



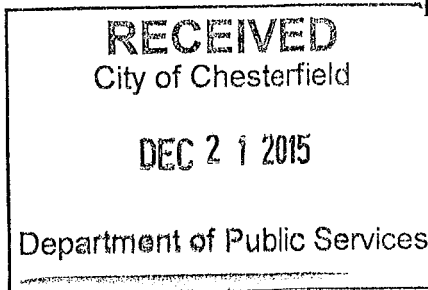
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December 17, 2015

Mr. Michael O. Geisel
Director of Public Services
City of Chesterfield
690 Chesterfield Parkway West
Chesterfield, Missouri 63017



Dear Mike:

The Planning and Public Works Committee has inquired whether the City of Chesterfield may impose a requirement on developers, contractors, and other parties which have to obtain surety bonds in order for the City to allow their work, mandating that they not use certain surety companies to issue such bonds. The City would like to prevent applicants from using sureties which have a history of unjustified or vexatious refusals to pay the City's prior bond claims without litigation or arbitration of the claims. The issue has arisen because at least one well-known surety company has such a history, which has created problems for the City.

The City has the legal duty to require surety bonds for most significant public works projects, under Section 107.170, R.S.Mo., which provides in pertinent part as follows:

"2. It is hereby made the duty of all public entities in this state, in making contracts for public works, the cost of which is estimated to exceed fifty thousand dollars, to be performed for the public entity, to require every contractor for such work to furnish to the public entity, a bond with good and sufficient sureties, in an amount fixed by the public entity, and such bond, among other conditions, shall be conditioned for the payment of any and all materials, incorporated, consumed or used in connection with the construction of such work, and all insurance premiums, both for compensation, and for all other kinds of insurance, said work, and for all labor performed in such work whether by subcontractor or otherwise.3. All bonds executed and furnished under the provisions of this section shall be deemed to contain the requirements and conditions as herein set out, regardless of whether the same be set forth in said bond, or of any terms or provisions of said bond to the contrary notwithstanding."

However, the terms which the City may impose on such bonds are not limited to the matters specified in the language of this statute. As stated in *City of St. Louis ex rel. Atlas Plumbing Supply Company v. Aetna Casualty and Surety Company*, 444 S.W.2d

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513, at 515-516 (Mo.App.St.L. 1969), Section 107.170 “does not purport to prescribe the whole of the content of the statutory bond. It is concerned with the expressed conditions which will give rise to liability on the bond and, by §522.300, with the identification of the beneficiaries thereunder. It makes no effort to regulate procedure and contemplates the possibility that the bond may embody conditions in addition to those specifically required.”

Thus, a municipality may enact an ordinance containing such required conditions, and ordering that they be incorporated into the bond itself. *Reorganized School District R-3 v. L. D. Compton Construction Co.*, 483 S.W.2d 674, at 676 (Mo.App.St.L. 1972), citing the *Atlas Plumbing Supply* case, adds that Section 107.170 “contemplated the possibility that the bond might embody conditions in addition to those specifically required by the statute. So also here, merely because the bond was given on a public building project in an area where such an ordinance could not be or had not been enacted, its validity is not affected. The contracting parties had the authority to incorporate such a provision in the instrument as long as it was reasonable and did not thwart the purpose and intent of the statute.” The City can therefore also require the inclusion of conditions in a surety bond with or without an ordinance specifically establishing them.

Moreover, “Because §107.170 sets no prescribed rules for the board members to follow in determining whether a bond is ‘good and sufficient,’ the decision whether to accept a particular bond must be considered a discretionary act ...”. *S & W Cabinets, Inc. v. Consolidated School District No. 6*, 901 S.W.2d 266, at 269 (Mo.App.E.D. 1995). “Neither the statute nor Missouri case law tells us precisely how particular officials fulfill their ministerial duty to require a bond.” *Union Pacific Railroad Company v. St. Louis Marketplace, Limited Partnership*, 212 F.3d 386, at 391 (8th Cir. 2000).

Those authorities govern surety bonds for public works projects, but it appears that the City also has the power to impose bond conditions for the private developments and construction projects which it regulates under its zoning and other police powers. Section 77.500, R.S.Mo., which pertains to cities of the third class such as Chesterfield, states that “the city council may ... regulate and control the construction of buildings”; and under Section 77.590, R.S.Mo., “For any purpose or purposes mentioned in this chapter, the council may enact and make all necessary ordinances, rules and regulations; and they may enact and make all such ordinances and rules, not inconsistent with the laws of the state, as may be expedient for maintaining the peace and good government and welfare of the city and its trade and commerce ...”.

Chapter 89, R.S.Mo., authorizes zoning by “all cities, towns and villages in this state.” In Section 89.020, R.S.Mo., it states that such zoning regulation by “the legislative body” of such cities, towns and villages is permitted “For the purpose of promoting health, safety, morals or the general welfare of the community ...”; in Section 89.030, it further states that “For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of sections 89.010 to 89.140; and within such districts may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures, or land.” Section 89.040 then provides broadly:

“Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality.”

Further emphasizing the broad powers of the city council in zoning matters, Section 89.050 states in pertinent part that “The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed.”

This sweeping language, taken together with the general principles set out in the analogous *Atlas Plumbing Supply, L. D. Compton Construction, S & W Cabinets* and *Union Pacific Railroad* cases, *supra*, would appear to give the city council at least as much authority to set bond requirements, under its zoning powers, as is available for public works projects under Section 107.170. It is noteworthy that another part of Chapter 89, which gives cities power over the subdivision of land, specifically refers to requirements for the posting of surety bonds with regard to subdivisions. Section 89.410 provides in pertinent part as follows [emphasis added]:

“1. The planning commission shall recommend and the council may by ordinance adopt regulations governing the subdivision of land within its jurisdiction. The regulations, in addition to the requirements provided by law for the approval of plats, may provide requirements for the coordinated development of the city, town or village; for the coordination of streets within subdivisions with other existing or planned streets or with other features of the city plan or official map of the city, town or village; for adequate open spaces for traffic, recreation, light and air; and for a distribution of population and traffic; provided that, *the city, town or village may only impose requirements for the posting of bonds, letters of credit or escrows for subdivision-related improvements as provided for in subsections 2 to 5 of this section.*

2. ... The regulations may provide that, in lieu of the completion of the work and installations previous to the final approval of a plat, the council shall accept, at the option of the developer, an escrow secured with cash or an irrevocable letter of credit deposited with the city, town, or village. *The city, town, or village may accept a surety bond, and such bond shall be in an amount and with surety and other reasonable conditions, providing for and securing the actual construction and installation of the improvements and utilities within a period specified by the council and expressed in the bond. ...*

6. Nothing in this section shall apply to performance, maintenance and payment bonds required by cities, towns or villages.”

The statute therefore clearly contemplates that cities may require “performance, maintenance and payment bonds” as well as subdivision construction bonds; and there is no provision of state law limiting the powers of Chesterfield or any other city to specify the conditions of any such bonds.

The City’s own Unified Development Code appears to take advantage of these statutory powers by stating with regard to subdivisions, in its Section 02-12 [emphasis added]:

“A. Completion Guarantee by Developer.

After the improvement plans have been substantially complete and all inspection fees and review fees paid, but before approval of the record subdivision plat, the developer shall guarantee the completion of public improvements. The developer shall either:

1. Complete the improvements in accordance with the approved improvement plans under the observation and inspection of the appropriate inspection agency; or
2. Deposit cash under an escrow agreement or post a land subdivision bond to guarantee the construction, completion, and installation of the improvements shown on the approved improvement plans within the improvement completion period approved by the Planning and Development Services Director, which shall not exceed two (2) years. *The land subdivision bond or escrow agreement shall be prepared and executed on forms furnished by the Department and shall be submitted to the City Council for approval or disapproval after review and approval by the Planning and Development Services Director and the City Attorney.*”

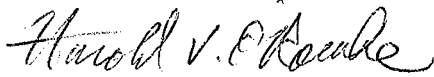
It therefore appears that the City has the power to impose whatever conditions it finds appropriate for surety bonds, at least as long as those conditions are reasonably related to the City’s broadly defined, legitimate purposes in the regulation of the projects, subdivisions, construction, public or private improvements involved. Those conditions, whether set out by ordinance enacted by the City Council, or otherwise, could include such language as the following:

“The City shall not permit or accept the posting of any bond issued or proposed to be issued by a surety or an affiliate of a surety which has, on more than one occasion in the preceding five (5) years, refused to pay all or part of a claim of the City on any other surety bond prior to litigation or arbitration of that claim, where

the claim was thereafter either (a) determined wholly or partially in favor of the City, or (b) settled by payment to the City of all or part of the claim.”

Please do not hesitate to let me know should you have any questions or wish to discuss this further.

Very truly yours,



Harold V. O'Rourke

cc: Michael G. Herring
Aimee Nassif