themselves cannot be excused from responsibility for the immigration ordinances' discriminatory purpose. The Board of Aldermen continued to perpetuate the ordinances even after the Mayor's discriminatory motive became clear on February 28, 2007 and March 5, 2007, and even after becoming aware of the ordinances' racially divisive effect in the community. On March 19, 2007, the Board voted to repeal the Landlord Ordinance (Ex. S, Plfs' Dep. Ex. 12 at 4), but on April 2, 2007, did not have sufficient votes to override the Mayor's veto. (Ex. T, Plfs' Dep. Ex. 13.) It can reasonably be inferred that the ill-fated effort to repeal the Landlord Ordinance was a reaction, at least in part, to the Mayor's public statements and the racial overtones of the ordinances in the community. (*See, e.g.,* Ex. U, Oct. 11, 2007 Adams Dep. 92, 94-95.) Yet, the Board of Aldermen ultimately continued to take action to perpetuate the Employer Ordinance despite the Mayor's public statements and the racial overtones. (*See* Ex. V, June 4, 2007 Ordinance amending Ordinance 1722 to add word "knowingly"; Ex. W, Ordinance 1736 making Ordinance 1722 effective immediately.)

Moreover, Alderman Drake, the one alderman who has been fairly vocal regarding the immigration ordinances, revealed at deposition that his own bias against Hispanic immigrants drove his support for the immigration ordinances. In addressing the "warehousing" of workers in the south end of town, Mr. Drake opined that illegal aliens were taking tree-trimming jobs, including jobs for Ray's Tree Service, away from the community's youth. (Ex. N, Oct. 8, 2007

Drake Dep. at 77-79.) Yet Mr. Drake had no basis whatsoever for concluding that those immigrant workers were "illegal" (*id.*), other than the fact that they were Hispanic. Moreover, in discussing the immigration ordinances in an email communication, Mr. Drake stated that he felt is was "imperative not to let the slumlord bully a town." (*Id.* at 81; Ex. X, Plfs' Dep. Ex. 30.) By "slumlord," Mr. Drake was referring to, among others, Stephanie Reynolds and Florence Streeter, two of the plaintiffs in the state proceeding challenging the immigration ordinances. (Ex. N, Oct. 8, 2007 Drake Dep. at 81-82.) Mr. Drake regarded Ms. Reynolds and Ms. Streeter as "slumlords" because "they own multiple properties, and they're feasting on the back of people that they shouldn't be renting to." (*Id.* at 82.) Mr. Drake further testified that the people Ms. Reynolds and Ms. Streeter should not be renting to were, "I'm going to have to guess illegal aliens." (*Id.*) But, again, Mr. Drake articulated no basis for believing that Ms. Reynolds' and Ms. Streeter's tenants were illegal aliens other than the fact that Ms. Reynolds and Ms. Streeter are plaintiffs in a lawsuit challenging the immigration ordinances. (*Id.* at 83.) Obviously, the real basis is that at least some of Ms. Reynolds' and Ms. Streeter's tenants are Hispanic. (*See, e.g.,* Ex. Y, Affidavit of Florence Streeter ¶¶ 7, 8; Plfs' Stmt. of Material Facts, Docket No. 84-1, Ex. L.)

The evidence, therefore, that the City's enactment of the immigration ordinances, including Ordinance 1722, was motivated by animus toward Hispanic immigrants generally, and not merely toward "illegal" immigrants, is compelling, and certainly is sufficient to defeat summary judgment. It further should be noted that the foregoing evidence has been developed from a truncated discovery schedule in which the City has not fully complied with the Plaintiffs' production requests and in which the number and duration of depositions for this kind of case have been limited. The depositions have revealed additional persons who might be able to

provide relevant evidence; for example, the City Building Commissioner, who apparently will be charged with the implementation and enforcement of Ordinance 1722, or the owner of Ray's Tree Service, who might be able to connect the dots regarding the targeting of the "warehoused" workers in Valley Park's south end. Under ideal circumstances, the Plaintiffs might subpoena those and other third parties for depositions, and may still subpoena various undeposed third parties for trial.

Moreover, the Plaintiffs agreed to conduct dispositions in compliance with this Court's Protective Order in *Reynolds v. City of Valley Park,* 06CV01487, in which this Court set certain parameters to protect the legislative privilege. Plaintiffs respect, and endeavored to respect, the legislative privilege, but that constraint nevertheless inhibited the effort to obtain discovery on whether Ordinance 1722 was motivated by racial animus. Despite that constraint, we submit that the evidence so far adduced is far more than sufficient to defeat summary judgment.[8]

This Court's Protective Order did provide that, in seeking to establish discriminatory intent, Plaintiffs could "inquire as to any materials [the aldermen] had available to them before the Board of Aldermen action was taken, and when discussing the challenged ordinance." (Prot. Order at 7.) A review of such materials here supports an inference of discriminatory intent.

In particular, the Board had available to it in the "Friday packet" that was distributed to the aldermen prior to the February 5, 2007 board meeting at which Ordinance 1722 was enacted a January 15, 2007 letter to the Mayor from the "Citizens Civil Defense." (Ex. Z; Ex. F, Oct. 16, 2007 Whitteaker Dep. at 73-74; Ex. U, Oct. 11, 2007 Adams Dep. at 52-55; Ex. I, Oct. 17, 2007

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[8] Plaintiffs believe that the deponents' counsel was in many instances overly aggressive in asserting the legislative privilege, particularly in instructing the witnesses not to answer questions relating to the implementation and enforcement of Ordinance 1722. This Court stated in its Protective Order that "[h]ow an ordinance is to be enforced is not related to the issue of motive or intent in passing an ordinance[.]" (Nov. 2, 2006 Prot. Order, Docket No. 27, at 8.) Plaintiffs have certified those questions and reserve the right to bring the matter before the Court if necessary.

Brust Dep. at 52-53.) The Citizens Civil Defense letter to the Mayor is a hateful diatribe that contends that the challenge to the anti-illegal alien ordinances is motivated by "Hispanic Jihadist's, Marxists, liberals and socialists. The Hispanic advocacy groups are exceptionally racist." (Ex. Z, at 1.) Among other things, the letter lists the Hispanic-American street gangs that purportedly reside in California and Chicago, attempting to associate those gangs with illegal immigrants. (*Id.* at 3-4.) The Citizens Civil Defense letter might be written off as the ranting of a marginalized hate-group, except that it was placed in the Friday packet to be available for the aldermen in considering whether to vote for Ordinance 1722.

In addition, the Friday packet for the August 7, 2006 board meeting contained an email from the City Attorney to St. Louis Mayor Slay, which was the source of the reports that the anti-immigration ordinance in Valley Park arose as a result of the "warehousing" of Hispanic workers by several landscaping and tree trimming companies in Valley Park. (Ex. AA, Plfs' Dep. Ex. 50, at sixth page, 8/2/2006 email from EMartin772 to Mayor Slay.)

B. Ordinance 1722 Will Have A Discriminatory Effect.

In their Opposition, the Plaintiffs set forth expert testimony and media reports that at least raise a fact question regarding whether, as a result of the existence of the anti-immigration ordinances, including Ordinance 1722, persons of Hispanic heritage will be deterred from living or working in Valley Park, employers will be induced to avoid hiring persons who appear to be of Hispanic heritage, and City officials and residents of Valley Park will be induced to lodge complaints under Ordinance 1722 against businesses based on the apparent Hispanic heritage of their workers. (Opp. at 27 and citations to the record.)

This Court declined to defer ruling on the summary judgment motions pending expert discovery, and Plaintiffs have had only a very limited opportunity to take third-party discovery

that might relate the likely discriminatory effect of Ordinance 1722. Nevertheless, there is one fact that the depositions of the Mayor and the aldermen has made abundantly clear and that relates to the question of discriminatory effect: No witness could satisfactorily explain how it would be determined that a complaint lodged against an employer pursuant to Ordinance 1722 is not, even in part, based on national origin, ethnicity or race. (*See, e.g.*, Ex. F, Oct. 16, 2007 Whitteaker Dep. at 108-110; Ex. N, Oct. 8, 2007 Drake Dep. at 61; Ex. O, Oct. 8, 2007 White Dep. at 73; Ex. U, Oct. 11, 2007 Adams Dep. at 108; Ex. I, Oct. 17, 2007 Brust Dep. at 47-49.)[9] Even the belatedly supplied Declaration of Valley Park Building Commissioner Jeffery Schaub -- which was most assuredly carefully prepared by the City's counsel -- fails to explain how it will be determined that a complaint is not based on national origin, ethnicity or race. (Ex. BB, Schaub Decl. ¶ 6 and passim.) (*See also* discussion in Section V, *supra.*)

With no way to ascertain whether a complaint is based on an impermissible factor -- it can hardly be expected that discriminators will reveal their biased motives on the complaint form -- Ordinance 1722 is wide open to all sorts of mischief, including by residents who are intent on driving Hispanic workers out of Valley Park.

V. DISCOVERY REINFORCES PLAINTIFFS' DUE PROCESS CLAIM.

By moving for summary judgment of Plaintiffs' due process claims, the City contends that no material, factual disputes exist to preclude summary judgment in its favor. Yet in support of its motion, the City made arguments grounded not in the plain language of the ordinance, but based on what could only have been extrinsic evidence. (*See* Docket No. 54 at 36; Docket No. 91 at 6 n.3.) The City subsequently produced a declaration addressing the City's planned enforcement of the Ordinance (Ex. BB, Schaub Decl.) that conflicts with the plain language of

[9] At least two aldermen were instructed not to answer this line of questioning under the pretext of legislative privilege. (*See* Ex. H, Oct. 11, 2007 Walker Dep. at 60-72; Ex. J, Oct. 19, 2007 Carroll Dep. at 67-68.)

the Ordinance. Thus factual disputes exist regarding Plaintiffs' claim that Ordinance 1722 does not provide due process. More significantly, depositions of Valley Park aldermen and the Mayor reinforce Plaintiffs' claim that the Ordinance fails to provide sufficient notice or opportunity for accused businesses to be heard before their right to do business in Valley Park is suspended. Neither the aldermen who enacted the ordinance, nor the mayor who proposed the ordinance, could address how Ordinance 1722 by its own terms could be enforced in a manner consistent with due process standards.

Depositions of the aldermen and Mayor reveal that Ordinance 1722 contains no standards that would provide notice to businesses of their obligations under the statute. First, neither the aldermen nor the Mayor could address what constitutes a valid complaint.[10] (*See*, *e.g.*, Ex. N, Oct. 8, 2007 Drake Dep. at 62-66; Ex. O, Oct. 8, 2007 White Dep. at 79; Ex. U, Oct. 11, 2007 Adams Dep. at 106-08.) Alderman Brust contemplated a procedure for establishing that a complaint was valid under which "[y]ou can tell pretty well by talking to somebody what – they know what where [sic] talking about, and you can just about tell by talking to 'em whether they don't know nothing about it or not." (Ex. I, Oct. 17, 2007 Brust Dep. at 44.) Second, neither the aldermen nor the mayor could articulate what standards Ordinance 1722 requires for determining whether a complaint is impermissibly based on race, ethnicity or national origin.[11] (See, *e.g.*, Ex. N, Oct. 8, 2007 Drake Dep. at 66; Ex. U, Oct. 11, 2007 Adams Dep. at 108.)

Additionally, the very aldermen who enacted Ordinance 1722 were unable to state what constitutes the critical "identity information" that an employer must provide once a valid

[10] Alderman Drake went so far as to imply that a complaint under the Ordinance could result in an arrest, stating that the "arresting officer . . . or the building superintendent—building code guy, building inspector" would determine whether or not a complaint is valid. (Ex. N, Oct. 8, 2007 Drake Dep. at 60-61.)

[11] One Alderman did propose a hypothetical scenario, but not one grounded in any standards found in the Ordinance. (*See* Ex. O, Oct. 8, 2007 White Dep. at 79.)

complaint is lodged against it. (See, e.g., Ex. U, Oct. 11, 2007 Adams Dep. at 109; Ex. F, Oct. 16, 2007 Whitteaker Dep. at 110.) The Ordinance's failure to identify what information a business must produce to the City in order to avoid automatic, mandatory suspension of its business license renders the Ordinance invalid under the due process clause. *See Lozano v. City of Hazleton*, 496 F. Supp.2d 477, 536 (M.D. Pa. 2007) (finding that the Ordinance's failure to specify the nature of the identity information renders notice inadequate).

Additionally, since filing its motion, the City has proffered evidence that establishes material, factual disputes with regard to the City's planned enforcement of the Ordinance. Ordinance 1722 requires that the City confirm that all complaints are valid before the City undertakes an enforcement action. The plain language of the Ordinance sets forth specific, limited criteria for a valid complaint. Once these are satisfied the City must initiate an enforcement action that subjects accused business entities to the burden of turning over identity information (which the business may or may not possess, and may or may not be lawfully entitled to release.) Yet the City has proffered the declaration of its Code Enforcement Officer indicating that he intends to engage in a highly subjective, discretionary review of each complaint. (*See* BB, Schaub Decl. ¶¶ 8, 10.) This intrusive investigation is not contemplated by Ordinance 1722 (*see* Ex. W, §4B(1)-(3)), and once again subjects the accused business to an investigation without opportunity to know the source or basis of the allegations made against it. More importantly, the procedure contradicts the language of the Ordinance, which requires that the City demand "identity information" from an accused business within three days of receiving a complaint containing the following information: an allegation describing the alleged violators, the actions constituting the violations, the date and location where such actions occurred, and the signature of the complainant. (Ex. W, §4B(1).)

The Ordinance's failure to define the "identity documents" that an accused business must provide to the City within three days of a demand for such information (on pain of having its license suspended) also constitutes inadequate notice. By declaration, the City now purports to define identity information, including "any and all information that the business entity possesses regarding the work authorization and identity of any person alleged to be an unlawful worker." (Ex. BB, Schaub Decl. ¶ 11.) This definition, which is not contemplated by the plain language of the Ordinance, further supports Plaintiffs' claim that Ordinance 1722 is not reasonably calculated to provide notice to business entities of what information might be demanded of them.[12]

In sum, the testimony of the elected officials who enacted Ordinance 1722 reinforces Plaintiffs' claim that the language of the Ordinance lacks standards or guidelines for compliance and provides inadequate notice by failing to explain what businesses must do to avoid losing the right to do business in the City. Subsequently promulgated standards for enforcing the Ordinance that conflict with or otherwise extend beyond the language of the Ordinance cannot, by their very nature, support the City's motion for summary judgment of Plaintiffs' due process claims. At the very least those purported standards create a material, factual dispute sufficient to defeat the City's motion, if not establish outright Plaintiffs' claim that Ordinance 1722 fails to comport with due process. For these reasons, summary judgment against Plaintiffs' due process claim must be denied.

[12] Moreover, requiring such information places employers in danger of violating privacy laws and the confidentiality provisions of the INA.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Plaintiffs' Opposition, Plaintiffs request that the Court enter an order denying the City's Motion for Summary Judgment in its entirety.

Dated: October 26, 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 October 26, 2007.

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