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IN THE CIRCUIT COURT OF PLATTE COUNTY, MISSOURI

PLATTE COUNTY, MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
UMB BANK, N.A., THE TRUSTEE OF THE TRANSPORTATION REFUNDING AND IMPROVEMENT BONDS (ZONA ROSA RETAIL PROJECT) SERIES 2007,	)	**Case No. 18AECC00379**
	)	
Defendant.	)	

LEGAL MEMORANDUM IN SUPPORT OF
PLATTE COUNTY'S MOTION FOR SUMMARY JUDGMENT

In this lawsuit, Platte County seeks to resolve a legal dispute regarding its obligations under a Financing Agreement dated October 1, 2007. The Financing Agreement pertains to revenue bonds issued to build infrastructure at Zona Rosa, a retail shopping center in southern Platte County. The Zona Rosa Bonds were issued by a third-party corporation, not Platte County, and are supported by a dedicated 1% sales tax within Zona Rosa. Despite projections to the contrary, the 1% sales tax revenue dedicated for the Zona Rosa Bonds does not generate sufficient revenue to satisfy the principal and interest on the bonds.

Defendant UMB Bank, N.A.—the Bond Trustee paid to pursue assets on behalf of the bondholders—has demanded that Platte County use its general tax revenues to pay the shortfall in 2018. UMB Bank has also demanded that Platte County cover shortfalls occurring in 2019 and beyond. Under the Financing Agreement for the Zona Rosa Bonds, Platte County never agreed to appropriate or pay its general tax revenues to the Zona Rosa bondholders. As explicitly stated in the Financing Agreement:

> [N]or shall anything contained herein constitute a pledge of the general credit, tax revenues, funds or moneys of the County.

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Financing Agreement, § 2.4. Yet, the tax revenues, funds or moneys of Platte County are precisely what the Bond Trustee seeks to collect. The Bond Trustee seeks to convert Platte County's voluntary choice of whether to make a payment—an arrangement that is recognized as valid under Missouri law—into a general obligation on Platte County's tax revenues, funds and moneys—an indebtedness that violates the Missouri Constitution because it was not approved by taxpayers.

The Court should issue summary judgment in favor of Platte County. UMB Bank's demands are contrary to Missouri law and can be resolved as a matter of law. Under the Financing Agreement, the Zona Rosa Bonds are payable from the 1% sales tax in Zona Rosa, not the general tax revenues of Platte County taxpayers. UMB Bank's arguments to the contrary would render the Financing Agreement unconstitutional. Accordingly, Platte County is entitled to judgment in its favor, and the Court should issue the declarations requested in Count I and II of its Petition.

Argument and Authorities

I. The Legal Standard

A party seeking summary judgment "'shall state with particularity the grounds for the motion . . . the rule calls for a concise description, complete with references to the supporting portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, of the movant's claim of entitlement to judgment as a matter of law . . . The key to summary judgment is the undisputed right to judgment as a matter of law [and] the absence of a fact question." *ITT Commercial Fin. Corp. v. Mid–America Marine Supply Corp.,* 854 S.W.2d 371, 380 (Mo. banc 1993) (quotations omitted). "The propriety of summary judgment is purely an issue of law." 854 S.W.2d at 376.

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II. Municipal Finance: Limitations on Government Indebtedness in Missouri

A county, like any other entity, has revenues, expenses, assets, and liabilities. However, as a governmental entity, taxpayers are the primary source of its revenue and bear the primary burden of its liabilities. Since 1875, the Missouri Constitution has imposed restrictions on the fiscal operations of counties. These restrictions serve to protect taxpayers, as many local governments prior to 1875 were financially distressed as a result of careless governance and bad investments. T. Jarett & L. Pearson, *Constitutional Debt Limitation on Municipalities in Missouri*, 55 J. Mo. B. 330, 330-31 (1999).

The municipal finance industry has formed and grown around these limitations. This industry not only facilitates the direct issuance of public debt—a form of financing that must comply with the spending and debt limitations under Missouri law—but also other forms of creative financing designed to avoid these spending and debt limitations.

A. Constitutional and Statutory Limitations on Government Indebtedness

Platte County is a political subdivision of the State of Missouri. (SOF 40, 56) As a result, Platte County is subject to the spending and debt limitations contained in Article VI of the Missouri Constitution. These provisions operate collectively to prevent a municipality such as Platte County from incurring debt it is unable to service on a cash basis and without the participation and approval of its voters.

1. Overview of Constitutional Spending and Debt Limitations

In Article VI, § 26(a), counties are prohibited from becoming "indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years." Mo. Const. Art. VI, § 26(a). This provision generally prevents counties from becoming indebted in an amount that exceeds their available, unencumbered cash

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and anticipated revenue for that year. *See, e.g.*, *Constitutional Debt Limitation on Municipalities in Missouri*, 55 J. Mo. B. 330, at 330-31.

In Article VI, § 26(b)—the provision at issue in this lawsuit—the Missouri Constitution requires taxpayer approval for any debt incurred by a municipality. In pertinent part, it states:

> Any county . . . of the state, by vote of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five percent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes[.]

Id.; *see also* RSMo. §§ 108.010-.020. The restrictions in § 26(b) protect taxpayers by ensuring that any services or projects undertaken by their local county government are approved by a sufficient number of voters. The required vote for the county to incur indebtedness must be "four-sevenths at the general municipal election day, primary or general elections and two-thirds at all other elections." *Id.* In addition to requiring voter approval, Art. VI, § 26(b) caps the total amount of debt that may be incurred. *Id.* A similar restriction exists in many states throughout the country. *See, e.g.*, Ark. Amend. 62, §§ 1-2, Art. 16, § 1 and Ark. Code 14-72-606; NE Art. 13, § 2 and Neb. Rev. Stat. § 72-1403 (issuance of revenue or general obligation bonds by county, § 72-1402), § 72-2301, 2309; S. Dak. Art. 13, § 4.

Another constitutional limitation exists in Art. VI, § 26(f). Under § 26(f), before any municipality can incur indebtedness, it must "provide for the collection of an annual tax on all taxable property therein sufficient to pay the interest and principal of the indebtedness as they fall due, and to retire the same within twenty years from the date contracted." Mo. Const. Art. VI, § 26(f). This requirement ensures that the municipality has sufficient tax revenues to service any debt it undertakes at the time it undertakes that debt. *See, e.g.*, *Wunderlich v. City of St. Louis*, 511 S.W.2d 753, 757 (Mo. 1974) (The limitations are "designed to [e]nsure that the funds that will be used to pay the indebtedness are provided in or concurrent with the original issue and

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subjected to the approval of two-thirds of the electorate, and that the taxpayers of the city will never be subjected to further or greater liability thereon[.]").

2. Procedural Requirements for Annual Budgeting and Appropriations

Beyond these substantive constitutional provisions, procedural requirements also exist. Under Article VI, § 24, all counties must prepare and publish an annual budget, file and make public annual financial reports, and be audited. Under RSMo. § 50.550(1), the county budget must "present a complete financial plan for the ensuing budget year," including identifying "proposed expenditures" for the year. RSMo. § 50.550(1). This process occurs in August prior to the next fiscal year, starting first with each department of Platte County submitting an estimate of its expenditure requirements for the ensuing year. (SOF 57-58, 60-61); RSMo. § 50.540.1. The Platte County Auditor collects that information, analyzes the anticipated revenues, expenses, and liabilities of the County, and prepares the Auditor's Recommended Budget detailing proposed income and expenditures for the entire County government. (SOF 61) The Auditor then presents that proposed budget to the County Commission for consideration, at which time the County Commission may make changes to the budget. RSMo. § 50.610. Following a public hearing, the County Commission will approve the budget along with any revisions it has made. (SOF 62-63)

At the same time the County Commission approves the annual budget, it must issue and approve orders necessary to authorize the budgeted expenditures. RSMo. § 67.030 ("[T]he governing body of each political subdivision shall . . . approve the budget and approve or adopt such orders, motions, resolutions, or ordinances as may be required to authorize the budgeted expenditures and produce the revenues estimated in the budget."); SOF 64. Platte County satisfies this requirement by issuing an "Appropriation Order" at the beginning of each fiscal year, which authorizes the proposed expenditures contained within its annual budget. (SOF 65-

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66) The annual budget and appropriation order "serves as a guiding document for the County, assisting the County Commission in overseeing and authorizing expenditures throughout the fiscal year." (SOF 118) An appropriation is not a mandate to spend. (SOF 67); *see Detroit City Council v. Mayor of Detroit*, 537 N.W.2d 177, 680 (Mich. 1995); *see also Construction, Operation, and Effect of Appropriations*, 64A C.J.S. Municipal Corporations, § 2104 (Feb. 2019). The Platte County Commission may budget and appropriate for a project at the beginning of the year and decide against making any such expenditures later in the year. (SOF 72-73) The County Commission can also decide to amend its budget and appropriation order. (SOF 66, 67, 72-73)

The County Commission makes decisions throughout the year whether to authorize expenditures of appropriated funds. This decision-making process includes whether to authorize a Warrant to be issued to the County Clerk or County Treasurer. (SOF 74-76) If the County Commission does authorize a Warrant to be issued, neither the County Clerk nor the County Treasurer have authority to make a payment, regardless of whether those funds have been budgeted or appropriated. (SOF 74-77) It is only after a Warrant has been authorized and issued does an expenditure become payable. (*Id.*)

For any indebtedness incurred or sought to be incurred by Platte County, it must comply with the budgeting and certification procedures in RSMo. § 50.660:

> No contract . . . imposing any financial obligation on the county or township is binding on the county or township . . . unless there is a balance otherwise unencumbered to the credit of the appropriation to which it is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation incurred[.]

RSMo. § 50.660. The statute further requires the accounting officer to certify that these requirements are met. Alternatively, for bond funds, the accounting officer may certify that:

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> The bonds or taxes have been authorized by a vote of the people and that there is a sufficient unencumbered amount of bonds yet to be sold or of taxes levied and yet to be collected to meet the obligation in case there is not a sufficient unencumbered cash balance in the treasury.

Id. These requirements must be satisfied for a contract or obligation to be legally binding on Platte County. *Id.*

B. Types of Municipal Financing: GO Bonds, Revenue Bonds, and the "Moral Obligation" Theory

A general overview of municipal finance is necessary to understanding the nature of the Zona Rosa Bonds and Platte County's role in the Financing Agreement. Any bond issued by a county is considered a municipal bond. *See* Municipal Bond, Black's Law Dictionary (10th ed. 2014). There are two general types of municipal bonds: General Obligation ("GO") Bonds and Revenue Bonds.[1] In addition, under a so-called "moral obligation" theory, a county may also support debt issued by another entity without incurring any debt or issuing any bonds of its own. (SOF 18 n. 4); *see also* Moody's Investor Service, *Lease, Appropriation, Moral Obligation and Comparable Debt of US State and Local Governments*, pp. 7-8 (July 9, 2018).

The key difference between these types of financing is the legal recourse available to creditors, if any, in the event of non-payment. A GO bond is payable from general tax revenue of the issuing county. *See State ex rel. City of El Dorado Springs v. Holman*, 363 S.W.2d 552, 556 (Mo. 1962). GO bonds impose a legal obligation that is fully enforceable against the county—thus providing the highest level of security for creditors. However, the obligation constitutes an indebtedness that must comply with the cash flow provisions of Art. VI, § 26(a) and obtain taxpayer approval under Art. VI, § 26(b). *See Id.* (GO bonds require all taxpayers to contribute to the cost, SOF 19). It is not uncommon for voters to refuse to approve a municipality's proposed issuance of GO bonds.

[1] Another form of financing referred to as "lease-backed obligations" are not at issue in this lawsuit.

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To avoid the requirement for taxpayer approval, an entity may issue revenue bonds. Unlike GO Bonds, revenue bonds are "payable solely from the revenues derived by the county . . . from the lease or other disposal of the facility." Mo. Const. Art. VI, § 27(b). By definition, revenue bonds are not considered an indebtedness or obligation of the issuing county because they are not payable from its general tax revenues. *See id.* at § 27(c). This definition is consistent with the long-recognized "special fund doctrine," which is a limited exception holding that "an indebtedness of a [municipality] payable only out of income derived from a property purchased or built is not a debt within the limitations of Mo. Const. Art. VI, § 26." *Wunderlich v. City of St. Louis*, 511 S.W.2d 753, 756 (Mo. banc 1974). This doctrine only applies "if the obligation incurred is payable solely from the special fund and not, directly or indirectly, from any form of taxation." *Id.* In that circumstance, the revenue bonds impose an obligation that is enforceable by creditors solely against the dedicated revenues associated with the special fund. *See, e.g.*, *id.*; *see also State ex rel. City of El Dorado Springs*, 363 S.W.2d at 556 (distinguishing GO bonds from revenue bonds).

Lastly, under the "moral obligation" theory, a county may offer to support debt issued by another entity without the county incurring any legal obligation or indebtedness of its own. Under this arrangement, the county makes a "credit enhancement" to the debt of another entity by expressing a present intention to *voluntarily* cover any shortfall in revenue used to pay the principal and interest on the debt incurred by another. (SOF 19, 18 n. 4); Moody's Investor Service, *Lease, Appropriation, Moral Obligation and Comparable Debt of US State and Local Governments*, pp. 7-8 (July 9, 2018) (Ex. L to SOF). The credit rating agencies have determined to give a higher credit rating to bonds that contain a so-called "moral obligation" than they otherwise would receive.

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"Moral obligation" financing is the creation of the municipal finance industry and the credit rating agencies, not the court system. The phrase "moral obligation" itself is a misnomer, because the arrangement does not impose any actual legal payment "obligation" on the county. *See State ex rel. Warren v. Nusbaum*, 208 N.W.2d 780, 804, 59 Wis.2d 391, 430 (Wis. 1973) ("The term 'moral obligations' recognizes the absence of any legally enforceable claim."). Instead, it is a concept that is self-enforced by the credit rating agencies. If the municipality later decides not to make payment on the third-party debt, the credit rating agency will consider that decision to be an "indicator of severe stress that would likely result in a negative rating action on the government's GO rating." (Moody's Investor Service, Ex. L to SOF, at p. 8). The county will be deemed less creditworthy, despite its actual financial condition and despite the absence of any legally-enforceable obligation or contract to pay the third-party debt. In practice, the threat of an adverse credit action coerces many municipalities to decide to cover the debt shortfall—though not legally obligated to do so—thus supporting a higher credit rating for the underlying bonds. *See, e.g.*, *id.* This in turn facilitates the issuance of the bonds.

The existence of revenue bonds and the concept of a "moral obligation" are best understood as financing mechanisms designed to avoid the spending and debt limitations that exist in many states, including Missouri. In many instances, such as here, revenue bonds issued by one entity are coupled with a non-binding "moral obligation" of a municipality, thus increasing the credit rating and marketability of the bonds. *See, e.g.*, Revenue Bonds, 1 Gelfand, State and Local Government Debt Financing, § 10:18 (2d ed.) ("[H]olders of revenue bonds have no claim on the general tax revenues . . . Attempts have been made to improve the security position of holders of revenue bonds by adding the 'moral obligation' of the issuing state or local government.").

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III. The Zona Rosa Bonds Are Revenue Bonds Issued by the Development Authority

The Industrial Development Authority of the County of Platte County, Missouri (the "Development Authority") is a public corporation formed under RSMo. § 349.055. (SOF 1-2) The Development Authority is a distinct entity that is legally separate from Platte County. *See, e.g.*, *State ex rel. Jardon v. Industrial Development Authority of Jasper County*, 570 S.W.2d 666, 670-71 (Mo. banc 1978) (bonds issued by the IDA of Jasper County were not issued by the county). On October 1, 2007, the Development Authority issued $32,200,000 in bonds titled "Transportation Refunding and Improvement Revenue Bonds (Zona Rosa Retail Project) Series 2007" (the Zona Rosa Bonds). (SOF 6, 8)

A. The Zona Rosa Bonds Are Payable from Revenues of a 1% Sales Tax

As the official name indicates, the Zona Rosa Bonds are revenue bonds of the Development Authority. (SOF 19-20) The Zona Rosa Bonds are issued solely by the Development Authority, not Platte County, and the Development Authority retained UMB Bank, N.A., to serve as the Bond Trustee. (SOF 19-20)

The characteristics of the Zona Rosa Bonds and the duties imposed on the Bond Trustee are set forth in a Trustee Indenture, executed by the Development Authority and the Bond Trustee on October 1, 2007. (SOF 11, 13, 15) Platte County is not a party to the Trust Indenture. (SOF 11, Ex. J) The Bond Trustee has admitted that the Zona Rosa Bonds are revenue bonds and not GO bonds. (SOF 19-20) It has also admitted that Platte County has not made any pledge of its general credit, tax revenues, funds, or moneys of Platte County to pay the Zona Rosa Bonds. (SOF 19-20)

To provide revenue for the Zona Rosa Bonds, the Development Authority entered into a Financing Agreement dated October 1, 2007. (SOF 22, Ex. C) Under the Financing Agreement,

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the source of dedicated revenue for the Zona Rosa Bonds comes from a 1% sales tax on commerce within Zona Rosa. (SOF 24-28) The 1% sales tax is collected by two transportation districts formed under RSMo. §§ 238.200-.280 (collectively, "Districts I and II"), both of which have the power under Missouri law to impose and collect a sales tax of up to 1%. *Id.* at §238.235(7); SOF 24-28. Districts I and II specifically agreed to make "[p]ayment to the Trustee of the amount necessary to fund clauses *First* through *Third* of Section 601(b)(6) of the Indenture," along with other payments related to the Zona Rosa Bonds. (SOF 28 *citing* Financing Agreement, Ex. C to SOF, at §§ 3.2(d)(ii)(A) and 4.2(d)(ii)(A)). Furthermore, Districts I and II specifically agreed that appropriated funds "are pledged . . . to payment of District Operating Costs and the Bonds and shall be transferred . . . to the Revenue Fund at the times and manner provided in [Section 3.2(d) and Section 4.2(d)]." (SOF 29 *citing* Financing Agreement, Ex. C, at §§ 3.3 and 4.3) In essence, Districts I and II agreed to pay the proceeds of the 1% sales tax in Zona Rosa to the Development Authority, which then uses those proceeds as the "revenue" for the Zona Rosa Bonds.

B. The Zona Rosa Bonds are Not Payable from General Tax Revenues of Platte County

Platte County is a party to the Financing Agreement. However, unlike the agreements made by Districts I and II to make payments to the Development Authority, Platte County only agreed to *consider* covering any shortfall in sales tax revenue used to pay the Zona Rosa Bonds—a so-called "moral obligation" enforced by credit rating agencies despite not being legally enforceable against taxpayers. As the Bond Trustee admits, Platte County has not made any pledge of its general credit, tax revenues, funds, or moneys of Platte County with respect to the Zona Rosa Bonds. (SOF 19-20)

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Under § 2.2 of the Financing Agreement, Platte County stated that it "intends on or before the last day of each Fiscal Year, to budget and appropriate, specifically with respect to this Agreement, moneys sufficient to pay the Appropriation Amount of the next succeeding Fiscal Year." (SOF 32 *citing* Financing Agreement, Ex. C, at § 2.2) To facilitate this intention, Platte County agreed to take certain administrative steps to ensure that its governing body, the County Commission, would be presented with the decision with whether to support the Zona Rosa Bonds, or to not support the Zona Rosa Bonds, each year. (SOF 39)

The administrative steps Platte County agreed to take are contained in Sections 2.2 and 2.3 of the Financing Agreement. (SOF 32, 35, 37, 39) Under § 2.3, Platte County promised that, each year, its Auditor would submit a proposed budget to the County Commission that budgets and appropriates for potential shortfall payments on the Zona Rosa Bonds. (SOF 37, 32) Under Missouri law, the County Commission must consider and approve an annual budget and appropriation order in January, the beginning of its fiscal year. (SOF 58-61) However, as a practical matter, it is impossible to know in January the exact amount of any revenue shortfall that will exist later that year, and there are no provisions in the Financing Agreement describing how to estimate the amount of any shortfall that might exist later in the year. (SOF 36) The solution contained in § 2.2 of the Financing Agreement was to define the "Appropriation Amount" to be the entire principal and interest to be paid on the Zona Rosa Bonds for that year. (SOF 32-34 *citing* Financing Agreement, Ex. C, at § 1.1). The Platte County Auditor has a contractual duty to propose the "Appropriation Amount" as part of the draft budget each year. (SOF 32, 37)

The decision whether to appropriate or to not appropriate the Appropriation Amount is made solely by the County Commission. (SOF 71, 64, 67, 72) *citing* Financing Agreement, Ex.

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C, at § 2.3). If the County Commission appropriates the full "Appropriation Amount," it enables itself to decide later in the year—once it receives a notice of a shortfall and its amount by the Bond Trustee—whether to make a voluntary payment to cover such shortfall. (SOF 71, 64, 67, 72) As detailed in Section II.A of this brief, an appropriation is merely a condition precedent to an eventual payment decision. (SOF 71, 64, 67, 72) An appropriation is not a decision or order to make payment, nor does it create any obligation or requirement to pay the amount appropriated. (SOF 71, 64, 67, 72); Financing Agreement, Ex. C, at §§ 2.2-.4. The decision whether to make payment is made later as part of the process for issuing a warrant.[2] (SOF 74-77) In contrast, if the County Commission decides not to appropriate for the Zona Rosa Bonds, it must provide notice of the non-appropriation within 15 days. (SOF 35) The County Commission is within its rights to not appropriate for the Zona Rosa Bonds because the Financing Agreement has no language requiring it to make an appropriation. (SOF 42-48)[3]

Ultimately, under the Financing Agreement, the only promises made by Platte County were to take certain administrative steps that would allow its governing body to decide each year whether to make a voluntary payment to cover any shortfall for the Zona Rosa Bonds. (SOF 31-39) Platte County never agreed to incur a general obligation (i.e., a pledge of payment from general tax revenue or assets) nor a revenue obligation (i.e., a pledge of payment of a dedicated source of revenue arising from the project). (SOF 42-48) The arrangement agreed to by Platte County provides a so-called "moral obligation," which assisted the Zona Rosa Retail Project

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[2] As detailed by Platte County Auditor Kevin Robinson, an exception to the warrant requirement exists for payroll budgets appropriated by the County Commission. County officeholders may make payroll expenditures without the need for a specific warrant from the County Commission. (SOF 78) *See, e.g.*, *City of St. Louis v. Smith*, 228 S.W.2d 780, 784 (Mo. banc 1950) ("[A]n appropriation is a legislative question that, if adopted, merely makes funds available for expenditure[.]").

[3] As detailed in Section V, this language does not exist in the Financing Agreement because it would render the agreement unconstitutional under Mo. Const. Art. VI, § 26(b).

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because credit rating agencies view this arrangement as enhancing the credit quality of the Development Authority's underlying debt. (Moody's Investor Service, Ex. L, at p. 7-8).

As explained in Section II.B, the only consequence to Platte County for not making a voluntary payment is the possibility of an adverse credit action against Platte County. Because there is no language in the Financing Agreement obligating Platte County to appropriate or make payments for the Zona Rosa Bonds, there is no breach associated with a decision by Platte County not to make a voluntary payment.

The provisions of § 2.4 of the Financing Agreement confirm that Platte County has no legal obligation to appropriate or make payments for the Zona Rosa Bonds. That provision states that the "Appropriation Amount" (i.e., the amount to be appropriated by Platte County) "shall not in any way be construed or interpreted as creating a liability or general obligation or debt of the County" in contravention of spending and debt limitations. (SOF 42-48) It states that the County's obligations are from "year to year only, and shall not constitute a mandatory payment obligation of the County in any ensuing Fiscal Year beyond the then current Fiscal Year." (SOF 42-48) For any fiscal year, whether an appropriation exists or not, § 2.4 confirms that "nothing contained herein constitute[s] a pledge of the general credit, tax revenues, funds or moneys of the County." (SOF 42-48)

C. Other Sources of Payment for the Zona Rosa Bonds

Beyond the dedicated revenue from the 1% sales tax in Zona Rosa, two other sources of payment exist for the Zona Rosa Bonds. First, under the Trust Indenture, the private developer-owner of Zona Rosa was required to post and maintain a $500,000 Letter of Credit for payment to the Bond Trustee. (SOF 50-53) The developer-owner signed a written Guaranty Agreement, under which it contractually guaranteed the Zona Rosa Bonds. (SOF 50-53) Second, the

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Development Authority established a Reserve Fund to be used for payment on the Zona Rosa Bonds and managed by the Bond Trustee. (SOF 54) As of December 3, 2018, the balance of the Reserve Fund is $3,030,920.38. (SOF 54-55) Neither of these payment sources come from Platte County tax revenues.

IV. Platte County has Fulfilled its Obligations under the Financing Agreement

Each year since October 1, 2007, Platte County has fulfilled its obligations under the Financing Agreement. Specifically, from 2008 through 2019, the Platte County Auditor has proposed a draft budget and appropriation request that would budget and appropriate the "Appropriation Amount." (SOF 79) These actions satisfied the administrative requirements contained in the Financing Agreement for Platte County, ensuring that the County Commission would be presented with the decision whether to appropriate or whether to not appropriate funds for a potential payment on the Zona Rosa Bonds. *See* Section II.B; SOF 32, 38-39.

From 2008 through 2018, the County Commission decided to adopt an annual budget and enter an appropriation order for the full amount of principal and interest on the Zona Rosa Bonds (i.e., the "Appropriation Amount"). (SOF 80) However, in January 2019, the County Commission exercised its lawful discretion and decided against budgeting or appropriating for any voluntary payment of a shortfall for the Zona Rosa Bonds. (SOF 116-17) The County Commission explained its non-appropriation decision in its 2019 approved budget: payments on the amount of shortfall would "require either a material reduction in core governmental services, primarily Public Safety, or doubling or tripling the County's real and personal property tax levies." (SOF 118) Consistent with § 2.2 of the Financing Agreement, Platte County notified the Bond Trustee of the non-appropriation decision within 15 days. (SOF 119, 35)

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Platte County has fulfilled every obligation it agreed to under the Financing Agreement. The County Commission did not issue a warrant in 2018 authorizing a payment to cover the revenue shortfall on the Zona Rosa Bonds, and there is no requirement that it do so under the Financing Agreement. (SOF 42-48) There is no language requiring Platte County to pay any amounts appropriated, directing it where any such payments should be made, or stating when they should occur. (SOF 42-48; Financing Agreement, Ex. C, at §§ 2.2-2.4) There is no language construing a non-payment by Platte County as a breach. *Id.* Platte County only agreed to *consider* making a voluntary payment to cover the shortfall, which is exactly what has occurred. (SOF 32)

Similarly, Platte County is within its rights to decide against budgeting or appropriating any funds for the Zona Rosa Bonds in 2019. There is no requirement that Platte County appropriate funds year after year under the Financing Agreement. (SOF 42-48) To the contrary, the Financing Agreement explicitly contemplates the possibility of a non-appropriation, requiring only that Platte County give notice if and when such an event occurs. (SOF 35) There is no language construing a non-appropriation as a breach. *Id.* Lastly, under the Financing Agreement, the "Appropriation Amount," only constitutes "currently budgeted expenditures of the County." (SOF 33-34) There are currently no budgeted expenditures that exist for a potential payment on the Zona Rosa Bonds. (SOF 113)[4] Platte County has complied with each of the obligations it agreed to under the Financing Agreement.

V. The Bond Trustee's Interpretation of the Financing Agreement is Unconstitutional

Platte County seeks declarations from this Court because the Bond Trustee has demanded that Platte County: (a) budget and appropriate year-after-year for the full amount of principal and

[4] By Order of this Court dated December 3, 2018, Platte County has held $765,390.95 as restricted funds within its reserve fund. However, these funds are not included in the County's 2018-2019 budget or appropriation orders for purposes of authorizing a potential voluntary payment on the Zona Rosa Bonds. (SOF 107-111)

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interest due on the Zona Rosa Bonds; and (b) upon demand, make payment to cover any revenue shortfall that exists in any given year. *See* Bond Trustee's Answer to Petition, Ex. F to SOF; *see* SOF 120). According to the Bond Trustee, the Financing Agreement contractually obligates Platte County to appropriate for and make payments on any revenue shortfall that exists for the Zona Rosa Bonds through 2032. *Id*.

A. The Financing Agreement Comports with the Constitution Because it Does Not Require Appropriations or Payments

The Bond Trustee's arguments are inconsistent with the provisions of the Financing Agreement. As detailed in Sections II and III, the Financing Agreement only requires Platte County to take certain administrative steps to ensure that the County Commission will be faced with the decision of whether to make a voluntary payment—a so-called "moral obligation" that enhances the credit rating of the bonds. (SOF 18 n. 4) The Zona Rosa Bonds are revenue bonds of the Development Authority—which the Bond Trustee admits (SOF 19-20)—that only require payment from the dedicated 1% sales tax in Zona Rosa imposed by Districts I and II. (SOF 26-30) *See Drey v. McNary*, 529 S.W.2d 403, 408-09 (Mo. banc 1975). (Revenue bonds "do not rely upon the general credit or tax money of the sovereign . . . ."). If the Court were to accept the Bond Trustee's construction of the Financing Agreement and impose a payment obligation on Platte County, it would convert its terms into a GO bond obligation that violates the Missouri Constitution.

As an initial matter, under Missouri law, the County Commission may lawfully decide to appropriate funds and make a *voluntary* payment to support third-party debt. This is recognized throughout Missouri caselaw, including decisions rejecting facial challenges asserted against similar financial arrangements. For example, in *Drury v. City of Cape Girardeau*, 66 S.W.3d 733 (Mo. banc 2002), the Supreme Court of Missouri rejected a facial challenged asserted by a

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plaintiff claiming that a local ordinance implementing a financing agreement was unconstitutional under Art. VI, § 26(b). *Id.* at 740. The Court found that "debt" only exists when there is:

> [A]n unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed.

Id. The Court found that the contract, "at this time, is purely executory. Its performance depends on actions by the city council . . . before any unconditional indebtedness arises." *Id.* A similar conclusion was reached in *Moschenross v. St. Louis County*, 188 S.W.3d 13 (Mo. App. E.D. 2006), in which the Court of Appeals ruled against a taxpayer asserting a facial challenge against a baseball stadium financing agreement. *Id.* The court found that the agreement did not create a present debt that was unconstitutional on its face because "the agreement in the present case was merely to request annual appropriations for repayment of the bonds, subject to the approval of the county council." *Id*. In each of these cases, the facial challenge failed because the municipality could lawfully decide to appropriate and make a payment without violating the constitution.

A different situation exists here because the Bond Trustee seeks to *require* Platte County to make payment on the Zona Rosa Bonds and *require* it take the predicate budgetary steps to do so (i.e., make an appropriation) every year. The Bond Trustee contends that Platte County has no choice whether to pay or to not pay. This construction would convert the provisions of the Financing Agreement into a mandatory obligation to pay the Development Authority's debt, an arrangement that has been found to violate the provisions of Article VI, § 26 of the Missouri Constitution. *See New Liberty Medical & Hospital Corp. v. E.F. Hutton & Co.*, 474 S.W.2d 1, 6 (Mo. banc 1971); *see also* Limitations on Indebtedness, 56 Am. Jur. 2d Municipal Corporations,

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§ 541 ("Any plan or scheme that has the effect of creating a burden against taxpayers, which it is the design of the constitutional provisions to prevent, is prohibited, no matter how the indebtedness is created."). Under Article VI, section 26(b), Platte County may not incur indebtedness without receiving taxpayer approval, which has not occurred here. Mo. Const. Art. VI, § 26(b) ("Any county . . . of the state, by vote of the qualified electors thereof voting thereon, may become indebted.").

As recognized by the Supreme Court of Missouri in *Scroggs v. Kansas City*, 499 S.W.2d 500 (Mo. 1973), to determine the existence of indebtedness, courts look to the source of funds that would supply the payment. *Id.* at 504-05. "'[I]f the state undertakes or agrees to provide any part of the fund from any general tax, be it excise or ad valorem, then securities issued upon the credit of the fund are likewise issued upon the credit of the state and are in truth debts of the state.'" *Id.* (quoting *State v. Martin*, 384 P.2d 833, 842-43 (Wash. 1963)). The Court quoted with approval the conclusion that "'[a]ny obligation which must in law be paid from any taxes levied generally is, we think, a debt of the state.'" *Id.* Based on this reasoning, the Court concluded that the "financial arrangements in this case represent another attempt to utilize 'lease financing' . . . as a way around debt limitations.' We do not criticize the attempt but we cannot approve it." *Id.* (ellipsis in original).

Other cases in Missouri confirm that the Bond Trustee's arguments would impose obligations that require taxpayer approval that was never obtained here. (SOF 42-48) *See, e.g.*, *Wunderlich v. City of St. Louis*, 511 S.W.2d 753, 756 (Mo. banc 1974) (finding that § 26(b) applied, and was satisfied, because while the "funding arrangement creates a present indebtedness" that "[i]s not contingent," it had received the required voter approval); *see also Spradlin v. City of Fulton*, 924 S.W.2d 259, 265 (Mo. banc 1996) ("Section 26(b) requires the

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voters of the city to approve the issuance of general obligation bonds that require a city-wide tax to meet the debt service before the city can collect it."). The failure to comply with the spending and debt limitations in the Missouri Constitution renders the purported obligation (as construed by the Bond Trustee) void. *See Scroggs* 499 S.W.2d at 504-05.

Many other states have similar spending and debt limitations for municipalities, and caselaw from those jurisdictions confirms that the "moral obligation" arrangement that exists here is not legally enforceable against Platte County. *See ACA Financial Guarantee Corporation & UMB Bank v. City of Buena Vista*, 298 F.Supp.3d 834, 848 (agreeing with the plaintiff that the "subject to appropriation" financing "created only an unenforceable 'moral obligation' to pay rent, rather than a legally binding debt.") *affirmed* 2019 WL 758292 (4th Cir. Feb. 21, 2019); *see also Wilson v. Kentucky Transp. Cabinet*, 884 S.W.2d 641, 644 (Ky. 1994) ("It is the bondholders who gamble that the lease will be renewed . . . Practical, moral or righteous claims do not pass the test of contract or constitutional law."); *Dykes v. Northern Virginia Transp. Dist. Comm'n*, 411 S.E.2d 1, 5 (Va. 1991) ("'Subject to appropriation' financing does not create constitutionally cognizable debt because it does not impose any enforceable duty or liability on the County."); *Halstead v. McHendry*, 566 P.2d 134, 138 (Okla. 1977) (constitutional debt limitation not violated because the provision "relates to legally enforceable obligations and not to moral obligations.").

In this case, the payment demanded by the Bond Trustee would constitute an unconditional, present indebtedness of Platte County taxpayers. Unlike the special revenue generated by the 1% sales tax in Zona Rosa—an arrangement that is permissible under Missouri law—the source of payment demanded by the Bond Trustee would come from the general tax revenues of Platte County. (SOF 110-12) According to the Bond Trustee, Platte County must pay

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the shortfall for 2018 and must appropriate and pay future shortfalls through 2032. (SOF 101) This is precisely the "pledge of the general credit, tax revenues, funds or moneys of the County" that the Financing Agreement expressly prohibited when it states that nothing "contained herein constitute[s] a pledge of the general credit, tax revenues, funds or moneys of the County." (SOF 42) Under *Scroggs*, *Wunderlich*, and *Spradlin*, the Bond Trustee's arguments would create the type of indebtedness that Mo. Const. Art. VI, § 26(b) specifically prohibits without prior taxpayer approval. The Bond Trustee's arguments would render the Financing Agreement unconstitutional and, therefore, void.

B. The Financing Agreement Comports with the Missouri Revised Statutes Because it Does Not Require Appropriations or Payments

The Bond Trustee's arguments, if accepted, would also violate the requirements of RSMo. § 50.660. Under § 50.660, "[n]o contract or order imposing any financial obligation on the county . . . is binding on the county . . . unless there is a balance otherwise unencumbered to the credit of the appropriation to which it is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made." The provision also requires the Platte County Auditor to certify on any such contract or order that these requirements have been satisfied. *Id.* For bonds, the provision can alternatively be satisfied by a certification from the Auditor that the bonds "have been authorized by vote of the people and that there is a sufficient unencumbered amount . . . of the taxes levied and yet to be collected to meet the obligation[.]" *Id.*

According to the Bond Trustee, Platte County is subject to a financial obligation to pay based on the Financing Agreement and its 2018 appropriation order. However, neither the Financing Agreement nor its appropriation order satisfies the requirements of § 50.660 such as to create a binding obligation. From 2008 to 2018, the County Commission has adopted budgets

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and issued appropriation orders for the Zona Rosa Bonds. (SOF 80) While these actions satisfy a necessary condition precedent to any voluntary payment, they do not actually create a cash balance in the Treasury to the credit of the Zona Rosa TDD Fund—i.e., the fund from which payment would be made. (SOF 69, 81-82, 84, 87) The County Commission must separately authorize the transfer of funds into the Zona Rosa TDD Fund, which is has never done. (SOF 69, 81-82, 84, 87) The Zona Rosa TDD Fund has always had a zero cash balance. (SOF 84) In fact, the Platte County budgets for 2008-2017 explicitly recognized that "[t]he Zona Rosa TDD appropriation will be funded by the sales tax generated within the District." (SOF 86 (clarifying the meaning of "Zona Rosa TDD (Appropriation Only).")

For the first time, in 2018, the Platte County Auditor included a proposed transfer into the Zona Rosa TDD Fund of $634,501.00 from the Reserve Fund. (SOF 86) This proposed transfer identified the manner by which the County Commission could decide to transfer a cash balance into the Zona Rosa TDD Fund for purposes of making a voluntary payment. (SOF 68-69, 82) However, the County Commission never approved a transfer of cash from the Reserve Fund to the Zona Rosa TDD Fund. (SOF 87) And to this day, there is not a cash balance in the Treasury credited to the Zona Rosa TDD that could be used for payment on the Zona Rosa Bonds. (SOF 82) The Platte County auditor has never certified otherwise, as required by § 50.660. The purported financial obligations asserted by the Bond Trustee fail to satisfy § 50.660 and, therefore, cannot be binding against Platte County as a matter of law.

C. The Bond Trustee's Defenses Are Insufficient as a Matter of Law

In its pleadings and papers, the Bond Trustee has asserted affirmative defenses it seeks to apply against Platte County to require it to appropriate and make payments to cover any shortfalls for the Zona Rosa Bonds through 2032. Specifically, the Bond Trustee asserts the

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doctrines of estoppel, laches, waiver, and unclean hands to challenge the declarations sought by arguing that Platte County is precluded from relying on the terms of the Financing Agreement and arguing that the Bond Trustee's position would render those terms unconstitutional. *See* Answer, Ex. F to SOF, at ¶¶ 71-72. In support of these asserted doctrines, the Bond Trustee contends that Platte County or its agents have: (a) benefited from the Zona Rosa Retail Project; (b) described the Zona Rosa TDD Fund in its budget documents as a fund "to guarantee the annual debt service payment on the [Zona Rosa Bonds] in the event revenues are not sufficient to meet debt service requirements; and (c) represented that its agreements did not violate any laws. *Id.*[5]

These affirmative defenses fail as a matter of law. In order to protect municipalities and their taxpayers, Missouri law provides that "all contracts with a municipal corporation must be in writing and all persons dealing with a municipal corporation are charged with notice of that law." *Gill Const., Inc. v. 18th & Vine Auth.*, 157 S.W.3d 699, 708 (Mo. App. W.D. 2004) (quotations omitted). This requirement is "mandatory, not directory," and operates to preclude a municipality from implicitly incurring liability based on actions outside of a written contract, including "liability either on the theory of ratification, estoppel, or implied contract." *Id.* (quotations omitted). These doctrines are inapplicable even if the municipality accepts benefits from the other party. *Id.*; *see also The Lamar Co. v. City of Columbia*, 512 S.W.3d 774, 793–94 (Mo. App. W.D. 2016) ("It is a long settled principle in Missouri that '[c]ities cannot be made liable,

[5] From a factual standpoint, theses affirmative defenses fail as a matter of law. Specifically, Platte County's has correctly asserted that the Financing Agreement does not violate any laws—it is only the Trustee's arguments that create a legal defect. *See* Section V.A. In addition, the question of whether Platte County benefited or did not benefit from the Zona Rosa Retail Project has no bearing on the County's obligations (or lack thereof) under a fully-integrated contract entered into by sophisticated parties. The same is true for the description of the "Zona Rosa TDD Fund," which despite referring to a "guarantee," does not and cannot supplant the express terms of the Financing Agreement that are in accordance with the Missouri Constitution and municipal finance laws.

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either on the theory of estoppel or implied contract, by reason of accepting and using [of] the benefits derived from void contracts.").

Here, the Bond Trustee has asserted affirmative defenses seeking to obligate Platte County to make payments on the Zona Rosa Bonds based on its alleged actions or the actions of its agents. As a matter of law, the doctrines of estoppel, laches, waiver and unclean hands cannot operate to create an obligation that did not exist under the express terms of the Financing Agreement. *See, e.g.*, *Gill Const., Inc.* 157 S.W.3d 699 (a municipality cannot incur liability under theories of ratification, estoppel, or implied contract because obligations must be contained in an express contract). This is especially the case here, where the Financing Agreement has a "merger" clause and "no amendment" clause rendering it the "entire agreement and understanding between the parties" that "may not be effectively amended, changed, modified, altered, or terminated" without express consent of the parties. (Financing Agreement, Ex. C to SOF, at §§ 6.6, 6.9) The parties to the Financing Agreement are sophisticated entities and are bound to its express terms. *ACA Financial Guaranty Corporation v. City of Buena Vista, Virginia,* No. 18-1268, 2019 WL 758292, at *7 (4th Cir. Feb. 21, 2019) ("ACA and the Bank are sophisticated commercial entities engaged in a multi-million dollar municipal finance transaction. They are to be bound by the plain and unambiguous terms of their contracts.").

The Bond Trustee also cannot apply these doctrines to render an unconstitutional contract enforceable. In Missouri, it is "legal policy that void municipal contracts cannot be enforced or remediated, on *any* theory, including equitable estoppel." *The Lamar Co.*, 512 S.W.3d at 793 (emphasis original). "[T]he public and those dealing with municipalities and their officers are charged with notice of their corporate powers and the authority of their officers and must govern themselves accordingly." *Id*. As detailed previously, the Financing Agreement is a permissible

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contract because it only imposes a non-legal "moral obligation" on Platte County. By construing the Financing Agreement to create a mandatory obligation to pay, the Bond Trustee would render it unconstitutional and unenforceable—an issue that cannot be estopped, waived, subject to laches, or unclean hands.

VI. A Declaratory Judgment is Warranted in Favor of Platte County

In its Petition, Platte County asserts two counts under the Declaratory Judgment Act, RSMo. §§ 527.010, *et seq.* (the "Act"), and asks for no damages. In Count I, Platte County seeks a declaration regarding its obligations under the Financing Agreement. *See* Petition, Ex. G to SOF, at pp. 10-11. In Count II, Platte County seeks a declaration that the Bond Trustee construction of the Financing Agreement would impose an obligation to pay on Platte County that is in violation of the Missouri Constitution. *Id.*, at pp. 11-12.

A justiciable controversy exists for these claims. Under RSMo. § 527.020, Platte County has standing to resolve the legal dispute regarding the terms of the Financing Agreement, and all necessary parties are currently before the Court. A real, substantial, and presently-existing controversy exists because the Bond Trustee has demanded that Platte County pay $765,390.95.00 in revenue shortfalls for the Zona Rosa Bonds in 2018. In addition, the Bond Trustee has demanded that Platte County appropriate funds and pay for any remaining shortfalls from 2019 through 2032. Platte County has a legally-protectable, pecuniary interest to which it does not have an adequate alternative remedy at law. The declarations sought in Count I and II of Platte County's Petition will fully and finally resolve the disputed legal issues.

Conclusion

The Court should enter each of the declarations sought in the County's Petition, Ex. G to SOF, at Paragraphs 46(a)(d) and 50(a)-(d).

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Respectfully Submitted,
/s Todd P. Graves

Todd P. Graves, MO #41319
Dane C. Martin, MO #63997
Jennifer Donnelli, MO #47755
GRAVES GARRETT LLC
1100 Main Street, Suite 2700
Kansas City, Missouri 64105
Tel: (816) 256-3181
Fax: (816) 256-5958
tgraves@gravesgarrett.com
dmartin@gravesgarrett.com
jdonnelli@gravesgarrett.com

Attorneys for Plaintiff Platte County, Missouri

CERTIFICATE OF SERVICE

This certifies that, on March 15, 2019, the foregoing was served via the Court's Electronic Case Filing System on the following:

Joseph Bednar
Spencer Fane LLP
304 East High Street
Jefferson City, MO 65101
Attorneys for Defendant UMB Bank, N.A.,
the Trustee of the Transportation Refunding
and Improvement Bonds (Zona Rosa Retail Project) Series 2007

/s *Todd P. Graves*
Attorney for Plaintiff