



MEMORANDUM

To: Jackson County, Missouri
From: Edward D. Greim, Graves Garrett LLC
Date: December 20, 2017
Re: Whether Jackson County Ordinance 5061 is lawful.

ISSUE

On December 11, 2017, the Jackson County Legislature (the “Legislature”) passed Ordinance 5061 (the “Ordinance”) to amend Jackson County Code § 9306 to transfer administrative authority for the County’s COMBAT tax from the Jackson County Executive to the Jackson County Prosecutor. You have asked us to advise you on whether Ordinance 5061 is lawful. We conclude that it is not.

BACKGROUND

In 1989, Jackson County authorized a 0.25% sales tax increase (the “COMBAT Tax”) pursuant to RSMo § 67.547 as Chapter 93 of the Jackson County Code.¹ JACKSON CNTY. CODE § 9301. The COMBAT Tax is to be deposited into a separate fund to be spent on public safety and prevention of drug abuse and violent crime. *Id.* § 9302. The COMBAT Tax is “under the day-to-day supervision of a COMBAT Director” who is appointed by the County Executive. *Id.* § 9306.

¹ RSMo § 67.547 authorizes county sales taxes. The COMBAT Tax is not enacted under RSMo § 67.391, which authorizes special anti-drug sales taxes for use by the county’s Prosecuting Attorney.



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On December 11, 2017, the Legislature passed Ordinance 5061 (the “Ordinance”). The Ordinance alters Chapter 93 to transfer administrative authority for the County’s COMBAT tax from the Jackson County Executive to the Jackson County Prosecutor. Text added to § 9306 by the Ordinance is underlined, text deleted from § 9306 is bracketed:

9306. COMBAT [Director] Administration.

The administration of the COMBAT tax and the COMBAT COMMISSION shall be under the day-to-day supervision of [a COMBAT Director] the Prosecuting Attorney. The Prosecuting Attorney is responsible for the selection of [sic] COMBAT Director/Administrator. All COMBAT staff shall report to the COMBAT Director/Administrator.

[The following shall apply to the COMBAT Director:

9306.1 Appointment.

The COMBAT Director shall be appointed by the County Executive, subject to the disapproval of the County Legislature.

9306.2 Removal.

The COMBAT Director shall serve at the pleasure of the County Executive, except that he or she may be removed from office either by the County Executive or by a majority of the County Legislature.

9306.3 Qualifications.

The COMBAT Director shall have a minimum of eight years experience in the areas of public health, substance abuse, prosecution, law enforcement, and/or other similar disciplines relevant to COMBAT, or the educational equivalent of such experience. At least five years of such experience shall be in supervision and administration.

9306.4 Duties.

The COMBAT Director shall set the priorities and direction of the COMBAT tax in all of its areas of emphasis, to include law enforcement, drug treatment, and community crime prevention. The Director shall supervise all staff authorized in the annual county budget, and shall provide staff support for the Drug Commission.]

ANALYSIS

The Ordinance violates the Charter and, even if adopted, would be void. First, in adopting the Ordinance, the Legislature has unlawfully assumed the authority to re-organize the County's administration. The Charter grants this authority to the Executive. *See* Point I, *infra*. Second, the Ordinance unlawfully transfers administrative, purchasing agent, and appointment authorities to the Prosecutor. *See* Points II, III, and IV, *infra*. The Charter grants these three types of authority to the Executive. Lastly, the Ordinance unlawfully undermines the charter form of government.

Jackson County (the "County") has adopted a charter (the "Charter"), which was most recently amended in 2010. Jackson County adopted and maintains its charter under the authority of the Missouri Constitution, which allows counties with a population of 85,000 or more to enact a charter form of government. MO. CONST. art. VI, §18. The charter may provide "for the vesting and exercise of legislative power pertaining to any and all services and functions of any municipality, except school districts" within the county. MO. CONST. art. VI, § 18(c). A charter county's actions "must be in harmony with the general law where it touches upon matters of state policy." *Id.* (quoting *Kansas City v. J.I. Case Threshing Mach. Co.*, 337 Mo. 913, 87 S.W.2d 195, 202 (Mo. banc 1935)). Charter counties are thus controlled by the Missouri Constitution and Statutes, but are otherwise governed by their Charter. *See*



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e.g., MO. CONST. art. VI, §18 (prescribing powers of and limitations on charter counties); RSMo §67.2555 (requiring charter counties of 600,000 to 700,000 inhabitants to competitively bid certain expenditures greater than \$25,000); *Jackson Cnty. v. State*, 207 S.W.3d 608 (Mo. banc 2006) (County challenging RSMo § 67.2555).

An ordinance that violates the charter is void. *See Pepper v. St. Charles Cnty., Mo.*, 517 S.W.3d 590, 593 (Mo. App. E.D. 2017). “Acts performed by a county that are beyond the powers granted or necessarily implied from its charter are void.” *Schmoll v. Housing Auth. of St. Louis Cnty.*, 321 S.W.2d 494, 498 (Mo. 1959). To declare legislation “‘void’ means that it never had the authority to create any legal rights or responsibilities whatsoever.” *R.E.J., Inc. v. City of Sikeston*, 142 S.W.3d 744, 746 (Mo. banc 2004); *accord Missouri Bankers Ass'n, Inc.*, 448 S.W.3d at 273–74.

I. Through the Ordinance, the Legislature Unlawfully Assumes the Executive Power to Reorganize County Administrative Functions

The Charter grants the Executive the power to re-organize the County’s administrative functions. Charter art. IV, § 11. By contrast, the Legislature’s powers regarding the re-organization of administrative functions are limited to disapproving such Executive orders.² *Id.* The County’s administrative organization concerning the COMBAT Tax was previously described, in part, by § 9306 of the Jackson County

² The Executive issued the most recent administrative re-organization Order on November 3, 2017. Exec. Order 17-20. The Legislature chose not to disapprove that Order.



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Code. That provision specified that the Executive appointed the COMBAT Director, who in turn oversaw day-to-day supervision of the COMBAT Tax. Under that previous text, the COMBAT Director was the Executive’s administrative delegee.³

Ordinance 5061 purports to re-organize the administrative structure of the county by transferring administrative oversight from the Executive’s delegee—the COMBAT Director—to the Prosecuting Attorney. The Legislature cannot exercise such administrative re-organization power; only the Executive can. The administrative, re-organizational power of the Executive would be meaningless if the Legislature could simply re-organize the County’s administrative functions on its own. Further, Charter article IV, § 11—which allows the Legislature to review and disapprove Executive reorganizations, but only if it acts within 30 days—would be superfluous if the Legislature could simply shift, reorganize, combine, or splinter offices and departments at will by Ordinance. It cannot. For this reason alone, the Ordinance violates the Charter and is void.

³ Consistent with this authority, the Executive has exercised his prerogative to organize the COMBAT staff through the issuance of Executive Orders. The Executive’s November 3, 2017 Order—which, as noted above, was not disapproved by the Legislature—recognizes that COMBAT is an office that reports up through the Department of Health Services.



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II. The Ordinance Unlawfully Transfers the Executive's Administrative Authority to the Prosecutor

The County's administrative tasks are subject to the Executive's supervision, via the County Departments. Charter art. IV, §§ 1 to 11. Administrative functions of the County are to be organized into Departments and overseen by the Executive. Charter art. IV, § 1. The Executive is to assign Directors of Departments, and the Departments are subject to the Executive's coordination and supervision. Charter art. IV, § 3. The Executive may further appoint other officers not otherwise provided. Charter art. III, § 6.1. Administrative powers of the County are thus reserved for the Executive's oversight via Departments, and day-to-day supervision of such activities is reserved for the Executive or his delegees. Accordingly, the Legislature cannot oversee or delegate administrative tasks of the County.

Ordinance 5061 specifies that "administration of the COMBAT tax . . . shall be under the day-to-day supervision of the Prosecuting Attorney." This provision conflicts with Article IV's assignment of administrative authority to the Executive. COMBAT is part of the Executive's administration established in Article IV of the Charter. It cannot be administered by the Prosecuting Attorney or at the Legislature's bidding—it can be administered only by the Executive.



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III. The Ordinance Unlawfully Transfers the Executive's Purchasing Agent Authority to the Prosecutor

The Ordinance also unlawfully transfers the Executive's Purchasing Agent authority to the Prosecutor. The Missouri County Budget Law, RSMo §§ 50.525 to 50.750, applies to charter counties.⁴ *See, e.g., Hellman v. St. Louis Cnty.*, 302 S.W.2d 911, 917-19 (Mo. 1957). All counties may appoint a Purchasing Agent to carry out the purchasing and competitive contracting requirements of the Missouri County Budget Law. RSMo § 50.753.⁵ Where a county appoints a Purchasing Agent, that individual is charged with a duty to evaluate a county's needs for supplies and services, field competitive bids or proposals for the same, and award a contract to the lowest and best bidder. RSMo § 50.757. The Purchasing Agent "may reject any or all bids for the

⁴ Charter counties are legal subdivisions of the state and thus can only control "matters of purely municipal, corporate concern and its actions must be in harmony with the general law where it touches upon matters of state policy." *Missouri Bankers Ass'n, Inc. v. St. Louis Cnty.*, 448 S.W.3d 267, 272-73 (Mo. 2014) (referring to harmony with the Missouri statutes) (internal quotation and citation omitted). Missouri's County Budget Law and Purchasing statutes, RSMo §§ 50.525 to 50.790, are part of Missouri's state-wide anti-corruption policy. This is evidenced in part by the competitive bidding requirements for county purchases, which Missouri also implements at the state level. *See* RSMo §§ 34.040, 34.042, 50.660, 50.757; *see Pub. Comm'n Servs., Inc. v. Simmons*, 409 S.W.3d 538, 546 (Mo. App. W.D. 2013).

⁵ RSMo § 50.753 applies to charter counties. Notably, its text was amended in 1995 to remove the following express restriction on charter counties appointing purchasing agents, shown here in italics: "The county commission of any county *of the first class not having a charter form of government* may by order of the commission appoint some suitable person to the position of county purchasing agent." 1995 Mo. Legis. Serv. H.B. 274 & 268 (emphasis added).



sale of articles and supplies for the use of the county.” *Id.* The Purchasing Agent has administrative control over the county’s competitive purchasing process.

The Charter specifically designates the Executive as County Purchasing Agent. Charter art. IV, § 4. The Purchasing Agent designation is granted under Article IV, which demonstrates that the duties associated with purchasing—particularly, the competitive purchasing requirements set forth in the Missouri statutes—are an administrative function of the County. It also indicates that such functions should be carried out via County Departments under the “coordination and supervision” of the Executive. Charter art. IV, § 3. The Charter thus conforms to and implements the Missouri County Budgeting Law and RSMo §§ 50.753 to 790.

The Ordinance purports to strip the Purchasing Agent (the County Executive) of these very powers, reassigning them to the Prosecuting Attorney. When the Ordinance refers to “administrative” powers over the COMBAT Tax and its staff, it in fact encompasses the existing bundle of Purchasing Agent powers that COMBAT staff exercise on behalf of the Executive. The COMBAT Tax funds are administered by evaluating needs, drafting requests for proposals, and fielding competitive bids or proposals for services. Those activities are quintessential purchasing activities under the Missouri County Budget Law and RSMo §§ 50.753 *et seq.*; they are reserved for a Purchasing Agent where, as here, one is appointed. Further, Article IV, § 4 of the Charter demonstrates that those purchasing activities are specifically to be



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administered in the County through Departments under the Executive's supervision—not under the supervision of the Prosecuting Attorney. The Charter grants the Prosecuting Attorney no such power.

The Ordinance thus purports to vest administrative power over purchasing activities to one other than the Executive—in direct conflict with the Charter. This, then, is a third independent basis for recognizing the Ordinance as void.

IV. The Ordinance Unlawfully Transfers the Executive's Appointment Authority to the Prosecutor

The Charter vests the Executive with power to appoint administrative Directors and other officers not otherwise provided. Charter art. IV, § 1. Administration of the COMBAT Tax is no exception. The COMBAT Tax administration involves evaluating needs, drafting requests for proposals, fielding and analyzing proposals, and assisting in the awarding of contracts to the lowest and best bidder. These are quintessential administrative functions—especially under the purview of the Purchasing Agent, as noted in Section III, *supra*. It is not a legislative function, nor is it a prosecutorial function. Thus, the power to appoint any director or officer within that administrative function is reserved for the Executive by the Charter. In purporting to grant the Prosecuting Attorney this appointment power, the Ordinance once again finds itself in direct contravention of the Charter.

Even if the COMBAT Tax administration tasks did not fall under Article IV of the Charter, the Executive would nevertheless have the power to appoint the



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“COMBAT Director/Administrator” described in Ordinance 5061. Whatever the “COMBAT Director/Administrator” office may be, the Executive has the power to appoint “officers not otherwise provided for.” Charter art. III, § 6.1. The Charter contemplates granting neither the Legislature nor the Prosecuting Attorney such powers. *See, generally*, Charter arts. II and V.

In conclusion, the Charter is very clear on the division of powers regarding County director and officer appointments: the Executive appoints directors and officers, and the Legislature has the power to disapprove certain appointments. Charter art. II, § 16.4; Charter art. III, § 6.1; Charter art. IV, § 1. Neither the Legislature nor the Prosecuting Attorney can make such appointments. The Ordinance violates the Charter.

V. The Ordinance Undermines the Structure of the Charter

The Charter establishes a separation of powers with checks and balances, similar (although not identical) to those embedded in the governments of Missouri and the United States of America. For example, the Legislature generally legislates, the Executive generally performs administration functions, and the judiciary is a separate entity controlled by neither the Legislature nor the Executive. *Cf.* Charter arts. II, III, IV, VI. The Legislature passes ordinances, but the Executive may veto them. Charter art. II, § 12. The Legislature can override a veto, though, by a two-thirds vote upon reconsideration. *Id.* As discussed in detail above, the Executive can



appoint directors and officers within his administration, but certain appointments are subject to the Legislature's power of disapproval. Charter arts. III, § 6.1 and IV, § 1.

The Ordinance's changes to § 9306 of the County Code would tip the Charter's balance of powers largely in favor of the Legislature. By the Ordinance, the Legislature takes up the executive role of appointing administrative heads to operate the County, bypassing the Executive's appointment power.

The danger of this imbalance of powers is drawn in sharp relief in the context of the COMBAT Tax. COMBAT Tax staff—and other administrative personnel—perform the competitive purchasing functions described in the Missouri statutes noted above: they help the COMBAT Director determine the County's needs within the scope of the COMBAT Tax—issues of public safety and drug and crime prevention—and draft requests for proposals. The Purchasing Department, in coordination with the COMBAT Director or its staff, then fields bids or proposals, and this group makes an initial determination on eligibility. They will then evaluate the proposals and make recommendations as to funding. Under the Charter, the COMBAT Director and staff function under the Executive "branch," as an administrative County function. This comports with the Charter's appointment of the Executive as Purchasing Agent, whose duty it is to determine the County's needs, request bids or proposals, field such bids or proposals, and identify the lowest and



best bidder. *See* RSMo §§ 50.753, 50.757, 50.660. The Director and staff are the Executive’s delegees for such tasks. But the Ordinance bypasses the Executive entirely in this role and allows the Legislature to appoint the administrative head of the COMBAT Tax, reducing the Executive to the purely ministerial—if not ceremonial—role of affixing his signature to contracts as directed by the Legislature. Applying the same tactic to other programs and departments, the Legislature would assume plenary control of the County’s finances and administration. The system of government established by the Charter plainly does not contemplate granting the Legislature such plenary power, and the Legislature cannot unilaterally assume the same merely by passing ordinances.

Further, as noted above, the Charter specifically appoints the Executive as the County’s Purchasing Agent. A county does not need to do that; it *may* do so at its pleasure. RSMo § 50.737. Here, the County’s voters spoke on that matter by passing a Charter that appoints a Purchasing Agent. Without this important provision, the Legislature might well have been free to control or specifically delegate an agent for purposes of spending. *See* RSMo §§ 50.760, 50.784. But that is not what the voters approved. The Legislature’s attempt to override the Charter’s Purchasing Agent appointment—while currently only limited to the COMBAT Tax—is therefore also an attempt to contravene the intent of the voters who enacted the Charter as the fundamental law of Jackson County government.



In disrupting the separation and balance of powers established by the Charter, the Ordinance interferes with the Charter form of government itself. It should be rejected as conflicting with the Charter and Missouri law.

CONCLUSION

Ordinance 5061 conflicts with the Jackson County Charter. The Legislature has assumed authority that it does not possess to pass an ordinance granting authority to the Prosecutor that the Charter grants to the Executive. Namely, it grants the Prosecuting Attorney: day-to-day administrative oversight of a County administrative and purchasing operation, reorganization of County administrative functions, and the appointment of directors and officers thereover. The Charter reserves such powers for the County Executive. Those powers are neither the Legislature's to grant nor the Prosecuting Attorney's to wield. The Ordinance thus violates the Charter and should be rejected with the above objections.

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July 2006-Present

- As lead counsel, won certification and a multimillion dollar settlement for a nationwide class of several hundred groups in the first lawsuit of its kind filed against the IRS; plaintiffs alleged targeting of conservative groups in violation of the First Amendment and federal statutes.
- Successfully defended the Wisconsin Club for Growth and Eric O'Keefe relating to Wisconsin's John Doe criminal investigation into allegedly illegal campaign coordination with Governor Scott Walker.
- Successfully defended Missouri's 2010 congressional redistricting in successive proceedings before the Missouri Supreme Court.
- Represented the Kansas Attorney General in litigation challenging his use of prosecutorial discretion, and in subsequent disciplinary proceedings.
- Represented the Kansas Secretary of State before the Kansas Supreme Court in a dispute about the withdrawal of a candidate for the U.S. Senate.
- Represented clients in taxpayer lawsuits challenging the use of state and local government funds in Missouri, Wisconsin, and Texas.
- Advise and represent political groups in trial and appellate litigation and administrative proceedings regarding candidate, initiative and referendum campaigns in Missouri and nationwide.
- Advise public and private clients in conducting internal investigations, including the 2011 investigation into the Catholic Diocese of Kansas City-St. Joseph and a 2017 investigation regarding Greene County, Missouri.

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Education

Harvard Law School, 2002

- Selected to teach on the Board of Student Advisers, 2000-2002
- Dean's Award for Leadership, 2002

University of Missouri-Columbia

- A.B., Economics; A.B., Political Science, 1999
- *summa cum laude*, Phi Beta Kappa
- Sigma Chi International Balfour Award, 1999

Honors and Board Memberships

- *Missouri Lawyers Weekly* "Most Influential Lawyer" for Missouri, 2013
- *Best Lawyers in America*, white collar criminal defense, 2018
- *Ingram's Magazine* "40 Under 40" (Kansas City region), 2016

- U.S. Commission on Civil Rights (Missouri advisory member), 2017—
- President of the Kansas City Chapter of the Federalist Society for Law and Public Policy, 2012—
- Chairman (2013-2014) of the Public Policy Committee of the Missouri Catholic Conference, which sets and approves the Conference's legislative and lobbying agenda and advises Missouri's bishops.
- Secretary of the Catholic Lawyers' Guild of Kansas City, 2006—