



**CITY OF ST. LOUIS
LAW DEPARTMENT**

**SHEENA HAMILTON
CITY COUNSELOR**

**1200 MARKET STREET, ROOM 314
ST. LOUIS, MO 63103-2864
(314) 622-3361**

**TISHAURA O. JONES
MAYOR**

CONFIDENTIAL AND ATTORNEY-CLIENT PRIVILEGED¹

May 23, 2023

Megan E. Green, Board of Aldermen President
City Hall, Room 230
1200 Market Street
Saint Louis, Missouri 63103

RE: BB29 and Open Carrying of Firearms

President Green,

Your office requested a legal opinion on whether BB29 is consistent with other applicable laws. I have examined facts and law in connection with rendering this Opinion, and I am of the opinion that, although many of the provision of BB29 are likely to be upheld by a Missouri court, the confiscation penalty is in conflict with Missouri state forfeiture law. For that reason, I recommended that the confiscation penalty be removed by amendment and that the bill be edited to take into account all types of valid Missouri concealed carry permits.

With respect to the confiscation penalty, a plaintiff could argue that it violates gun rights protected by the Second Amendment of the United States Constitution; Article I, Section 23 of the Missouri Constitutions; and at least one Missouri statute, Section 21.750. In terms of the Second Amendment, the United States Supreme Court has dramatically broadened gun protections in its most recent decisions and appears willing to strike down many common gun regulations that are more restrictive than the laws at the time of the Second Amendment's ratification. Gun permit requirements in general are at risk of being overturned based on this legal-historical test, but exactly how far or how fast courts will move on these issues is unknown. Based on the most recent case interpreting the current version of the Missouri Constitution's right to bear arms, the Missouri Constitution is more favorable to restrictions than the Second Amendment. Meanwhile, Missouri's statutory scheme, which preempts most local gun regulations, appears to allow the City to regulate open carry, but not confiscation.

¹ I provide this Opinion pursuant to Article X, Section 2 of the City of St. Louis Charter and in connection with your official role as President of the Board of Aldermen. The advice and privilege over the advice belong to the City. Waiver of attorney-client privilege is a legal matter. In my view, sharing this advice could open the City to legal risk.

I. The Text of BB29

BB29 states in Section One:

A person commits the ordinance violation of unlawful display of a weapon if he or she knowingly openly carries or displays a firearm readily capable of lethal use within the City of St. Louis unless the person possesses a valid Missouri concealed carry endorsement issued prior to August 28, 2013, a valid Missouri concealed carry permit issued pursuant to RSMo 571.101 to 571.121, or a valid concealed carry endorsement or permit issued by another state or political subdivision of another state that is recognized by the State of Missouri and displays the concealed carry endorsement or permit upon demand of a law enforcement officer except as provided in Subsection B of this Section.

It then states that Section One does not apply to certain situations. These situations are exceptions to the statute prohibiting unlawful use of weapons, 571.030, such as use of weapons by law enforcement officers. The penalty provisions are in Section Two of BB29:

- A. A violation of the provisions of this Ordinance may be punished by a fine of not less than \$500.00, period of incarceration not to exceed thirty (30) days, or both such fine and period of incarceration.
- B. Upon conviction of a violation of this Ordinance, in addition to the penalties provided for in Subsection A of this Section, the court may order the confiscation and disposal, or the sale or trade of firearms and ammunition found in the possession or immediate control of the defendant at the time of their arrest to a licensed firearms dealer of firearms and ammunition. The proceeds from any sale or gains from any trade shall be the property of the police department or sheriff's department responsible for the defendant's arrest or the confiscation of the firearm and ammunition. If any such firearms or ammunition are not the property of the defendant, they shall be returned to their rightful owner upon the rightful owner's completing of an affidavit using the standard form promulgated by the St. Louis Metropolitan Police Department.
- C. Subsections A and B of this Section Two shall not apply under the following circumstances: 1. A person who holds a valid Missouri concealed carry endorsement issued prior to August 28, 2013, a valid Missouri concealed carry permit issued pursuant to RSMo 571.101 to 571.121, or a valid concealed carry endorsement or permit issued by another state or political subdivision of another state that is recognized by the State of Missouri who openly carries a firearm readily capable of lethal use without having their concealed carry endorsement or permit in their possession, in which circumstances they may be punished by a fine of not more than \$35.00.
- D. A person who holds a valid Missouri concealed carry endorsement issued prior to August 28, 2013, a valid Missouri concealed carry permit issued pursuant to RSMo 571.101 to 571.121, or a valid concealed carry endorsement or permit issued by

another state or political subdivision of another state that is recognized by the State of Missouri who openly carries a firearm readily capable of lethal use who fails to display their concealed carry [sp] permit of endorsement upon demand of a law enforcement officer, in which circumstances they may be punished by a fine of not more than \$35.00.

Kansas City has an “unlawful use of weapons” ordinance that has similar provisions. It lists several types of violations that track state statutes and it prohibits open carrying without having a valid concealed carry permit in one’s possession or failing to display the permit upon demand.² The Kansas City ordinance imposes up to a \$1000 fine and jail time for a violation, but it provides exceptions to those penalties. For “a person holding a valid concealed carry ... permit” who openly carries without having the permit in possession, the fine is only \$35. As discussed below, this is to conform to Section 21.750 of the Revised Statutes. Likewise, there is only a \$35 fine for a person who fails to display “his or her valid ... permit” upon demand of a law enforcement officer while openly carrying. Notably, Kansas City’s ordinance does not contain the confiscation provision that in BB29.

II. Legal Analysis

a. Second Amendment

Over the last 15 years, the United States Supreme Court has substantially shifted the case law on the Second Amendment by requiring an originalist interpretation of that Amendment. In Heller v. District of Columbia, 128 S. Ct. 2873 (2008), the Court struck down an ordinance in the District of Columbia that essentially prohibited gun possession in the District. The Court believed the Second Amendment was intended to protect an individual’s right to have firearms for the purpose of self-defense, and the District’s law clearly violated that right. However, the Court stated as follows:

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”

Id. According to the Court, such restrictions are “presumptively lawful regulatory measures,” and the list is not exhaustive. Id. At the time that Heller was decided, courts believed the Second Amendment did not apply to state regulation. Two years after Heller, the Supreme Court extended the Second Amendment’s application to the states by virtue of the Fourteenth Amendment’s Due Process Clause. McDonald v. City of Chicago, Ill., 561 U.S. 742, 791 (2010).

Last year, the United States Supreme Court declared unconstitutional under the Second Amendment a New York statute making it a crime to possess a firearm without a license, whether inside or outside the home. New York State Rifle & Pistol Ass’n. Inc. v. Bruen, 142 S. Ct. 2111 (2022). Under the New York statute, an individual who wanted to carry a firearm outside his home

² See Kansas City Code § 50-261.

could only obtain an unrestricted license to "have and carry" a concealed "pistol or revolver" if he could prove that "proper cause exists" for doing so. An applicant satisfied the "proper cause" requirement only if he could "demonstrate a special need for self-protection distinguishable from that of the general community." The Court found this requirement was unconstitutional, because it did not comport with gun owners' rights at the time of the Second Amendment's ratification. The Court explicitly rejected using "means-ends" tests, such as strict scrutiny or intermediate scrutiny standards that focused on a compelling or important governmental interest, to decide what the Second Amendment protects.

In keeping with Heller, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command. If the government can prove that the regulated conduct falls beyond the Amendment's original scope, then the analysis can stop there; the regulated activity is categorically unprotected. But if the historical evidence at this step is inconclusive or suggests that the regulated activity is *not* categorically unprotected, the courts generally proceed to step two.

Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late-19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense. We conclude that respondents have failed to meet their burden to identify an American tradition justifying New York's proper-cause requirement. Under Heller's text-and-history standard, the proper-cause requirement is therefore unconstitutional.

Bruen, 142 S. Ct. at 2138 (internal citations and quotation marks omitted).

The Court in Bruen recognized that many courts going back to Reconstruction have upheld open carry and concealed carry laws, including permit requirements, against Second Amendment challenges. The Bruen Court said the tests used in many of those cases were flawed, and many of them relied upon the existence of laws in the late 19th century or after, which may not be relevant to what the Second Amendment protected when it was ratified in 1791. In summarizing the state of the law in 1791, the Bruen Court said that:

historical evidence from antebellum America does demonstrate that *the manner of* public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others.

.... States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.

Bruen, 142 S. Ct. 2111 at 2150.

These cases make clear that the constitutionality of a given restriction under the Second Amendment will depend not only on a specific regulation at issue, but also on how the regulation interacts with other laws affecting the challenger's right to bear arms. Specifically, the Court will compare how the rights and restrictions applicable to a challenger compare to the rights and restrictions of a gun owner or possessor in the late 18th and early 19th centuries. It bears noting that, in Bruen, the court found there were broad protections for public carrying of firearms at the time of the founding of the country, unless the possessor was causing an "affray" or carrying the weapon in a manner to terrorize the public. While others dispute the Supreme Court's historical evidence, it is safe to say that many gun restrictions that have been viewed as moderate or constitutional in the past—like the regulation of open carrying—are at risk if challenged. See Fraser v. Bureau of Alcohol, Tobacco, Firearms and Explosives, No. 3:22-CV-410, 2023 WL 3355339 (E.D. Va. May 10, 2023) (applying Heller and Bruen and holding that prohibition on persons 18 to 20 years old from buying firearms violated Second Amendment).

b. Missouri Constitution

Article I, Section 23 of the Missouri Constitution provides:

That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.

It is not clear if the Missouri right to bear arms was intended to be synonymous in scope and protection with the Second Amendment. As Second Amendment protections broaden, the Missouri right to bear arms may become irrelevant, but Missouri case law is currently helpful. The Missouri Supreme Court in 2015 stated that the Missouri right to bear arms was not violated by concealed carry restrictions. Dotson v. Kander, 464 S.W.3d 190, 198–99 (Mo. 2015). It cited as support a statement in Heller recognizing that "historically, the Second Amendment has not prohibited states from regulating concealed weapons." The Dotson case was before the stricter analysis imposed in Bruen.

More recently, the Missouri Court of Appeals applied the strict scrutiny test mandated by the Missouri Constitution to a University of Missouri system rule prohibiting the possession of firearms in the vehicles of University employees on campus. State ex rel. Schmitt v. Choi, 627 S.W.3d 1 (Mo. Ct. App. 2021). To survive strict scrutiny, the regulation must serve a compelling

governmental interest and be narrowly tailored to achieve such interest, i.e., a means-end test that the United States Supreme Court held invalid for the Second Amendment. The Missouri Court of Appeals said the University system's rule was narrowly tailored to achieve a compelling governmental interest of promoting safety and reducing crime, and thus the rule survived strict scrutiny, where the University system's statistical expert and two police chiefs testified about the link between increases in violent crime and the numbers of firearms on campus and expanded right to carry laws. Although it did not violate the Missouri Constitution, the Choi Court said the University system rule was preempted by statute.

The strict scrutiny standard in the Missouri Constitution allows room for regulation of open carry of firearms so long as it is narrowly tailored to promote a compelling governmental interest. It appears that statistical and expert evidence like that presented in the Choi case could support the validity of BB29, especially if open carrying of weapons is linked to escalation of conflicts and homicide rates.

c. The Majority of BB29 Is Not Preempted by Section 21.750, however the Confiscation Provision Is Preempted by the Criminal Activities Forfeiture Act.

Local ordinances that conflict with state statutes are preempted as a matter of law. Zang v. City of St. Charles, 659 S.W.3d 327 (Mo. 2023). While most of BB29 is drafted to avoid preemption concerns, the confiscation penalty presents preemption problems and should be removed by amendment to the board bill. Also, the bill should be edited to accurately reflect the multiple types of concealed carry permits issued in Missouri.

The preemption analysis required by BB29 is complex due to the intersection and cross-referencing of statutes that were adopted over time with different purposes and wording. Section 21.750 of the Revised Statutes contains a "field preemption" statement on gun regulation by the Missouri Legislature but then makes express exceptions for local ordinances that mirror state gun offenses and ordinances regulating open carrying of firearms. Section 21.750 states:

1. The general assembly hereby occupies and preempts the entire field of legislation touching in any way firearms, components, ammunition and supplies to the complete exclusion of any order, ordinance or regulation by any political subdivision of this state. Any existing or future orders, ordinances or regulations in this field are hereby and shall be null and void except as provided in subsection 3 of this section.

2. No county, city, town, village, municipality, or other political subdivision of this state shall adopt any order, ordinance or regulation concerning in any way the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permit, registration, taxation other than sales and compensating use taxes or other controls on firearms, components, ammunition, and supplies except as provided in subsection 3 of this section.

- 3.

(1) Except as provided in subdivision (2) of this subsection, nothing contained in this section shall prohibit any ordinance of any political subdivision which conforms exactly with any of the provisions of sections 571.010 to 571.070 [laws on weapons charges], with appropriate penalty provisions, or which regulates the open carrying of firearms readily capable of lethal use or the discharge of firearms within a jurisdiction, provided such ordinance complies with the provisions of section 252.243. No ordinance shall be construed to preclude the use of a firearm in the defense of person or property, subject to the provisions of chapter 563.

(2) In any jurisdiction in which the open carrying of firearms is prohibited by ordinance, the open carrying of firearms shall not be prohibited in accordance with the following:

(a) Any person with a valid concealed carry endorsement or permit who is open carrying a firearm shall be required to have a valid concealed carry endorsement or permit from this state, or a permit from another state that is recognized by this state, in his or her possession at all times;

(b) Any person open carrying a firearm in such jurisdiction shall display his or her concealed carry endorsement or permit upon demand of a law enforcement officer;

(c) In the absence of any reasonable and articulable suspicion of criminal activity, no person carrying a concealed or unconcealed firearm shall be disarmed or physically restrained by a law enforcement officer unless under arrest; and

(d) Any person who violates this subdivision shall be subject to the penalty provided in section 571.121.

Section 571.121 says:

Any person issued a concealed carry permit pursuant to sections 571.101 to 571.121, or a concealed carry endorsement issued prior to August 28, 2013, shall carry the concealed carry permit or endorsement at all times the person is carrying a concealed firearm and shall display the concealed carry permit and a state or federal government-issued photo identification or the endorsement or permit upon the request of any peace officer. Failure to comply with this subsection shall not be a criminal offense but the concealed carry permit or endorsement holder may be issued a citation for an amount not to exceed thirty-five dollars.

The latter statute was adopted when permits were *required* for concealed carry of firearms in Missouri, which is no longer the case (although they are available). As such, an argument may be made that the confiscation penalty and the fine and incarceration penalties in BB29 exceed what is allowed under 21.750 and by reference 571.121. However, a careful reading shows that those

statutes do not limit the City to imposing a \$35 fine for all open carry violations. The City should apply that low fine for concealed carry permit holders to prevent any argument of preemption, but the statutory scheme shows that the City may treat non-permittees differently.

Ordinances are presumed to be valid and lawful, and a party challenging the validity of an ordinance has the burden of proving the City has exceeded its constitutional or statutory authority. Zang v. City of St. Charles, 659 S.W.3d 327, 331 (Mo. 2023); Coop. Home Care, Inc. v. City of St. Louis, 514 S.W.3d 571, 578 (Mo. banc 2017). An ordinance is invalid if it is in conflict with state statutes. There are different ways that a statute may preempt local law.

Preemption may be either express or implied. Express preemption occurs when the legislature explicitly proscribed local regulation in a specific area. On the other hand, [i]mplied preemption can occur in either of two ways—through ‘conflict’ preemption or through field preemption. Conflict preemption occurs when “the [local law] permits what the statute prohibits or prohibits what the statute permits. Notably, there is no conflict if the local law merely enlarges or supplements the state law, such as when the locality prohibits more than the state prohibits. Additionally, field preemption occurs when the General Assembly has created a state regulatory scheme that is so comprehensive that it reasonably can be inferred that the General Assembly intended to occupy the legislative field, leaving no room for local supplementation.

Zang, 659 S.W.3d at 332 (internal citations and quotation marks omitted). Local laws may be more restrictive than statewide laws, so long as a “municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required[.]” Id., 659 S.W.3d at 335.

With the possible exception of the confiscation remedy that is discussed separately below, the City has a good argument that BB29 is within the bounds allowed by the Legislature in 21.750. The latter statute preempts the field of regulation of purchasing, registering, and carrying of weapons in the state, but it also carves out certain exceptions where local governments may regulate. As the statute expressly states, “nothing contained in ... [Section 21.750.3] prohibits any ordinance, which regulates the open carrying of firearms..., provided such ordinance complies with the provision of section 252.243” (not applicable here)³ and “[e]xcept as provided in subdivision (2).” Subdivision (2) says if local governments prohibiting open carry by ordinance cannot prohibit open carrying by those who have valid concealed carry permits. Thus, Section 21.750.3 expressly leaves room for local regulation or bans of open carrying for any person other than a “person with a valid concealed carry ... permit.” Subdivision (2) does not address the situation where someone possesses a gun and does not have a valid concealed carry permit. Since Subdivision (2) addresses permittees, its reference to 571.121 is applicable only to permittees. In short, subdivision (2) limits local governments to a slap on the wrist for permit holders who fail to carry in their possession or display their permits, just as the law provided when concealed carry permits were required

³ The relevant portion of Section 252.243 provides, “[t]he discharge of firearms for lawful hunting, sporting, target shooting, and all other lawful purposes shall not be prohibited in hunting heritage protection areas, subject to all applicable state and federal laws, and local ordinances prohibiting hunting or the discharge of firearms adopted before August 28, 2007.”

statewide. Subdivision (2) does not specify or limit the applicable penalty for open carrying by those who lack a permit altogether. The latter group is not entitled to the same rights as those who get the permit but accidentally leave it in the car or at home.

By the same reasoning, the City would argue it has room under Section 21.750 to enforce its open carry ban on non-permittees by confiscating weapons. While that argument may be valid, the confiscation provision presents other legal problems. First, it is possible that a challenger would contend that confiscation of a firearm under a local ordinance is only permitted in the situations where state law provides for a similar penalty. A statute says a court may confiscate a weapon that is used in a felony or attempted felony. RSMo. § 571.095. In response, the City would point out that under preemption principles a local government may adopt ordinances that are stricter than state law, as long as it does not violate the state's statutory scheme. If local governments may ban open carry for non-permittees under the express provisions of 21.750, then using confiscation is reasonably within that reserved authority.

However, even if Section 571.095 does not render the confiscation penalty invalid through conflict preemption, the confiscation penalty is in conflict with the Criminal Activities Forfeiture Act found at RSMo 513.600, et seq. Section 513.610 provides that "[a]ll property of every kind, including cash or other negotiable instruments, used or intended for use in the course of, derived from, or realized through criminal activity is subject to civil forfeiture. Civil forfeiture shall be had by a civil procedure known as a CAFA forfeiture proceeding." CAFA defines criminal activity to include certain offenses, including weapons offenses under Missouri statutes.

In a CAFA proceeding, the State must file a petition which sets forth: (1) the property sought to be forfeited; (2) that the property sought to be forfeited is within the jurisdiction of the court; (3) the grounds for forfeiture; (4) the names of all known persons having or claiming an interest in the property; and (5) the date and place the property was seized. The burden of proving each of these elements is upon the investigative agency. § 513.607.6(2). Missouri disfavors forfeitures, and such actions are only undertaken if they advance the letter and spirit of the law.

State v. Geist, 556 S.W.3d 117, 121–22 (Mo. Ct. App. 2018) (internal citations and quotation marks omitted). The notice and other procedural requirements of this Act are strict, and the Act specifies the allowed disposition of the forfeited property. It appears that CAFA and 571.095 are a comprehensive scheme for forfeiture. The confiscation provision in BB29 appears to allow what state law prohibits, which is the confiscation of weapons for different violations than under CAFA and without all of the process required in a CAFA proceeding.

Probably due to the CAFA, the Missouri Supreme Court rules applicable to ordinance violations do not discuss forfeiture (other than forfeiture of a bond) or confiscation as a penalty. See Missouri Supreme Court Rule 37.65 (imposing fines, fees, costs, and a sentence of incarceration). It is further noted that the Revised Code of the City does not provide for confiscation as a penalty in any situation except for dangerous animals. Although the animal control statutes provide an example on paper of a confiscation process, it apparently is rarely used by the City. Unlike the gun regulation area, state statutes do not discourage local regulation on animal control, and public health local ordinances on animal control, including euthanasia of dangerous or abandoned animals, have a long history. See Pro. Houndsmen of Missouri, Inc. v. Cnty. of Boone, 836 S.W.2d

17, 19 (Mo. Ct. App. 1992) (upholding dangerous animal ordinance that included authority to euthanize animal in some cases; ordinance was not preempted by statute and did not violate due process); 56 A.L.R.2d 1024 (explaining that traditionally the destruction of animals under public health ordinances has been upheld and animals were not viewed as property subject to significant due process requirements).

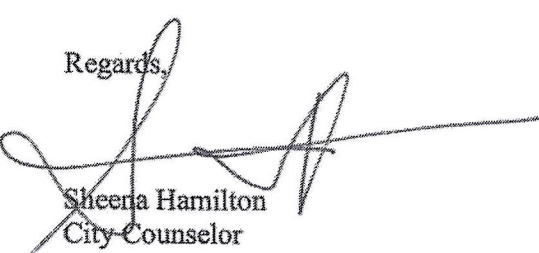
If a court concluded that the confiscation penalty in BB29 is invalid due to preemption by statute, such a ruling likely would not affect the enforcement of the remainder of the ordinance. When an ordinance's provision is found to be invalid, the Court will not declare the entire ordinance void unless it determines that the municipality would not have enacted the ordinance without the invalid portion. City of St. Peters v. Roeder, 466 S.W.3d 538, 547 (Mo. 2015). The remainder of BB29 is likely to stand on its own. There is no indication in the ordinance that all of the provisions are intended to stand or fall together, and, in fact, a severability clause is housed in the proposed bill.

It is recommended that the confiscation penalty be eliminated by amendment. Further, there is a drafting issue that could cause an unintended consequence. BB29 seeks to treat permittees differently than non-permittees, but it only references Missouri permits issued under RSMo § 571.101 to 571.121, which are five-year concealed carry permits. The language in BB29 replicates language in the Kansas City ordinance. Missouri law also provides for extended and lifetime concealed permits under RSMo § 571.205-230. BB29 should reflect those as well to be in conformance with 21.750, which references any valid Missouri concealed permit.

III. Conclusion

While there is the possibility that BB29 would be struck down in a Second Amendment challenge under the holdings of recent Supreme Court cases, the Supreme Court has not struck down regulations of the type at issue here yet, which are fairly common. The Missouri Constitution appears to be no more restrictive on gun regulation than the Second Amendment at this time. Section 21.750 prohibits most local regulation on guns, but most of BB29 is drafted to regulate open carry in a manner permitted by that statute. An exception is the confiscation provision, which is subject to challenge as being in conflict with state law on civil forfeiture of property based on criminal activities. Also, the description of valid permits should be amended to include those issued pursuant to RSMo § 571.205-230 to prevent an argument that the ordinance is in conflict with the scheme set forth in 21.750.

Regards,



Sheena Hamilton
City Counselor