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September 15, 2011

HAND DELIVERY

Vickie Thompson-Carr
City Clerk
City of Kansas City, Missouri
414 East 12th Street
25th Floor
Kansas City, Missouri 64106

**RECEIVED BY
THE CITY CLERK**

SEP 15 2011



Re: Filing of Suggestions in Opposition to Proposed Transit Initiative (Ordinance 110607)

Dear Madam Clerk:

Attached to this email please find, for filing, Suggestions in Opposition to Adoption of Proposed Transit System Ordinance (Ordinance 110607) and Placement of Proposed Transit System Ordinance on Ballot, which we are submitting on behalf of the Kansas City Regional Transit Alliance and the Transit Action Network. By copy of this transmittal letter, we are mailing a copy of these Suggestions today to each of the five persons listed on the underlying Initiative Petition as being the Committee of Petitioners, at the respective address for each shown on the underlying Initiative Petition.

Our understanding is that the City Council's Transportation and Infrastructure Committee will conduct a hearing on this matter at its meeting on September 22, 2011. We respectfully request the opportunity to make a presentation to the Committee on this subject at that hearing. Prior to the hearing, we will coordinate with Councilman Johnson's aide to supply a list of persons that may testify within our allotted time period.

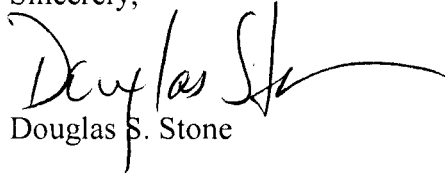
Chicago Dallas Denver Edwardsville Jefferson City Kansas City Los Angeles New York
Overland Park Phoenix St. Joseph St. Louis Springfield Topeka Washington, DC Wilmington

In California, Polsinelli Shughart LLP.

Vickie Thompson-Carr
September 15, 2011
Page 2

We are taking the liberty of copying the members of the Committee directly for your convenience. Please note that one page of the Exhibits is in color.

Sincerely,



Douglas S. Stone

DSS:
Enc.

cc: Hon. Russ Johnson (w/encl.)
Hon. Dick Davis (w/encl.)
Hon. Jermaine Reed (w/encl.)
Hon. Melba Curls (w/encl.)
Hon. Cindy Circo (w/encl.)
Galen Beaufort, Esq. (w/encl.)
Bill Geary, Esq. (w/encl.)
Kansas City Regional Transit Alliance (w/encl.)
Transit Action Network (w/encl.)
Karen D. Chastain (w/encl.)
Lamar Mickens (w/encl.)
Cynthia L. Mickens (w/encl.)
Richard C. Tolbert (w/encl.)
Kim Williamson (w/encl.)

**BEFORE THE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
OF THE CITY COUNCIL OF KANSAS CITY, MISSOURI**

**SUGGESTIONS IN OPPOSITION TO
ADOPTION OF PROPOSED TRANSIT SYSTEM ORDINANCE (ORDINANCE 110607)
AND PLACEMENT OF PROPOSED TRANSIT SYSTEM ORDINANCE ON BALLOT**

**RECEIVED BY
THE CITY CLERK**

SEP 15 2011



Submitted By:

**Polsinelli Shughart PC
700 West 47th Street, Suite 1000
Kansas City, Missouri 64112**

On Behalf Of

**The Kansas City Regional Transit Alliance
and the Transit Action Network**

September 15, 2011

I. INTRODUCTION

a. Background

On July 7, 2011, a purported committee of petitioners identified as Karen D. Chastain, Lamar Mickens, Cynthia L. Mickens, Richard C. Tolbert, and Kim Williamson (the “**Petitioners**”) filed with the City Clerk (the “**City Clerk**”) of Kansas City, Missouri (the “**City**”) a set of signed initiative petitions (the “**Initial Submission**”) seeking the adoption of an Ordinance (the “**Proposed Ordinance**”) by the City Council of the City (the “**Council**”). Upon review of the Initial Submission in accordance with Section 731 of the Constitutional Charter of the City (the “**Charter**”), the City Clerk issued a Notice of Insufficiency with respect to the Initial Submission on July 19, 2011. On July 26, 2011, the Petitioners filed a supplementary set of signed initiative petitions with respect to the Proposed Ordinance as permissible pursuant to Section 732 of the Charter (collectively with the Initial Submission, the “**Petition**”). On August 1, 2011, the City Clerk issued a Certificate of Sufficiency with respect to the Petition. On August 4, 2011, the Proposed Ordinance, now designated as Ordinance 110607, was introduced at the Council’s Legislative Session and referred to the Council’s Transportation and Infrastructure Committee. On August 18, 2011, the Council’s Transportation and Infrastructure Committee set a public hearing on the Proposed Ordinance for the Committee’s meeting on September 22, 2011, and established September 15, 2011 as the date by which memoranda in support or opposition to the Proposed Ordinance must be filed.

The text of the Proposed Ordinance as circulated by the Petitioners (which is printed in full on one side of the dual-sided Petition reproduced here for convenience as two separate pages) is attached hereto as **Exhibit A**. The Proposed Ordinance is comprised of four distinct components – the legal title (the “**Legal Title**”), the recitals (the “**Recitals**”), the substance of the Proposed Ordinance, specifically the imposition of an increase in the current levies of certain City-wide dedicated sales taxes (the “**Proposed Sales Taxes**”) for capital improvements and transportation purposes (the “**Substantive Text**”), and policy and procedural provisions (the “**Implementing Provisions**”), which include the calling of a special election for a vote on the Proposed Ordinance and the designation of a ballot title that would be presented to voters in the voting booth (the “**Proposed Ballot Title**”).¹ **Exhibit A** identifies each of these four distinct components as well as the Proposed Ballot Title.

The Substantive Text of the Proposed Ordinance imposes (1) a 0.25% capital improvements sales tax, and (2) a 0.125% transportation sales tax, both of which would (under the terms of the Substantive Text) become effective in 2011 and continue for 25 years unless sooner terminated. The Implementing Provisions of the Proposed Ordinance (1) reaffirm the requirement of compliance with the City’s MBE/WBE and construction workforce policies in the use of all capital appropriations, (2) call a special election to be

¹ Under applicable election laws (for both State and local elections), the actual text of a law proposed by initiative does not appear on the ballot presented to voters on election day. Instead, voters are presented with a “ballot title” that (when done properly) summarizes the proposed law. As discussed in detail below in these Suggestions, the law mandates that a ballot title meet certain standards in order to promote a fair election.

held in 2011 at which the Proposed Sales Taxes would be submitted to the City's qualified voters for their approval or rejection, and (3) specify the Ballot Title for such election.²

The Proposed Ballot Title provides that the revenues from the Proposed Sales Taxes would be used (in the exact words of the Proposed Ballot Title) "to *help* fund these improvements to the city's transit system" (emphasis added)³ (the "**Proposed Project**"):

- Construct a 22-mile light rail spine from Waldo to a Park & Ride (P&R) lot south of Kansas City International Airport...with electric shuttle service to the terminals...including stops at or near Brookside, UMKC, the Plaza, Westport, Penn Valley Park & Liberty Memorial, Union Station, the Downtown Power & Light District on Main Street, City Market, NKC, Vivion Rd., Line Creek Park, and Zona Rosa generally following the Country Club right-of-way, Main St., Burlington, North Oak Trafficway, and the Interurban right-of-way;
- Construct a 19-mile commuter rail line from south Kansas City to Union Station including stops at or near a P&R lot at Blue Ridge and Hwy. 71, a P&R lot at Blue Ridge and I-470, the Bannister redevelopment site, Swope Park, and the Truman Sports Complex generally following existing rail corridors and Truman Rd.;
- Construct an 8.5-mile streetcar line from the Kansas City Zoo to Union Station including stops at or near Research Medical Center, Citadel redevelopment site, Cleaver Blvd., 39th St., Troost Ave., Hospital Hill, and Crown Center generally following the Prospect Ave., Linwood Blvd., and Gilham Rd. corridor;
- Construct an electric shuttle bus and bikeway feeder network that will connect to all rail stations with the bikeways separated from traffic and using where possible the grassy medians of city boulevards.

The Proposed Ballot Title further provides that the revenues from the Proposed Sales Taxes will also be used to finance bonds and secure federal matching funds.

² One might correctly assert that stating that the Proposed Sales Taxes would become effective in 2011 and calling a special election in 2011 (both of which are stated in the Proposed Ordinance, but neither of which is legally possible) is a defect in the Proposed Ordinance that creates a legal impossibility. While that may certainly be true, there are many other defects more substantial and fatal. The Council could (if it were so inclined) adopt an ordinance identical to the Proposed Ordinance but substituting 2012 for 2011 to overcome that issue. One would assume that if the Council chose to do so, and then called the special election provided for in the substitute Ordinance, the Petitioners would not require that the original Proposed Ordinance be voted upon instead. Therefore, we will not dwell further on this point.

³ Proposed Ordinance, Section 4. It is important to note that the language of the Proposed Ballot Title, by including the phrase "*help* fund", is an acknowledgment by the Petitioners of the fact that the Proposed Sales Tax does not provide sufficient revenue alone to pay the costs of the Proposed Project. As we will note many times throughout these Suggestions, this funding gap is not small, it is massive, and it is the main (although not the only) legally fatal defect in the Petitioners' Proposed Ordinance.

b. Procedural Framework

Pursuant to Section 702 of the Charter, if the Council does not adopt an ordinance proposed by an initiative petition that has been certified as sufficient by the City Clerk – in the exact form of the proposed ordinance – within 60 days following the date of the City Clerk’s certification of sufficiency, the committee of petitioners may require the submission of the particular proposed ordinance to a vote of the City’s qualified electors. In such case, the committee of petitioners must, within 10 days after the expiration of that 60-day period or any final action by the Council adopting the ordinance in a form that differs from that which was proposed, certify to the City Clerk that the committee requires such submission of the particular proposed ordinance to a vote of the City’s qualified electors.

Pursuant to Section 703 of the Charter, if the City Clerk timely receives such certification from the committee of petitioners, the City Clerk must certify that fact to the Council at its next regular meeting. The Charter provides that the Council shall thereafter submit the proposed ordinance to the City’s qualified electors at the next available municipal or state election for which the City can lawfully provide required notices to the election authorities without seeking a court order, provided that such election may not be less than 30 days after the committee of petitioners’ certification.

In this case, the Petition was certified as sufficient by the City Clerk on August 1, 2011, and the last day of the 60-day period for Council action described above is September 30, 2011.

c. Summary of Decisions Required of the Council

Given this background and procedural framework, the Council is faced with at least the first question below, and potentially the second:

- (1) Should the Council adopt the Proposed Ordinance?
- (2) If the Council declines to adopt the Proposed Ordinance, and if the Petitioners subsequently make timely certification requesting placement of the Proposed Ordinance on the ballot, must the Council submit the Proposed Ordinance to the voters?

The first question is of course a threshold decision to be made by the Council on a public policy basis, and as discussed in Section II, we urge the Council not to adopt the Proposed Ordinance. If the Council decides not to adopt the Proposed Ordinance and the Petitioners timely provide the certification to the City Clerk demanding submission of the Proposed Ordinance to the voters, then the second question becomes pertinent, and requires a legal analysis of the constitutionality of the Proposed Ordinance⁴. As discussed in Section

⁴ It is well settled that “Municipal charters are a charter city’s organic law, its constitution”. *State ex rel. Karen Chastain v. City of Kansas City*, 289 S.W.3d 759, 764 (Mo. App. W.D. 2009) (citing MO. CONST. art. VI, § 19(a); *State ex rel. Childress v. Anderson*, 865 S.W.2d 384, 387 (Mo. App. S.D. 1993)). Therefore, throughout these Suggestions, we refer to circumstances violative of the Charter, as well as violative of the Missouri Constitution, both as “unconstitutional”.

III, it is unquestionable that the Proposed Ordinance is facially unconstitutional as a matter of form, and as such, the Council is fully legally justified in refraining from submitting the unconstitutional Proposed Ordinance to the voters, and we urge the Council to refrain from such submission.

II. THE COUNCIL SHOULD NOT ADOPT THE PROPOSED ORDINANCE BASED ON COMPELLING PUBLIC POLICY CONSIDERATIONS

There are two primary compelling public policy considerations that should persuade the Council not to adopt the Proposed Ordinance, specifically that the Proposed Ordinance is wholly impracticable, and the Proposed Ordinance would materially mislead voters. Both of these considerations are addressed below.

a. The Proposed Ordinance is Wholly Impracticable

1. *The Proposed Ordinance Does Not Provide Sufficient Funding to Construct, Operate or Maintain the Proposed Project*

The attached **Exhibit B** is in its original state a two-sided document (reproduced here for convenience as two separate pages) that on one side contains prose purporting to provide financial and other information with respect to the Proposed Project (the “**Financial Summary**”), and at the bottom of that page refers the reader to the other side with the language “RAIL STARTER ROUTES & BALLOT LANGUAGE PRINTED ON BACK”. Because the Financial Summary has been circulated by the Petitioners, it is reasonable to assume that it reflects the Petitioners’ own “explanation” of the financing plan for the construction, operation and maintenance of the Proposed Project. Upon examination, however, it becomes clear that the Petitioners’ financing plan *cannot* finance the Proposed Project.

The Financial Summary states that the total capital construction cost of the Proposed Project is One Billion Four Hundred Forty Eight Million Dollars (\$1,448,000,000), and that the “Total Financing and O&M costs”⁵ is One Billion Seventy Six Million Dollars (\$1,076,000,000) over 18 years⁶. The Financial Summary also purports to identify the sources of revenue that would repay the costs of the Proposed Project, only one of which is the Proposed Sales Tax. According to the Financial Summary, the Proposed Sales Taxes would generate a total of One Billion Dollars (\$1,000,000,000) over twenty-five (25) years, and the remaining sources of revenue to pay the costs of the Proposed Project would come from (i) Federal matching funds of Five Hundred Eighty Million Dollars (\$580,000,000), (ii) philanthropic and private contributions over twenty-five (25) years of Three Hundred

⁵ “O&M costs” means operations and maintenance costs.

⁶ No explanation is provided on the Financial Summary as to why O&M costs are only estimated for 18 years while the sales tax is to last 25 years (and presumably the Proposed Project would continue beyond the 25 year financing period for the construction costs).

Fifty Million Dollars (\$350,000,000), (iii) “private developer’s”⁷ contributions over twenty-five (25) years of Three Hundred Million Dollars (\$300,000,000), (iv) contributions by the Kansas City Area Transportation Authority (the “KCATA”) over twenty-five (25) years of Two Hundred Twenty-Five Million Dollars (\$225,000,000) for “improving the bus system”, and (v) a contribution by the State of Missouri over twenty-five (25) years of One Hundred Million Dollars (\$100,000,000).⁸

Based on the foregoing, it is obvious that the revenue from the Proposed Sales Taxes is only approximately forty percent (40%) of the amount even Petitioners’ state would be needed to pay the costs of the Proposed Project, leaving \$1.5 Billion to be “contributed” by these other uncommitted parties. As if that was not bad enough, there are additional material uncertainties within the four corners of the Financial Summary itself that must give the Council pause as it considers adoption of the Proposed Ordinance. For example, the purported sources of revenue stated on the Financial Summary total Two Billion Five Hundred Fifty Five Million Dollars (\$2,555,000,000), and total costs total Two Billion Five Hundred Twenty Four Million Dollars (\$2,524,000,000). While at first blush this might seem at least mathematically sufficient, the realities of the capital markets require further analysis.

If one affords the Petitioners the benefit of the doubt, and accepts the proposition that federal matching funds of Five Hundred Eighty Million Dollars (\$580,000,000) will be available to reduce the amount that would need to be financed, then the capital construction cost to be financed by bonds becomes *only* Eight Hundred Sixty-Eight Million Dollars (\$868,000,000). When one adds the costs of issuance and a debt service reserve fund, the face amount of such bond issue could well exceed Nine Hundred Fifty Million Dollars (\$950,000,000). The financing cost stated by the Petitioners on the Financial Summary is Five Hundred Million Dollars (\$500,000,000) (presumably over the same 25 years of the Proposed Sales Tax, although that is not specified). Using those variables⁹ to solve for an assumed interest rate, it appears the Petitioners have assumed an interest rate of something slightly less than 4% per annum. At that interest rate, the *annual* payments to repay such a bond issue would be approximately Fifty Five Million Dollars (\$55,000,000). If the federal matching funds described on the Financial Summary were made available so the financed amount could be reduced as just described, and if the only other source of

⁷ Presumably, the Petitioners meant private *developers’* contributions rather than a *private developer’s* contribution.

⁸ Although we offer this analysis of the Petitioners’ “finance plan”, we do not concede the accuracy of their cost estimates or of the extent of revenue that could be generated by the Proposed Sales Taxes. We urge the Council to investigate the reasonableness and reliability of these figures. One assumes that City staff could express an educated opinion as to the reasonableness and reliability of these figures. Of course, the Council cannot investigate the reasonableness or reliability of the \$1.5 Billion that Petitioners are relying upon to come from the contributions that must be received over 25 years to pay the remainder of the costs of the Proposed Project, because as best as can be determined, *no one has made any commitment to make any of these contributions, let alone \$1.5 Billion...*

⁹ A total face amount of \$950,000,000, a term of 25 years, and an aggregate interest cost of \$500,000.

revenue to actually materialize was the Proposed Sales Tax, there would not be sufficient revenue (even using the Petitioners' projection of the total revenue from the Proposed Sales Tax) to make the annual bond payments (and no money for O&M)¹⁰.

The fatal flaws of this "finance plan" are further exposed when one considers that in order for bonds to be marketable at reasonable interest rates, the capital markets will require either an annual revenue stream of 135% to 140% of the annual required bond payment, or additional credit enhancement such as a City guaranty. *Therefore, even if all of the revenue sources described on the Finance Summary were already committed in a binding fashion over time in exactly the annual amounts needed to pay the bonds each year, that revenue would not be enough to allow the required principal amount of bonds to be sold.* We would not dispute that there might be *some way* that a finance transaction could be structured in the future based on current or future market conditions. Yet the truth remains that the "finance plan" being disseminated by the Petitioners has a more than \$1.5 Billion shortfall that makes the "plan" completely impracticable.

This shortfall in the "plan" is more than a gap. It is an immense desert to be traversed, and the Petitioners, by proposing a "plan" so intrinsically dependent as it is on contributions over twenty-five (25) years from the other uncommitted sources (philanthropic and private donations, and amorously described "contributions" from private developers, the KCATA and the State of Missouri, all totaling \$1.555 Billion), are asking the Council to thrust the City and the citizenry into that desert with the promise of periodic oases that, like so many oases in the distance, are in fact nothing more than an illusion.

The "finance plan" proffered by the Petitioners in support of the Proposed Ordinance is ill-conceived and wholly unattainable, and should compel the Council to decline to adopt the Proposed Ordinance for public policy reasons. In addition, as will be discussed in Section III, the failure of the Proposed Ordinance to create by its terms a revenue stream that will fully fund the Proposed Project is also a fatal *legal* defect rendering the Petition facially unconstitutional as a matter of form and the Council has no legal obligation under Missouri law to submit the Proposed Ordinance to the voters.

2. The Proposed Project Relies on the Ability to Use Portions of Union Station, as well as Property Owned or Controlled by Railroads, the City of North Kansas City and the State of Missouri, and Such Reliance is Insupportable

The use of Union Station is a specific component of each part of the Proposed Project described in the Proposed Ballot Title. Such use of Union Station is the

¹⁰ \$1 Billion over 25 years is \$40 Million per year, compared to the \$55 Million needed to pay such bonds each year.

fundamental linchpin that connects and unites the light rail, commuter rail, and streetcar components of the Project.¹¹

Notwithstanding the key role that Union Station plays in the Proposed Project, the Proposed Ordinance does not address the fact that:

- Union Station is privately owned and there is no indication that Petitioners or anyone else has secured a contract with the owners of Union Station to accommodate the Proposed Project
- If the City acquired an ownership interest in Union Station for the Project, the City could arguably be in breach of its obligations under a settlement agreement relating to the transfer of Union Station to private ownership in the 1990s¹²
- If the City merely attempted to acquire a portion of the rail yard at Union Station (and not land owned by Union Station, if that were even possible under the Proposed Project) or railroad right of way from a

¹¹ It is worth noting at this point that the specific components of the Proposed Project are not contained in the Substantive Text of the Proposed Ordinance, they are contained *only* in the Proposed Ballot Title. This creates an interesting result under Missouri law. If the Proposed Ordinance were to be adopted by the voters through a ballot employing the Proposed Ballot Title, the language in the Proposed Ballot Title would likely be found by a court to be binding on the City, as a limitation enacted by the voters on the use of the proceeds of the Proposed Sales Tax, *even though* the Substantive Text of the Proposed Ordinance does nothing more than impose the Proposed Sales Tax, because it was the Petitioners themselves that designated the Proposed Ballot Title in the Proposed Ordinance. See, for example, the discussion in the dissenting opinion by Justice Blackmar in *Wenzlaff v. Lawton*, 653 S.W.2d 215 (Mo. banc 1983), at page 218: “The case of *Rathjen v. Reorganized School District R-2 of Shelby County*, 365 Mo. 518, 284 S. W.2d 516, 524 (Mo. banc 1955) does not support a claim that the ballot title may be used in construing an initiative measure because that case involved an amendment proposed by the General Assembly *and the title was an integral part of the legislative submission.*” (emphasis added).

This is not to say that the terms of a ballot title are therefore a part of the *substance* of a proposed ordinance. In fact, by definition, that is not possible. The role and responsibility of a ballot title under the Charter is that the ballot title is to contain “a concise and unprejudiced statement of the substance of such ordinance”. Charter, Section 712. The portion of an ordinance designating a ballot title is by definition supposed to *reflect* the substance of the ordinance, not *add to* or *constitute* the substance. Missouri courts recognize that there is a distinction between the binding effect of a ballot title that contains additional limitations beyond the substance of an ordinance adopted by initiative, on the one hand, and the obligation of the Council pre-election to submit to voters what is a facially unconstitutional ordinance proposed by initiative, on the other hand. See, for example, the acknowledgment by the Missouri Court of Appeals for the Western District of Missouri in *Mid-State Distributing Company v. City of Springfield*: “A ballot proposition which might have been condemned before the election will be judged less strictly after the election.” 617 S.W.2d 419, 423 (Mo. App. W.D. 1981) *motion for reh’g and/or transfer denied* May 4, 1981, *application to transfer denied* July 14, 1981.

¹² *City of Kansas City v. Trizec Corp., Ltd.*, Case No. CV88-24595, (Jackson Cnty. Cir. Ct.) (Settlement Agreement), *on appeal* Case WD No. 47173 (Mo.App.), *approved by Ordinance 940028* (passed Jan. 6, 1994, effective Jan. 16, 1994). *See also State ex rel. Chastain v. City of Kansas City*, 968 S.W.2d 232, 234-35 (Mo. App. W.D. 1998).

railroad for purposes of portions of the Proposed Project, the City would be faced with the challenge of condemning another public use – railroad use – and to successfully do so would have to successfully demonstrate that the use of the rail yard for the Proposed Project would not materially impair or interfere with the applicable railroad’s use of the rail yard. The same analysis applies with respect to any use of railroad right of way that is needed or desired for the construction and operation of the Proposed Project.¹³

This fundamental reliance on the use of Union Station is another fatal defect in the Proposed Ordinance, because such use is uncertain at best and is very likely unworkable at all. Without use of Union Station, a foundational component of the Project is removed. Similarly, the Proposed Project seems to rely on the use of existing railroad right of way, and perhaps even actual track bed (although admittedly that level of detail is not provided in the Proposed Ordinance). Nevertheless, the right to use such railroad property cannot be obtained through condemnation absent a showing that the Proposed Project would not materially impair or interfere with the applicable railroad’s use of such property.

The light rail component of the Proposed Project includes a route that follows the Burlington Avenue right of way in North Kansas City. Acquisition of rights to utilize Burlington Avenue, also known as State Highway 9, would require that the City condemn state right of way. The City does not have legal authority to condemn state property. Without such authority, this portion of the Proposed Project’s required route cannot be assured.

Even if, to avoid the legal barrier to condemning state property, the City chose instead to attempt to acquire rights to use the property adjacent to the State Highway 9 right of way, the City would encounter significant legal obstacles due to the City of North Kansas City’s municipal water department building immediately west of the Burlington Avenue / Armour Road intersection. As stated above in the context of the legal limitations on the City’s authority to condemn railroad property, the City would only be able to condemn property of the City of North Kansas City if the City’s use would not materially impair or interfere with such existing municipal use of the property.¹⁴ Given the location of the municipal water department building, and perhaps other existing municipal, county or State uses along the Burlington Avenue corridor, the prescribed light rail route is unworkable.

This is not to say that in the future (perhaps even the near future), a good plan for mass transit improvements could not be achieved through a *cooperative* effort. Nevertheless, achieving such a plan through a cooperative effort is difficult enough. Attempting to adopt a specific mass transit plan (and imposing a sales tax that only pays for part of that plan) without first obtaining the cooperation of parties whose

¹³ *City of Smithville v. St. Luke's Northland Hosp. Corp.*, 972 S.W.2d 416, 420, 424 (Mo. App. W.D. 1998); *City of Kirkwood v. Union Elec. Co.*, 896 S.W.2d 946, 947 (Mo.App. E.D. 1995).

¹⁴ See *Infra*, Footnote 13.

cooperation is *required* to implement that plan, is not just bad public policy, it is an approach doomed to failure.

3. *The Proposed Project Relies on the Use of Either an Existing Bridge, or construction of a New Bridge, Over the Missouri River, and Such Reliance is Insupportable*

To construct the light rail component of the Proposed Project in the manner required by the Proposed Ordinance, it will be necessary to acquire sufficient rights to use either an existing bridge over the Missouri River between downtown and North Kansas City or to construct a new bridge. Either possibility is impracticable. As discussed above, the City's condemnation of rights to use a current railroad bridge would not be legally permissible unless such use would not materially impair the railroad's use of its property, a standard the City would almost certainly be unable to meet. As for construction of a new bridge, this would only add to the \$1.5 Billion shortfall that already exists before adding the cost of constructing a bridge. Overall, failure of the Proposed Ordinance and specifically the Proposed Project to specifically address the substantial challenges of bridging the light rail system from downtown to the northland is a fundamental flaw in the Project as currently conceived.

b. The Proposed Ordinance Would Mislead Voters

1. *The Proposed Ordinance Wrongly Suggests to Voters that Approval of the Ordinance Will Implement the Proposed Project*

The Proposed Ordinance provides a detailed description of the four main components of the Proposed Project, yet neither the Proposed Ordinance nor the Proposed Ballot Title discloses the Sarahan scale of the \$1.5 Billion chasm between the cost of the Proposed Project and the funding provided by the Proposed Sales Tax. We respectfully suggest that the typical voter who reads the Proposed Ballot Title will likely be left with the impression that a vote in favor of the Proposed Ordinance means that the new tax dollars generated by the Proposed Sales Taxes he or she is voting upon will bring the Proposed Project to life. After all, as discussed below, such an assumption by the average voter would be consistent with the requirements of the Missouri Constitution (as discussed in Section III below) that any governmental actions required to be undertaken by an ordinance proposed by the initiative process be fully funded by new revenue provided by such process. The post-election reality for voters that they approved a 25 year tax for a project that still lacks more than half of the necessary project financing would likely be a substantial disappointment for many voters. It also begs the question what would the City do (or more importantly be legally *able* to do) with the proceeds of the Proposed Sales Tax if the Proposed Sales Tax passes but the Proposed Project cannot be financed.

2. *The Proposed Ballot Title Does Not Accurately Convey the Content of the Substantive Text and Prejudices Voters' Understanding of the Policy Issues Involved in the Proposed Ordinance*

The Substantive Text of the Proposed Ordinance is the portion of the Proposed Ordinance that would impose the Proposed Sales Tax. Notably missing from the Substantive Text is any direction of the revenues from the Proposed Sales Taxes to the Proposed Project. By contrast, the Proposed Ballot Title, which is the *only* text that would be presented to voters on a ballot if asked to cast a vote on the Proposed Ordinance, lists detailed components of the Proposed Project.

While a court may bind the City to utilize the Sales Tax revenues according to the terms of the Proposed Ballot Title if the voters adopt the Proposed Ordinance, we respectfully suggest that from a public policy perspective, it is important that voters have the benefit of ballot titles that accurately reflect the Substantive Text of the Proposed Ordinance. Indeed, this is exactly what is required under Section 712 of the Charter: a ballot title must be a “concise and unprejudiced statement of the *substance* of such ordinance.” (emphasis added) This Proposed Ballot Title does not meet this standard, and as discussed in Section III, the failure to meet this standard renders the Proposed Ordinance containing the Proposed Ballot Title unconstitutional on its face as a matter of form. For purposes of the Council’s first decision - whether to adopt the Proposed Ordinance – we suggest that the Proposed Ballot Title is not just materially misleading, as noted above, but also prejudicial.

The Ballot Title begins with the following text: “In order to provide the people a more green, prosperous, and transit-oriented city...” By adding this extraneous judgment-infused language to the beginning of the Ballot Title, the underlying statement to the voter is that “if you are in favor of the environment and want prosperity, vote yes, if you are anti-environment and against prosperity, vote no.” This obviously prejudicial language sets up a false choice for the voter that is certainly intended to manipulate voters into casting votes in favor of the Proposed Ordinance. No rational person would suggest that the voters should be presented with a ballot in the voting booth reading “In order to promote world peace, increase employment opportunities, reduce gas prices and increase property values, should we elect Pat Paulsen as President of the United States?” The Petitioners’ Proposed Ballot Title is no less objectionable than that example, and equally inappropriate for endorsement by this Council as a matter of public policy.¹⁵

For the reasons set forth in this Section II, the Council we urge the Council to decline to adopt the Proposed Ordinance.

¹⁵ We recognize that, like the references to 2011 in the Proposed Ordinance, the Council *could* adopt a substitute for the Proposed Ordinance with a neutral version of a ballot title, but that would still not remove the fundamental fatal defects in the Proposed Ordinance related to the \$1.5 Billion funding gap.

III. IF THE COUNCIL DECLINES TO ADOPT THE PROPOSED ORDINANCE, AND IF THE PETITIONERS SUBSEQUENTLY MAKE TIMELY CERTIFICATION REQUESTING SUBMISSION OF THE PROPOSED ORDINANCE TO THE VOTERS, THE COUNCIL SHOULD NOT, AND IS NOT LEGALLY REQUIRED TO, SUBMIT THE PROPOSED ORDINANCE TO THE VOTERS, BECAUSE THE PROPOSED ORDINANCE IS FACIALLY UNCONSTITUTIONAL AS A MATTER OF FORM UNDER THE MISSOURI CONSTITUTION AND THE CITY CHARTER

a. Governing Legal Principles

Missouri law does not require the Council to submit facially unconstitutional ordinances to the voters even when the City Clerk has certified the underlying Initiative Petition as sufficient. Generally, the law disfavors pre-election review of ordinances proposed through initiative, and often, courts will allow elections to move forward, delaying any judicial review until after the election.¹⁶ However, Missouri courts have stated that such pre-election review is permissible where the proposed ordinance suffers from a “constitutional violation...so obvious as to constitute a matter of form.”¹⁷ The Proposed Ordinance at issue here clearly satisfies this test on the basis (as discussed further below) that the Proposed Ordinance is unquestionably in violation of Article III, Section 51 of the Missouri Constitution¹⁸. In addition, in the case of a Constitutional Charter City, such as Kansas City, a municipal charter is the City’s organic law of constitution¹⁹, and therefore pre-election review is equally permissible with respect to an ordinance that (like the Proposed Ordinance, based on the discussion below) is facially in violation of the City’s Charter as a matter of form. See, *Mid-State, supra*.

1. *Conformance To The Missouri Constitution Required*

In *Kansas City v. McGee*, 269 S.W.2d 662 (Mo. 1954), the Missouri Supreme Court examined the substantive constitutionality of an initiative when the Kansas City City Council refused to put an initiative on the ballot on the basis that the ordinance proposed by initiative violated Article III, Section 51 of the Missouri Constitution. *McGee* is notable for its thorough discussion of what constitutes a “matter of form,” and the degree to which a court may consider the substance of an ordinance proposed by initiative in deciding whether such proposed ordinance must be submitted to the voters:

¹⁶ *Knight v. Carnahan*, 282 S.W.3d 9, 21 (Mo. App. W.D. 2009).

¹⁷ *Id.*; see also *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. banc 1984); *State ex rel. Hazelwood Yellow Ribbon Comm. v. Klos*, 35 S.W.3d 457, 468-69 (Mo. App. E.D. 2000).

¹⁸ Article III, Section 51 of the Missouri Constitution provides, in pertinent part, that “The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby....”

¹⁹ MO. CONST. art. VI, § 19(a); *State ex rel. Childress v. Anderson*, 865 S.W.2d 384, 387 (Mo. App. S.D. 1993).

Many authorities hold that courts cannot interfere with the process of legislation by the initiative except to determine whether the petition is in proper form and contains the required number of signatures. In other words, the inquiry must be limited to strictly procedural matters. In the case of *State ex rel. Stokes v. Roach*, Mo.Sup., 190 S.W. 277, this court en banc so stated the rule by a divided vote of four to three. It was held that courts have no power to examine the law proposed to be enacted by the initiative to determine its constitutionality; that such questions cannot be decided until the act has been adopted and become effective as a law.

...

Defendants say that the settled policy on this question in this state is that the courts are limited to an examination of the procedural matters when called on to interfere in the legislative process of enacting laws by the initiative method... [I]n the *Halliburton* and *Moore* cases, the law proposed by the initiative petition was considered an essential part of the petition and therefore subject to examination by the courts [pre-election]. It was held that since the proposed law must be filed with the petition it becomes a part thereof.

...

The purpose of Sec. 51... becomes apparent when we consider the duties and restrictions imposed upon the city authorities. Sec. 26(a) of Art. VI, 1945 Constitution, prohibits any city from becoming indebted in an amount exceeding in any year the income and revenue provided for such year. It would be difficult for a city council to comply with that constitutional provision and the budget law if appropriations could be made by the initiative process. The people, therefore, by the constitution expressly prohibited an appropriation law being voted through the initiative unless the law at the same time provides the revenue.

Id. at 663-665. The court went on to examine the law proposed by the initiative petition, and held that because it did not provide new revenue to fund the proposed initiative, it violated Article III, Section 51 of the Missouri Constitution, and Kansas City was justified in keeping the initiative off the ballot. *Id.* at 664.

Notably, the Missouri Supreme Court in *McGee* also explicitly held that Article III, Section 51 of the Missouri Constitution applied to initiatives under municipal charters:

petition pertaining to the rezoning of property in the City of Springfield, Missouri, under Article XIV of the City of Springfield Charter because the rezoning of property is not subject to the initiative process as decided by the Missouri Supreme Court in *State v. Donohue*, 368 S.W.2d 432 (Mo. banc 1963).” *Id.* Petitioners then filed an action for a writ of mandamus compelling the clerk to place the initiative on the ballot pursuant to the city’s charter. *Id.* The trial court denied the writ, and petitioners appealed. *Id.* at 386. On appeal, the court held that, while zoning matters were not excluded from the initiative process by the sections of the charter dealing with initiatives, other, more specific provisions of the charter made clear that only the city planning and zoning commission had the power to make zoning decisions, and the city council was therefore justified in not placing the initiative on the ballot. *Id.* at 389.²¹

3. *The Right to Propose Ordinances by Initiative May Lawfully Be Limited by a Constitutional City’s Charter*

State ex rel. Chastain v. City of Kansas City, 289 S.W.3d 759 (Mo. App. W.D. 2009) makes clear that “a municipal charter *may* contain provisions that interfere with the initiative process at the municipal level, and such interference is not contrary to the Missouri Constitution and state laws.” *Id.* at 765 (citing *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501, 506 (Mo. App. E.D. 2006); *State ex Rel. Powers v. Donahue*, 368 S.W.2d 432, 438-39 (Mo. banc 1963)). In *Chastain*, the Council, acting pursuant to its Charter, repealed a voter-initiated ordinance one year and one day after it passed. Karen Chastain and other sponsors of that ordinance sought a declaratory judgment that the provision of the Charter allowing the Council to effect such repeal was unconstitutional, as it violated the power of the people to initiate laws under Article III, Section 49 of the Missouri Constitution. “In granting a city the ability to adopt and amend a charter, the Missouri Constitution reflects a city’s ‘broad authority to tailor a form of government that its citizens believe will best serve their interest.’” *Id.* (quoting *State ex rel. Petti*, 190 S.W.3d at 505 (quoting *City of Springfield v. Goff*, 918 S.W.2d 786, 789 (Mo. banc 1996))). “The only limitation of a municipality’s authority to tailor its government is that the charter must be consistent with and subject to the Missouri Constitution and state laws.” *Id.* (citing MO. CONST. art. VI, § 19(a); *State ex rel. Childress*, 865 S.W.2d at 387). “If consistent with and subject to the constitution and laws of this state, charter provisions have the force and effect of enactments of the legislature.” *Id.* (quoting *State ex rel. Petti*, 190 S.W.3d at 505). The court in *Chastain* then examined *State ex rel. Powers* and *State ex rel. Petti*, both of which held that a city charter may contain provisions which remove certain issues from the initiative process, specifically zoning. *Id.* at 765. The court went on to hold that:

Moreover, as suggested by *State ex rel. Petti*, article III, section 49, of the Missouri Constitution does not grant citizens of this

²¹ This is an important point, because the Proposed Ordinance violates not only Article III, Section 51 of the Missouri Constitution and Section 712 of the Charter, it also violates Article X of the Charter governing the use and disposition of City parkland as discussed in Section III below.

state an unlimited right to initiate laws at the municipal level. 190 S.W.3d at 505. “There is no unlimited right to the use of the initiative or referendum process.” Id. at 508. Article III, section 49, provides the citizens of this state the power to propose and enact or reject state laws and amendments to the Missouri Constitution by the initiative process and makes no mention of voter initiated ordinances at the municipal level. “[T]here is no constitutional provision in Missouri ... which would secure the initiative on behalf of municipal voters.” *State ex rel. Childress*, 865 S.W.2d at 390 (emphasis added). Because there is no constitutional right to initiate laws at the municipal level and citizens of a municipality possess broad authority to tailor municipal charters as they see fit, the Missouri Constitution is not violated by charter provisions, such as section 704, that permit interference with the initiative process at the municipal level.

Id. at 765-66.

b. Application of Governing Legal Principles to the Proposed Ordinance

If the Council decides not to submit the Proposed Ordinance to the voters (as we urge it to decide), and if the Petitioners bring a court action to compel the Council to submit the Proposed Ordinance to the voters, the Missouri courts can be expected to uphold the Council’s decision because the Proposed Ordinance obviously and facially violates the Missouri Constitution and the Charter as a matter of form in the following ways.

1. The Proposed Ordinance is Facially Unconstitutional as a Matter of Form Because it Will on its Face Require the Appropriation of Funds Beyond the New Revenues Created and Provided by the Proposed Ordinance in Violation of Article III, Section 51 of the Missouri Constitution

As discussed above, the Proposed Ordinance must comply with Article III, Section 51 of the Missouri Constitution, which requires that “The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby....” However, it is obvious that the Proposed Ordinance, by application of the language in the Ballot Title that specifies the modes and general routes of the Proposed Project, fails to create the new revenues that would be required to fully fund the Proposed Project and thus is facially unconstitutional as a matter of form.

We refer the Council to the detailed discussion of the financial aspects of the Proposed Project contained in Section II above. There can be no fact-based dispute that the only source of revenue *created* by the Proposed Ordinance is the Proposed Sales Tax, which, even according to the Petitioners, would generate only 40% of the \$2.524 Billion the Petitioners have stated to be the total cost of constructing,

financing, operating and maintaining the Proposed Project over twenty-five (25) years.²²

If the Proposed Ordinance were to be submitted to the voters by the Council, and if it were to be passed by the voters, the Council would presumably be (1) bound to construct the Proposed Project as described in the Proposed Ballot Title, and (2) legally required to appropriate funds beyond the revenue from the Proposed Sales Taxes in the (likely) event that portions of the remaining \$1.555 Billion of the “revenue sources” described by the Petitioners do not materialize as and when needed to pay such costs or debt service on such costs, or (also likely) do not materialize in the full amount listed on the Financial Summary. Actually, our analysis of the case law on this subject shows that the *likelihood* of these additional “revenue sources” is in any event irrelevant, because, in no uncertain terms, if the Proposed Ordinance would require the City to construct the Proposed Project, but the Proposed Ordinance does not create the new revenues needed to fully pay the costs, the Proposed Ordinance is facially unconstitutional as a matter of form, and consequently the Council has no legal obligation to submit the Proposed Ordinance to the voters.

2. *The Proposed Ordinance is Unconstitutional as a Matter of Form Because it Violates the Charter*

- i. The Proposed Ordinance circumvents the Board of Parks and Recreation Commissioners’ authority and ignores provisions governing parkland under the Charter, thereby violating Article X of the Charter

The Proposed Ordinance, by its specification of the routes for the Proposed Project in the Proposed Ballot Title, requires the use of City parklands, including unspecified portions of Line Creek Park, the Kansas City Zoo, Swope Park, Penn Valley Park, Liberty Memorial, Emanuel Cleaver II Boulevard, Broadway Boulevard, and Pershing Road. Under Article X of the Charter, the Board of Parks and Recreation Commissioners (the “**Park Board**”) has direct authority over the City’s parklands.²³ The Charter further provides that “lands obtained for park, parkway or boulevard purposes shall remain forever parks, parkways, and boulevards for the use of all inhabitants of the City.”, and “If any property is determined by the Park Board to be no longer necessary or appropriate for park, parkway, or boulevard use, such property may be removed from the park system by a vote of the people”.²⁴ Stated another way, before land is to be removed

²² Actually, that \$2.54 Billion amount only accounts for 18 years of O&M. Presumably, O&M needs would not cease after 18 years. Therefore, the true cost of the Proposed Project over the 25 year period, using the Petitioners’ figures (which we do not concede to be accurate), would actually be \$224 Million Dollars higher (\$32 Million times 7) than the amount stated by the Petitioners.

²³ “The Board of Parks and Recreation Commissioners shall directly superintend, control, manage, develop and extend all parks, parkways, boulevards and other properties and resources as assigned by the City Council upon recommendation of the Board.” Section 1001(c), City Charter.

²⁴ Section 1004, City Charter.

from park, parkway, or boulevard use, the Park Board must make a determination that such use is no longer necessary, *and then* the voters must approve such decision.²⁵

The Proposed Ordinance ignores, and thus violates, the Charter by requiring use of parklands for the Proposed Project (albeit unspecified portions) without any Park Board determination that park use of the portion of the parkland that would be devoted to use for the Proposed Project is no longer necessary or desirable. Under *Childress, supra*, this violation of the Charter by the terms of the Proposed Ordinance renders the Proposed Ordinance facially unconstitutional as a matter of form, and is a second, separate basis that would legally justify a decision by the Council not to submit the Proposed Ordinance to the voters.

The devotion of parkland to use by the Proposed Project will also require the appropriation of funds by the Council that are not generated by the Proposed Ordinance. Because the Proposed Project relies on federal matching funds, certain federal requirements would apply to the use of parklands as part of the Proposed Project. For example, for any parkland devoted for use by the Proposed Project, the City would have to either replace that parkland with new parkland (presumably at a cost) or spend an equivalent amount of new funds to improve existing park property.²⁶ Other federal requirements scrutinize the necessity of using the parkland and require an analysis of possible harms to other parklands from the project being considered (again, at a cost). For these requirements to be avoided, a finding of *de minimis* impact must be made, which requires a finding of support by the Park Board (who, like the rest of us, do not yet know the specific parkland that would be affected).²⁷ In the absence of such a finding, which may or may not be made in the future, or which may not even be *possible* to make under the circumstances of the Proposed Project, one can only conclude that the devotion of parkland to the Proposed Project will require the appropriation of funds by the Council from funds other than the Proposed Sales Taxes to bear the cost of the required replacement of parkland or reinvestment in remaining parkland. In addition, therefore, to being unconstitutional as a violation of the Charter, these costs (piddling,

²⁵ One might attempt to argue that if the voters approved the Proposed Ordinance, they would have in the same vote approved the use of City parklands as described in the Proposed Ordinance. The two fallacies in such an argument are (i) under the Charter, the voters may not be asked to vote on the release of parkland until after the Park Board makes a finding that park use of the area in question (which has yet to be specified) is no longer necessary or desirable, and (ii) since the specific parkland to be devoted to use by the Proposed Project has not been identified, a court would be hard pressed to conclude that the vote on the Proposed Ordinance legally satisfies the vote required under Section 1004 of the Charter, because the voters had no information on which to cast a vote on the diversion of any specific portion of parkland.

²⁶ 49 U.S.C. § 303.

²⁷ 49 U.S.C. § 303(d)(3).

perhaps, when compared to the already existing \$1.5 Billion funding gap) are another independent example of the failure of the Proposed Ordinance to generate the funds necessary to bear the costs of the Proposed Project; another independent facial violation of Article III, Section 51 of the Missouri Constitution.

- ii. The Proposed Ordinance violates Section 712 of the Charter because the Ballot Title is neither a concise nor an unprejudiced statement of the substance of the Proposed Ordinance

Article VII of the Charter, which governs local initiatives and referenda, requires in Section 712 that ordinances submitted to the voters through the initiative or referendum provisions of the Charter are to be submitted by a ballot on which there is to appear only a ballot title. Section 712 goes on to provide that the ballot title may be either the legal title of the ordinance being proposed for adoption by the voters or a concise and unprejudiced statement of the substance of such ordinance.

With respect to the Proposed Ordinance, the Petitioners have chosen not to employ the legal title of the Proposed Ordinance as the ballot title, instead designating in the Proposed Ordinance that the Proposed Ballot Title is to be the ballot title required by the Charter. However, the Proposed Ballot Title fails to comply with not just one, but with both of the requirements for this type of ballot title. First, as we have pointed out before, it does not reflect the *substance* of the Proposed Ordinance (i.e., the imposition of the Proposed Sales Tax) but instead goes well beyond the substance of the Proposed Ordinance by specifying the modes and routes of the Proposed Project, thus limiting through the Proposed Ballot Title (if the Proposed Ordinance were to be adopted) the use of the revenue from the Proposed Sales Tax. Even if Missouri courts would enforce the limitations in the Ballot Title following the adoption of the Proposed Ordinance if the voters passed it, that has no bearing on the separate question now before the Council, whether, *pre-election*, the Proposed Ordinance is facially unconstitutional as a matter of form by reason of its failure to satisfy the requirements of Section 712 of the Charter.

As was also discussed in Section II above, the Proposed Ballot Title, which begins with the language “In order to provide the people a more green, prosperous, and transit-oriented city....” is obviously *not* unprejudiced. It is instead purposefully persuasive and intended to sway a voter’s mind by drawing a linkage between the Proposed Project and (presumably to most voters) the desirable but amorphous goals of good environmental stewardship, fiscal prosperity and mass transit. The Council should ask itself, and perhaps ask the Petitioners, whether the Petitioners would object if the City chose to adopt a substitute for the Proposed Ordinance that was identical to the Proposed Ordinance but contained a ballot title that began with the phrase “In order to potentially bankrupt the

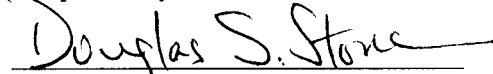
City, divert funds otherwise to be expended on basic city services and obligate the City and its citizens to a project that requires more than \$1.5 Billion beyond the revenue raised by this ordinance...”. Of course, the Proposed Ballot Title is nothing more than the converse of this example, and equally as unconstitutional.²⁸

The obvious violations of the Charter imbedded in the Proposed Ordinance are yet another, independent basis for concluding that the Proposed Ordinance is facially unconstitutional as a matter of form and the Council is not legally obligated to submit the Proposed Ordinance to the voters.

IV. CONCLUSION

We urge the Council not to adopt the Proposed Ordinance as a matter of public policy in light of the ill-conceived and unconstitutional “plan” it represents. We also urge the Council to refuse to submit the Proposed Ordinance to the voters even if the Petitioners make such demand under the Charter. As the discussion above shows, the facial unconstitutionality of the Proposed Ordinance as a matter of form eliminates any legal obligation on the part of the Council to submit the Proposed Ordinance to the voters, and we suggest actually imposes a *duty* on the part of the Council not to submit the Proposed Ordinance to the voters. We respect the role of the initiative process when lawfully pursued, but that does not mean that *every* ordinance proposed by an initiative petition that obtains a certification of sufficiency from the Clerk should be submitted to the voters. The law protects Kansas City from unconstitutional initiative proposals, luckily so, and we ask the Council to do the same.

Respectfully Submitted,



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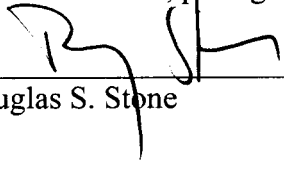
On behalf of The Kansas City Regional Transit Alliance and the Transit Action Network

September 15, 2011

²⁸ This is not to say that a neutral preamble to a ballot title is inappropriate or uncommon, such as “In order to promote the health, safety and welfare of the city and its citizens...”, or “In order to provide revenue to fund abc project...” However, a ballot title that is drafted to sway minds is unconstitutional, period.

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Suggestions to be mailed on September 15, 2011 to the individuals purportedly comprising the Committee of Petitioners at their respective addresses as shown on the Petition by first class mail, postage prepaid.



Douglas S. Stone

EXHIBIT A

PROPOSED ORDINANCE

See Attached

Ordinance

Legal Title

Enacting a new Section 68-476, Code of Ordinances, entitled KCMO Initiative to Build a New Regional Public Transportation System to enact a new tax totaling 3/8 % to be devoted to a multi-modal light rail-based regional transit system headquartered at Union Station to extend for 25 years beginning in 2011, providing for submission of this ordinance to the qualified voters of the city for their approval at the next available election, authorizing and directing the City Clerk to notify the responsible election authorities of this election, authorizing and directing the City Clerk to notify the Missouri Director of Revenue if the proposal is approved by the voters; and recognizing this ordinance to be an emergency measure.

Recitals

Whereas, Sections 94.600 through 94.655, RSMo, authorize a sales tax for transportation purposes of up to 1/8 %, and the City currently utilizes 3/8 % of that authorization for operation of the Kansas City Area Transportation Authority, leaving 1/8% available for other transportation uses; and
Whereas, Sections 94.575 through 94.577, RSMo, authorize a sales tax for capital improvements of up to 1/2 % and the City currently uses 3/4% of that authorization for police and public safety purposes, leaving 1/4% available for other capital improvement uses; and
Whereas, no sales tax ordinance shall be effective until it has been submitted to the qualified voters of the City and approved by a majority of the qualified voters voting; NOW, THEREFORE,
BE IT ORDAINED BY THE COUNCIL OF KANSAS CITY:

Substantive Text

Section 1. ENACTMENT OF KCMO Initiative for a more green, prosperous, and transit-oriented city That a new 68-476, Code of Ordinances, entitled Sales tax for KCMO initiative for a more green, prosperous, and transit-oriented city:
Sec. 68-476. Sales tax for KCMO Initiative For a More Green, Prosperous, and Transit-Oriented City.
(a) Imposition of sales tax part one. Pursuant to the authority granted by and subject to the provisions of section 94.575 through section 94.577, Revised Statutes of Missouri, a tax for the benefit of the city is hereby imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable services at retail to the extent and in the manner provided in section 144.010 through section 144.525, Revised Statutes of Missouri, and the rules and regulations of the director of revenue issued pursuant thereto. The rate of the tax shall be 1/8 percent on the receipts from the sale at retail of all tangible personal property or taxable services at retail within the city, if such property and such services are subject to taxation by the state under the provisions of section 144.010 through section 144.525, Revised Statutes of Missouri. The tax shall become effective sometime in 2011, for a period of twenty-five years, unless sooner terminated, and shall be collected as provided in section 94.575 through section 94.577, Revised Statutes of Missouri.
(b) Imposition of sales tax part two. Pursuant to the authority granted by and subject to the provisions of section 94.600 through section 94.655, Revised Statutes of Missouri, a tax for the benefit of the City is hereby imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable services at retail to the extent and in the manner provided in section 144.010 through section 144.525, Revised Statutes of Missouri, and the rules and regulations of the director of revenue issued pursuant thereto. The rate of the sales tax shall be 1/8 percent on the receipts from the sale at retail of all tangible personal property or taxable services at retail within the City, if such property and such services are subject to taxation by the state under the provisions of section 144.010 through section 144.525, Revised Statutes of Missouri. The tax shall become effective in 2011, and shall apply to all sales made after that date for a period of twenty-five years, unless sooner terminated, and shall be collected as provided in section 94.600 through section 94.655, Revised Statutes of Missouri.

Implementing Provisions

Section 2. Reaffirmation of MBE/WBE AND WORK FORCE POLICIES. The City's MBE/WBE and construction workforce policies will be followed in the use of all capital appropriations.
Section 3. SPECIAL ELECTION CALLED. A special election is called and shall be held on 2/20/11, at which election the question of imposing and extending the sales taxes described in this ordinance shall be submitted to the qualified voters of the City for their consideration, as required by section 94.577 and section 94.605, Revised Statutes of Missouri.
Section 4. BALLOT TITLE. The ballot title shall be: QUESTION #1 SHALL THE FOLLOWING BE APPROVED?
KCMO INITIATIVE FOR A MORE GREEN, PROSPEROUS, AND TRANSIT-ORIENTED CITY
In order to provide the people a more green, prosperous, and transit-oriented city shall the City of Kansas City, Missouri impose a capital improvement sales tax of 1/4% and a transportation sales tax of 1/8%, both not to exceed 25 years, beginning in 2011, to help fund these improvements to the city's transit system:
*Construct a 22-mile light rail spine from Waldo to a Park & Ride (P&R) lot south of Kansas City International Airport... with electric shuttle service to the terminals... including stops at or near Brookside, UMKC, the Plaza, Westport, Penn Valley Park & Liberty Memorial, Union Station, the Downtown Power & Light District on Main Street, City Market, NKC, Vivion Rd., Line Creek Park, and Zona Rosa generally following the Country Club right-of-way, Broadway, Main St., Burlington, North Oak Trafficway, and the Interurban right-of-way;
*Construct a 19-mile commuter rail line from south Kansas City to Union Station including stops at or near a P&R lot at Blue Ridge and Hwy. 71, a P&R lot at Blue Ridge and I-470, the Bannister redevelopment site, Swope Park, and the Truman Sports Complex generally following existing rail corridors and Truman Rd.,
*Construct an 8.5-mile streetcar line from the Kansas City Zoo to Union Station including stops at or near Research Medical Center, Citadel redevelopment site, Cleaver Blvd., 39th St., Troost Ave., Hospital Hill, and Crown Center generally following the Prospect Ave., Linwood Blvd., and Gilham Rd. corridor;
*Construct an electric shuttle bus and bikeway feeder network that will connect to all rail stations with the bikeways separated from traffic and using wherever possible the grassy medians of city boulevards; and also use the tax proceeds to finance bonds and secure federal matching funds?
YES NO

Ballot Title

INITIATIVE FOR A MORE GREEN, PROSPEROUS & TRANSIT-ORIENTED CITY

The five following residents of Kansas City, Missouri hereby petition the City Council of Kansas City, Missouri to adopt the ordinance entitled "Initiative for a More Green, Prosperous and Transit-Oriented City" and to authorize the City Manager to take any and all actions necessary to carry out the provisions of the following proposal to the voters of Kansas City, MO on the next available election date after the public hearing.

In order to provide the people a more green, prosperous, and transit-oriented city shall the City of Kansas City, Missouri impose a capital improvement sales tax of ¼% and a transportation sales tax of 1/8%, both not to exceed 25 years, beginning in 2011, to help fund these improvements to the city's transit system:

- *Construct a 22-mile light rail spine from Waldo to a Park & Ride (P&R) lot south of Kansas City International Airport... with electric shuttle service to the terminals...including stops at or near Brookside, UMKC, the Plaza, Westport, Penn Valley Park & Liberty Memorial, Union Station, the Downtown Power & Light District on Main Street, City Market, NKC, Vivion Rd., Line Creek Park, and Zona Rosa generally following the Country Club right-of-way, Broadway, Main St., Burlington, North Oak Trafficway, and the Interurban right-of-way;
- *Construct a 19-mile commuter rail line from south Kansas City to Union Station including stops at or near a P&R lot at Blue Ridge and Hwy. 71, a P&R lot at Blue Ridge and I-470, the Bannister redevelopment site, Swope Park, and the Truman Sports Complex generally following existing rail corridors and Truman Rd..
- *Construct an 8.5-mile streetcar line from the Kansas City Zoo to Union Station including stops at or near Research Medical Center, Citadel redevelopment site, Cleaver Blvd., 39th St., Troost Ave., Hospital Hill, and Crown Center generally following the Prospect Ave., Linwood Blvd., and Gilham Rd. corridor;
- *Construct an electric shuttle bus and bikeway feeder network that will connect to all rail stations with the bikeways separated from traffic and using where possible the grassy medians of city boulevards; and also use the tax proceeds to finance bonds and secure federal matching funds?

The five following residents of the City of Kansas City, Missouri as a committee of petitioners shall be regarded as filing the petition. Each is a resident of the City of Kansas City, Missouri. Cynthia L. Mickens 3943 Paseo Blvd. KCMO 64110; Richard C. Tolbert 629 East 13th Terrace KCMO 64126; and Kim Williamson 3558 Genesee St. KCMO 64111 are not eligible for anyone to sign any petition with any name other than his or her own, or the individual's name in another name, nor their name for the same purpose for the same petition. No one shall sign a petition when he or she knows or should know that the same is false.

STATE OF MISSOURI, COUNTY OF JACKSON

CLAY CHASTAIN, after being first duly sworn, under oath state the following named persons,

SIGNATURE	ADDRESS	PRINTED NAME	DATE
<i>Bridgette C. Schmitt</i>	2041 N. Skow 10000 Mac Lane	Bridgette C. Schmitt	10/23/11
<i>Daisy E. Miller</i>	5637 Forest Ave. KCMO 64110	Daisy E. Miller	10/23/11
<i>Janette Leaphart</i>	4540 Penn Valley Ave. KCMO	Janette Leaphart	10/23/11
<i>Jennifer Clain</i>	5643 Forest KCMO 705 E. 26 th Ave #2 KCMO	Jennifer Clain	10/23/10
<i>Brandy Decker</i>	3814 Wyoming KCMO	Brandy Decker	1-7-11
<i>Sunny Gibson</i>	3550 Wabasha	SUNNY GIBSON	1-7-11
<i>Patricia O'Connell</i>	14900 Peterson Rd KCMO	Patricia O'Connell	1-7-11
<i>Paul Caestecker</i>	104 E. Dartmouth, KCMO	Paul Caestecker	1-7-11
<i>Dana Campbell Price</i>	8409 E. 95th Street KCMO	Dana Campbell Price	1-7-11
<i>Ashley Edmondson</i>	3501 Jefferson St. ZW KCMO	Ashley Edmondson	1-7-11
<i>Bracy Pan</i>	4118 Merrier KCMO 64111	Bracy Pan	1-7-11
<i>Richard Lynn</i>	KC MO 4514 Wyoming 6434 VORNALL RD. KCMO 64112	Richard Lynn	1-7-11
<i>William Schulte</i>		WILLIAM SCHULTE	010711
<i>John T. Wilson</i>	4233 Wyoming KCMO 64110	John T. Wilson	04/07/2011
<i>Diona Welch</i>	10820 Washington Ct	Diona Welch	1/7/2011
<i>Diane Kendall</i>	411 E. 14 th Street KCMO	DIANE KENDALL	1/7/2011
<i>Caroline William</i>	4100 S. Baxter	caroline william	1/7/11
<i>Mary Roberson</i>	2 W 58 th St KCMO	Mary Roberson	1-7-11
<i>Rex Reep</i>	5825 Holliday St KCMO 64115	REX REEP	1-7-11

I signed the foregoing initiative petition, and each of them signed his or her name thereto in my presence. I believe that each has stated his or her name and address correctly, and that each signer is an elector of the City of Kansas City, Missouri. Subscribed and sworn to before me, a Notary Public, on this 17th day of July, 2011, at Kansas City, Missouri.

EXHIBIT B

“INFORMATION SHEET FOR 2011 TRANSIT INITIATIVE”

See Attached

INFORMATION SHEET FOR 2011 TRANSIT INITIATIVE

Overview of Proposed World Class Transit System: The plan calls for a comprehensive and electrified transit system framed around a centrally-located light rail spine operating from south KC thru the Central Business District and up through the northland to near KCI. A southeast commuter rail line and an eastside streetcar line will feed into the light rail spine at Union Station. A fleet of electric shuttle buses will take riders to and from their neighborhoods to rail stations. A new 150-mile citywide bikeway network will connect to the new transit system as will current ATA buses. The North Wing of Union Station will serve as a new regional public transportation center providing convenient connections between all modes of transit. * Kansas City's citywide transit system can be expanded into a regional transit system by dovetailing it into the advanced bus system being developed in Kansas and a suburban commuter rail system being proposed by Mike Sanders.

New Kind of City: Kansas City is energized, its economy ignited, and the people's lives improved with a modern and efficient transit system everyone can use and benefit from. The light rail-based transit system not only makes possible a new convenient, vintage and affordable urban lifestyle, but also spawns a stronger green economy creating 50,000 new jobs, \$5-7 billion in new business sales, and a surge in new city revenues. The people get a more green, prosperous, and transit-oriented city. The City gets a new symbol of progress and competitive marketing advantage to attract new residents, businesses, conventions, visitors, and economic development back to the central city.

CAPITAL CONSTRUCTION COSTS:

TRANSIT MODE	COSTS
22 mile light rail spine @ \$45 million per mile	\$0.990 Billion
8.5 mile streetcar line @ \$22 million per mile	\$0.187 Billion
19 mile commuter rail line @ \$9 million per mile	\$0.171 Billion
150 electric shuttle buses and 150 miles of bikeways	<u>\$0.100 Billion</u>
<i>* Total Capital Construction Costs</i>	<i>\$1.448 Billion</i>

SOURCE OF REVENUE:

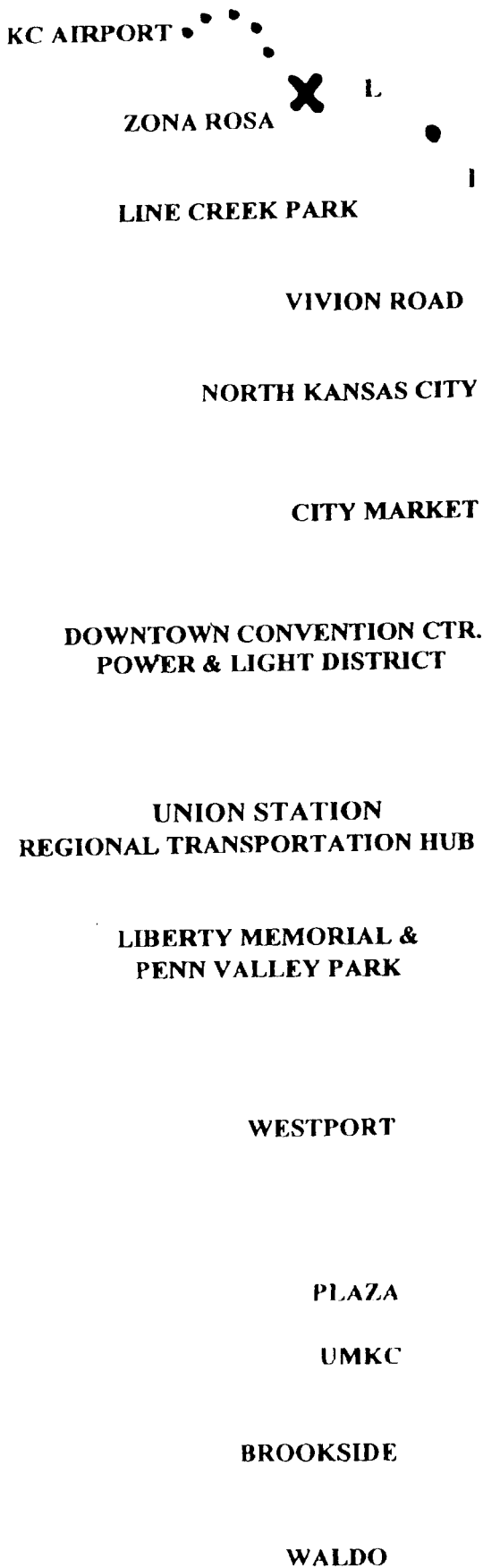
KCMO local 3/8 cent sales tax contribution over 25 years	\$1.000 Billion
Federal contribution from 40% match or (\$1.448 Billion x .4)	\$0.580 Billion
Philanthropic & Private contributions over 25 years	\$0.350 Billion
Private developer's contribution over 25 years	\$0.300 Billion
ATA's contribution over 25 years for improving the bus system	\$0.225 Billion
State contribution over 25 years	<u>\$0.100 Billion</u>
<i>* Total Revenues Raised</i>	<i>\$2.555 Billion</i>

FINANCING, OPERATION, AND MAINTENANCE COSTS:

Financing costs	\$0.500 Billion
O & M costs over 18 years (18 x \$32 million per year)	<u>\$0.576 Billion</u>
<i>*Total Financing and O & M costs</i>	<i>\$1.076 Billion</i>

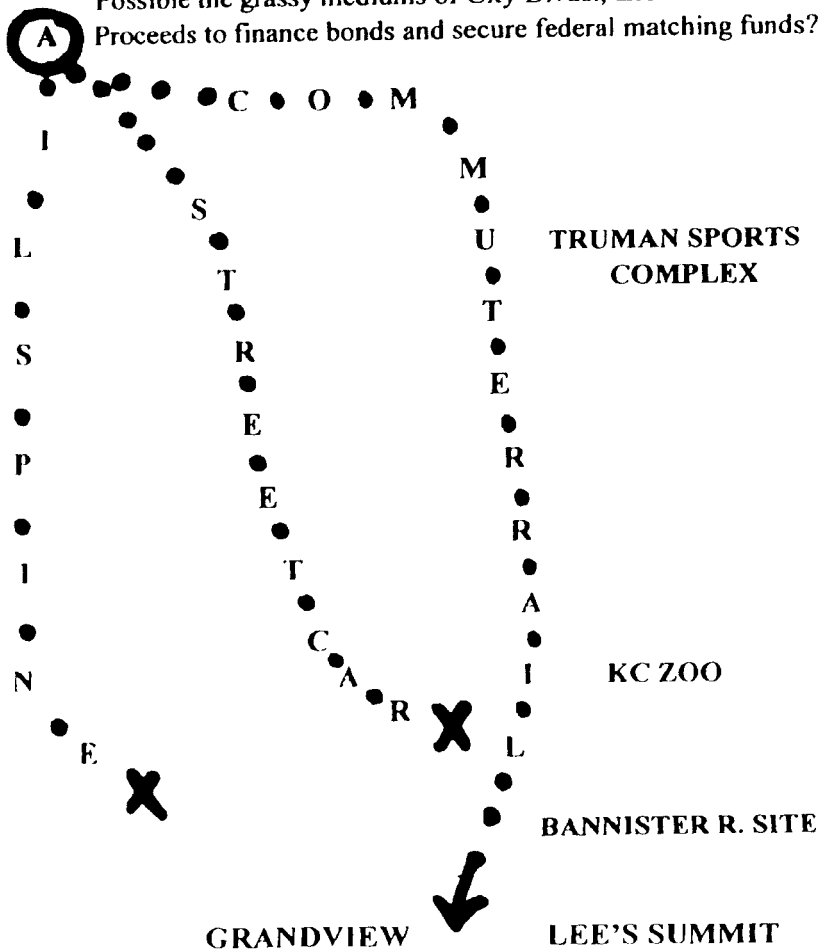
RAIL STARTER ROUTES & BALLOT LANGUAGE PRINTED ON BACK

RAIL STARTER ROUTES



BALLOT LANGUAGE

In order to provide the people a more green, prosperous, And transit-oriented City shall the City of Kansas City, Mo. Impose a capital imp.sales tax of ¼% and a transportation Sales tax of 1/8%, both not to exceed 25 years, to fund these improvements to the City's transit system: Construct a 22-mile light rail spine from Waldo to a Park & Ride (PR) lot south of KCI... with electric shuttle bus service to the terminals Including stops at or near Brookside, the Plaza, Westport, Penn Valley Park & Liberty Memorial, Union Station, Downtown Power & Light District, City Market, NKC, Vivion Rd., Line Creek Valley, and Zona Rosa generally following the Country Club Right-of-way, Broadway, Main St. Burlington, North Oak Trafficway, and the Interurban right-of-way; Construct a 19-mile commuter rail line from S.KC to Union Station including Stops at or near a PR lot at Blue Ridge and Hwy. 71, a PR Lot at Blue Ridge & I-470, Bannister red. site, Swope Park, and the Truman Sports Complex generally following existing rail corridors and Truman Rd.; Construct an 8.5 mile streetcar Line from the Kansas City Zoo to Union Station including stops at or near Research Hospital, Citadel redevelopment site Cleaver Blvd., 39th St., Troost Ave., Hospital Hill, and Crown Center generally following the Prospect Ave., Linwood Blvd., Gilham Rd. corridor; Construct an electric shuttle bus and Bikeway feeder network that will connect to all rail stations with the bikeways separated from traffic and using where Possible the grassy medians of City Blvds., and use the tax Proceeds to finance bonds and secure federal matching funds?



We see no merit in defendants' argument that Sec. 51 has no application to municipal ordinances. In the case of *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539, loc. cit. 545(7), in speaking of constitutional provisions, the court en banc said, 'These same governmental principles and constitutional provisions apply also to municipalities because their legislative bodies exercise part of the legislative power of the state.' Legislative acts or special charters may authorize enactment of city ordinances by initiative. However, such authorization carries with it constitutional restrictions imposed on the authority granted.

Id. See also *Committee For A Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 510 (Mo. banc 2006) (challenge to a state-level initiative)²⁰; *State ex rel. Sessions v. Bartle*, 359 S.W.2d 716 (Mo. 1962); *State ex rel. Card v. Kaufman* 517 S.W.2d 78, 81-82 (Mo. 1974).

2. Conformance To The City Charter Required

As noted previously, it is well accepted that in Missouri "Municipal charters are a charter city's organic law, its constitution." *State ex rel. Chastain v. City of Kansas City*, 289 S.W.3d 759,764 (Mo. App. W.D. 2009) (citing MO. CONST. art. VI, § 19(a); *State ex rel. Childress v. Anderson*, 865 S.W.2d 384, 387 (Mo. App. E.D. 1993)).

The Charter violation that causes an ordinance proposed by initiative to be facially unconstitutional need not only be a violation of the Charter's provisions governing the initiative process. In *State ex rel. Childress v. Anderson*, 865 S.W.2d 384 (Mo. App. S.D. 1993), the Court explicitly held that an initiative subject to a city's charter could be kept off the ballot by the city if it violated other portions of the charter. The initiative at issue in *Childress* sought to rezone certain property in Springfield. *Id.* at 385. After receiving the petition, the Springfield City Council passed a resolution directing the clerk to "take no action with respect to any initiative

²⁰ In *Committee for a Healthy Future*, the defect asserted was that the initiative provided funding for the program itself, but made no mention of funding for the associated administrative costs. The Missouri Supreme Court held that because Section 8 of the initiative, which set out uses of the money raised, described certain purposes to be achieved through use of the funds, if those purposes could not be achieved without administrative costs, then a liberal reading of Section 8 allowed the funds raised to be used for those administrative costs. Therefore, the court rejected that challenge to that initiative (and another very similar challenge). Nevertheless, in the case of this Proposed Ordinance, the Council is not faced with a defect based on an oversight of excluding administrative costs as a potential use of the funds to be generated by the Proposed Ordinance, but instead the Council is faced with a defect based on the Proposed Ordinance providing only approximately 40% of the money needed to undertake the actions required by the Proposed Ordinance if it were to be adopted by the voters. This is by itself a fatal flaw to the constitutionality of the Proposed Ordinance. In any event, *Committee for a Healthy Future* stands as additional support for the proposition that pre-election consideration of the substance of an ordinance is permissible in the context of a review of the facial constitutionality of an ordinance proposed by initiative.