

**IN THE  
MISSOURI SUPREME COURT**

**No. SC91454**

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**MIKE WEBBER, et al.,  
Plaintiffs/Appellants,**

**v.**

**ST. LOUIS COUNTY, MISSOURI, et al.,  
Defendants/Respondents**

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**SUBSTITUTE JOINT RESPONSE BRIEF OF RESPONDENT HAULERS**

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## STATEMENT OF FACTS

### A. Enactment of Waste Disposal Program.

In 2006, St. Louis County made various changes to its waste code. L.F. at 292. St. Louis County had several strong public policy justifications for the changes. First, the County wanted “to keep waste hauling rates low by prolonging the lifespan of [St. Louis County’s] existing landfills” and, second, “to respond to citizen complaints about trash and too many garbage trucks driving through unincorporated county neighborhoods.” L.F. at 292. Finally, St. Louis County also wanted to increase recycling. L.F. at 292.

Accordingly, in December 2006, the St. Louis County Council enacted Sections 607.1300 and 607.1310 SLCRO, which authorized the St. Louis County Executive to “establish areas within the unincorporated County for the collection and transfer of waste and recovered materials” (the “Program”). L.F. at 146. The Program resulted in eight areas determined after consideration of factors including size, compactness, road system and other relevant considerations for trash collection (the “Areas”). L.F. at 146. Subsequent amendments to 607.1310 provided for (among other things) discounts for senior citizens, a customer service center, and accommodations for disabled customers. L.F. at 281-82. Each of these benefits and services were to be provided by the trash haulers that were selected to provide the waste removal services.

The Program provided for a bidding process open to all trash haulers. The purpose of the bidding process was to identify and assign the lowest responsible bidder as the exclusive trash hauler for a given Area. L.F. at 146. Providing residents in each Area a single trash hauler addressed the public policy concerns regarding hauling rates, trash

accumulation, and the numerous large garbage trucks driving through St. Louis County neighborhoods.

As a result of the bidding process, Respondent IESI (“IESI”) was assigned three Areas, Respondent Veolia ES Solid Waste Midwest, LLC (“Veolia”) was assigned three Areas, and Respondent Allied Services, LLC (“Allied”) was assigned two Areas (hereinafter IESI, Veolia, and Allied are referred to as the “Respondent Haulers”). L.F. at 30-32. Services under the Program began in late 2008. L.F. at 299. The “trash hauling rates . . . are set by the [Respondent Haulers. St. Louis County] does not set, regulate, or monitor trash rates”, unless it is alleged that such rates are unreasonably high. L.F. at 293. In addition, the Respondent Haulers collect payment for their services directly from their customers/residents – not St. Louis County.

St. Louis County contracted with the Respondent Haulers between June and August of 2008. Br. of Appellant at 4. Appellants then waited over a year after the contracts were entered into and almost three years after the first ordinances of the Program were enacted before seeking to invalidate the program via Petition filed on September 11, 2009. Br. of Appellant at 7; L.F. at 1.

**B. State Law Protecting Trash Haulers.**

In May 2007, after St. Louis County authorized the Program, and during the period of its initiation, the Missouri General Assembly enacted a law requiring that counties provide two-year notice to existing haulers of any decision to provide for solid waste collection services in areas serviced by those haulers. *See* Section 260.247, RSMo. (2007). Section 260.247 RSMo. became effective on January 1, 2008. The purpose of

the two-year notice provision “‘is to provide an entity engaged in waste collecting with sufficient notice to make necessary business adjustments prior to having its services terminated in a given area.’” *State ex rel. American Eagle Waste Industries v. St. Louis County*, 272 S.W.3d 336, 342 (Mo.App. 2008) (citation omitted). None of the three named Plaintiffs/Appellants in this case are alleged to be engaged in the business of waste collection. L.F. at 24-39.

**C. Appellants’ Class Action Lawsuit and Dismissal.**

On September 11, 2009, Plaintiffs/Appellants Paul Marquis and Cathy Armbruster filed their class action petition in the Circuit Court for St. Louis County. L.F. at 1. On December 10, 2009, they filed an amended petition, adding Mike Weber as a named plaintiff (the “Amended Petition”). L.F. at 24. The Amended Petition named each of the Respondent Haulers and Respondent St. Louis County as defendants. L.F. at 24.

The theory underlying each of the Amended Petition’s four counts is articulated in Count 1, which sought a declaratory judgment that the ordinances establishing the Program were illegal and void *ab initio*. Count 2 (“Money Had and Received”) and Count 4 (“Unjust Enrichment”) alleged that the Appellants were entitled to a refund of the monies paid for collection services to the Respondent Haulers. Count 3 alleged that the Respondents violated the Missouri Merchandising Practices Act. L.F. at 24-49.

**D. Motions to Dismiss.**

The Respondent Haulers filed a Joint Motion to Dismiss Appellants’ Class Action Petition and a supporting memorandum (the “Motion to Dismiss”). L.F. at 7-23. Respondent St. Louis County filed a separate Motion to Dismiss. L.F. at 6. In their

Motion to Dismiss, the Respondent Haulers asserted that Count 1 should be dismissed because Appellants lack standing to challenge St. Louis County's compliance with Section 260.247's two-year notice requirement, insofar as that provision protects trash haulers, not consumers. The motion also explained that Count I was defective because, contrary to Appellants' assertion, the voting requirements set forth in Article II, Section 24 of the St. Louis County Charter were inapplicable to the implementation of the Program. As such, no voter approval was required to enact the ordinances at issue.

Because Counts 2 through 4 were derivative of Count 1's claim that the ordinances were illegal and void *ab initio*, the Motion to Dismiss noted that it followed that those claims must also fail. Moreover, the Motion pointed out that there were no allegations in the Amended Petition suggesting that the Appellants did not receive the services the Respondent Haulers were required to provide under the Program. Nor did the Amended Petition allege that the Appellants had paid for such services by inadvertent mistake. As such, Count 2 (Money Had and Received) and Count 4 (Unjust Enrichment) failed to state a claim on those grounds as well. The Motion to Dismiss also stated that Appellants failed to state a claim under the MMPA because: (1) they failed to identify an actionable loss; (2) they failed to allege that they were actually deceived by a violation of

the MMPA; and (3) their claim was barred by the voluntary payment doctrine.<sup>1</sup> L.F. at 7-23. Respondent St. Louis County also asserted that Appellants' Amended Petition must fail for mootness and laches. L.F. at 6.

**E. Trial Court Order.**

The Trial Court heard argument on both the Respondent Haulers' Motion to Dismiss and Respondent St. Louis County's Motion to Dismiss on December 11, 2009. On January 5, 2010, the Trial Court, without opinion, dismissed with prejudice the Amended Petition's four counts against all four Defendants/Respondents. L.F. at 355.

**STANDARD OF REVIEW**

The Trial Court dismissed Appellants' Amended Petition, without opinion, on January 5, 2010. L.F. at 355. "If a trial court fails to state a basis for its dismissal, this Court presumes the dismissal was based on the grounds stated in the motion to dismiss ... [and t]his Court must affirm the dismissal if it can be sustained on any ground supported by the motion to dismiss." *Lueckenotte v. Lueckenotte*, 34 S.W.3d 387, 391 (Mo. banc 2001). Review on each of the reasons offered in the motion to dismiss is *de novo*, but this Court should affirm the Trial Court's Order and Judgment if any basis for granting the motion exists. *Id.*

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<sup>1</sup> The Motion to Dismiss also sought Respondent IESI's dismissal on the basis that the original petition failed to include a named plaintiff that was a customer of IESI. L.F. at 21. This issue was rendered moot by the Amended Petition, which added plaintiff Mike Weber, an alleged IESI customer. L.F. at 28.

As set forth in Respondents’ Motions to Dismiss, the Trial Court correctly dismissed Appellants’ Amended Petition because (1) no voter approval was required for the Program, L.F. at 13-15; (2) Appellants lack standing to assert claims under Section 260.247, RSMo., L.F. at 11-12; (3) the claims are moot, L.F. at 6; and (4) the claims are barred by laches, L.F. at 6. If this Court agrees that any of these legal arguments were sufficient to dismiss Count 1 of Appellants’ Amended Petition, this Court should affirm the Trial Court’s dismissal of Count 1. Further, Counts 2, 3 and 4, should be dismissed as they are derivative of Count 1. In addition and in the alternative, this Court should affirm the Trial Court’s dismissal of Counts 2, 3 and 4 because, for the reasons set forth below, dismissal of those Counts was proper regardless of whether or not Count 1 was dismissed.

**I. The Trial Court did not err in dismissing Count 1 of the Amended Petition, because Section 2.180.24 of the St. Louis County Charter does not apply and no voter approval was required for the implementation of the Program.**

The Trial Court correctly dismissed Count 1 of Appellants’ Amended Petition because no voter approval was required for implementation of the Program. St. Louis County’s authority to provide for the collection of waste by Council authorization alone is beyond dispute. Section 2.180 of the St. Louis County Charter specifically provides that “the council shall have, by ordinance, the power to . . . 11. Collect and dispose of . . . garbage and refuse, or license and regulate such collection and disposal.” App. at A-3. Missouri courts have recognized that St. Louis County’s Charter “gives the St. Louis County Council power to license and regulate the collection and disposal of solid waste

by enacting ordinances.” *F.W. Disposal South LLC v. St. Louis County*, 168 S.W.3d 607, 609 (Mo. App. E.D. 2005). In fact, it has already been recognized that Section 2.180.11 provides St. Louis County with the power to create the Areas without voter approval. *See State ex rel. American Eagle Waste Industries v. St. Louis County*, 272 S.W.3d 336, 343 n.7 (Mo. App. E.D. 2008).

Additionally, Section 2.180.22 of the Charter empowers St. Louis County by ordinance - without requiring a popular vote - to “[f]urnish or provide within the part of the county outside incorporated cities any service or function of any municipality . . . .” App. at A-5. Missouri law from this Court is well-established that the collection of trash is a municipal function. *See Valley Spring Hog Ranch Co. v. Plagmann*, 220 S.W. 1 (Mo. banc 1920) (noting that cities have broad authority under their police power to act on behalf of the public health by regulating garbage collection); *see also State ex rel. City of Macon v. Belt*, 561 S.W.2d 117, 118 (Mo. banc 1978) (stating that “the exclusive privilege to collect and dispose of solid waste is ‘fairly referable’ to the comfort, health and general welfare of the inhabitants of the City . . . and is a valid exercise of the police power”); *Campbell v. City of Frontenac*, 527 S.W.2d 643, 645 (Mo. App. E.D. 1975) (“We entertain no doubt that a city . . . has the power to reasonably regulate the collection, removal and disposition of garbage accumulating within its limits, either under the police power inherent in sovereignty or under the power conferred by the Missouri Constitution and applicable Statutes”).

Despite the foregoing, Appellants assert that “doubts about the existence or extent of county power are resolved against the County” and that St. Louis County no longer has

the power to freely regulate the collection of refuse, because of Section 2.180.24 of St. Louis County's Charter. Br. of Appellant at 18. Appellants claim that Section 2.180.24 limits the creation of taxing districts for garbage collection to those districts approved by the voters therein. Relying on form over substance, Appellants characterize the serviced collection Areas under the Program as "districts" and argue because they are required to pay for the refuse collection, the Program comes under Section 2.180.24. Simply declaring it so, does not however make it so.

What Appellants conveniently ignore is the fact that St. Louis County has not created "taxing" districts with permanent boundaries which are funded by special assessment, taxation, or service charge payable to the district. Instead, St. Louis County chose to provide the municipal service of trash collection as authorized by subsections 11 and 22 of Charter Section 2.180, by dividing the unincorporated area into the smaller service Areas to capture economies of scale and cost savings. The services specifically provided to the County residents are paid for by those residents (with their fees paid directly to the Respondent Haulers).

The creation of these smaller service Areas is within the authority provided by subsections 11 and 22 of Charter Section 2.180 and does not conflict with Section 2.180.24. Further, Appellants' expansive interpretation of Section 2.180.24 would render meaningless the grants of authority under Sections 2.180.11 and 2.180.22 to enact ordinances to furnish municipal services, including garbage collection. Courts should not interpret laws in a manner that produces an absurd or unreasonable result; instead, a legislative enactment "must be considered in its entirety and all provisions harmonized, if

reasonably possible.” *State ex rel. Safety Ambulance Service, Inc. v. Kinder*, 557 S.W.2d 242, 247 (Mo. banc 1977); *Christian Disposal, Inc. v. Village of Eolia*, 895 S.W.2d 632, 634 (Mo. App. E.D. 1995).

Appellants correctly assert that a Missouri county cannot act outside its authority, yet provide no support for any argument that St. Louis County acted outside its authority by creating the Program. Appellants present only an illogical interpretation of St. Louis County’s Charter: Namely, that St. Louis County’s Charter both grants St. Louis County unbridled authority to “[c]ollect and dispose of . . . garbage and refuse, or license and regulate such collection and disposal,” in subsections 11 and 22 of Charter Section 2.180, and revokes that authority in Section 2.180.24. The logical and harmonious interpretation of these subsections is that Section 2.180.24 only requires a vote to establish permanent taxing districts, which the Program did not establish.

Because the Program is within St. Louis County’s Charter authority and did not require voter authorization, the Trial Court correctly dismissed Count 1 of Appellants’ Amended Petition and this Court should affirm the Trial Court’s Order and Judgment.

**II. The Trial Court did not err in dismissing Count 1 of the Amended Petition, because Appellants lack standing to assert claims based upon Section 260.247, RSMo.**

First, even if Appellants had standing to assert a claim based upon Section 260.247, RSMo., it must be noted that it is impossible for Section 260.247, RSMo., to cause the ordinances of the Program to be void *ab initio*, because the ordinances of the Program were enacted *first*. Furthermore, the *American Eagle* Court did not void the

ordinances of the Program, it merely held that St. Louis County had not provided appropriate notice to the class of individuals (namely, refuse haulers) protected by Section 260.247, RSMo. Second, the Trial Court correctly dismissed Count 1 of Appellants' Amended Petition because Appellants lack standing to assert claims based on alleged violations of Section 260.247, RSMo. Section 260.247 requires St. Louis County to provide two-year notice to *existing waste haulers* prior to the provision of waste collection services by a political subdivision. Specifically, Section 260.247 states:

Any city or political subdivision which annexes an area or enters into or expands solid waste collection services into an area *where the collection of solid waste is presently being provided by one or more private entities*, for commercial or residential services, *shall notify the private entity or entities* of its intent to provide solid waste collection services in the area by certified mail... [a] city or political subdivision shall not commence solid waste collection in such area for at least two years from the effective date of the annexation or at least two years from the effective date of the notice...

(emphasis added). No notice is required to the property owners under the statute.

It is well-established that to have standing to assert a claim under a statute, a plaintiff must be within the “zone of interest” which the statute was drafted to protect. *State ex rel. Christian Health Care Of Springfield, Inc. v. Missouri Dept. Of Health And Senior Services*, 229 S.W.3d 270, 277-78 (Mo. App. W.D. 2007); *Hudson v. School Dist. Of Kansas City*, 578 S.W.2d 201, 313-14 (Mo. App. W.D. 1979). “[W]here it can be

determined that the purpose and policy rooted in the values set out in the legislation in question places the party in the “zone of interest” that the legislation seeks to protect, [a] party should have standing to enforce the statute.” *Christian Health Care*, 229 S.W.3d at 277-78. The very case cited by Appellants, shows that Appellants are not within the “zone of interest” of Section 260.247. *See American Eagle*, 272 S.W.3d at 336.

*American Eagle* was an action brought by trash haulers, not residents of the designated trash collection Areas. 272 S.W.3d at 336. *American Eagle* also reaffirmed the holding in *Christian Disposal, Inc. v. Village of Eolia*, 895 S.W.2d 632 (Mo. App. E.D. 1995), that Section 260.247 is designed to protect the financial interests of trash haulers. **“The fundamental purpose of section 260.247 is to provide an entity engaged in waste collecting with sufficient notice to make necessary business adjustments prior to having its services terminated in a given area.”** *American Eagle*, 272 S.W.3d at 342-43 (quoting *Christian Disposal*, 895 S.W.2d at 634) (emphasis added and internal edits omitted). Further, this Court in *American Eagle* stated that:

This has nothing to do with the process of an entity's collection of trash and ***everything to do with mitigating the effects of a government's takeover of trash collection on that entity's business.*** This general purpose reflects the state policy of ***protecting private entities engaged in trash collection...***

272 S.W.3d at 343 (emphasis added).

Appellants attempt to expand the “zone of interest” of Section 260.247 by asserting that they have been forced to make “illegal” payments to the Respondent Haulers and because their taxes are being expended on this “challenged action.” Br. of

Appellant at 24. Appellants discredit their own argument: they blanketly state that a plaintiff can challenge an action if “their taxes went or will go to public funds that have been or will be expended due to the challenged action,” even though Appellants acknowledge on the same page that payments for the waste removal are being made to the Respondent Haulers and not St. Louis County in the form of taxes. Br. of Appellant at 24. Next, Appellants assert that they are “threatened by criminal prosecution and imprisonment if they do not contract with and pay” trash hauler fees; however, the legislature considered this issue in amending Section 260.247, RSMo., yet chose not to expand the “zone of interest” to consumers. Finally, Appellants assert again that they have standing to challenge the Program, because St. Louis County Charter Section 2.180.24 gives Appellants the right to vote on the Program; however, as established above, Section 2.180.24 does not apply and furthermore is irrelevant to an interpretation of Section 260.247, RSMo.

Section 260.247, RSMo., is limited both on its face and as interpreted by the courts only to protect haulers and to have no application to consumers. The Eastern District was clear in its holdings in *Christian Disposal* and *American Eagle* that the class entitled to protection is refuse haulers, who require sufficient notice to make business adjustments. Consumers suffer from no such infirmity. Accordingly, Appellants lack standing to challenge St. Louis County’s alleged non-compliance with the requirements of that statute. The Trial Court therefore correctly dismissed Count 1 of Appellants’ Amended Petition and this Court should affirm the Trial Court’s Order and Judgment.

**III. The Trial Court did not err in dismissing the Amended Petition, because Appellants lack taxpayer standing to challenge the Program.**

As noted in Section II, Appellants attempt to focus attention on purported expenditures arising from the enforcement and administration of Sections 607.1300 and 607.1310 to support their argument that they have taxpayer standing to challenge the alleged illegality of those ordinances. However, this argument misses the mark. The issue is whether Appellants have standing to challenge St. Louis County's compliance with the two-year notice provision set forth in Section 260.247. And this Court has held that "for a party to have standing to challenge the constitutionality of a statute, he must demonstrate that he is 'adversely affected by the statute in question.'" *W.R. Grace & Company v. Hughlett*, 729 S.W.2d 203, 206 (Mo. 1987) (citation omitted). In addition, other courts have similarly recognized:

To have proper standing, the party seeking relief must show two things: that he is sufficiently affected by the action he is challenging to justify consideration by the court of the validity of his action, and that the action violates the rights of the particular party who is attacking it and not some third party.

*Wahl v. Braun*, 980 S.W.2d 322, 325 (Mo.App. E.D. 1998) (internal citations omitted). The purpose of these requirements is to "assure that there is a 'sufficient controversy between the parties [so] that the case will be adequately presented to the court.'" *W.R. Grace*, 729 S.W.2d at 206.

Here, Appellants attempt to challenge St. Louis County’s compliance with a statute that in no way affects them. There are no allegations to the contrary. Plaintiff has alleged no harm that would be (or has been) suffered by them directly as a result of the trash haulers not receiving the two-year notice provided for by Section 260.247. Missouri law is clear – they do not have standing to argue this point. *See e.g., Wahl*, 980 S.W.2d at 325 (“Plaintiff has pled no harm *directly suffered* as a result of defendants’ actions. Plaintiff simply bases his allegations on the possibility of unfavorable circumstances resulting from the actions of defendants. We do not address the merit of plaintiff’s point on appeal, since he is without standing.”) (emphasis added).

Because Appellants lack taxpayer standing to challenge compliance with Section 260.247, the Trial Court correctly dismissed Appellants’ Amended Petition to the extent it relied on that challenge, and this Court should affirm the Trial Court’s Order and Judgment.

**IV. The Trial Court did not err in dismissing the Amended Petition, because Appellants’ claims are barred by laches now that St. Louis County has implemented the Program, the Respondent Haulers have relied on that implementation of the Program in good faith, and Appellants have unreasonably delayed in bringing this action.**

“‘Laches’ is an equitable doctrine which provides that an ‘unreasonable delay bars a claim if the delay is prejudicial to the’ party asserting the laches defense.” *Northwest Plaza, L.L.C. v. Michael-Glen, Inc.*, 102 S.W.3d 552, (Mo. App. E.D. 2003) (internal citation omitted). Inexcusable delay can give rise to a defense of laches. *See Lee v.*

*Spellings*, 447 F.3d 1087 (8th Cir. 2006). Here, Appellants’ substantial and unreasonable delay in seeking judicial relief clearly prejudiced the Defendants, as set forth more explicitly in Section V, below. Appellants waited more than three years after St. Louis County began enacting the Program ordinances and more than a year after St. Louis County signed contracts with the Respondent Haulers for the Program to assert their alleged claims. L.F. at 1, 146; Br. of Appellant at 4, 7. Had Appellants timely asserted their claim for declaratory relief back in 2006, when the Program complained of was established, Appellants possibly could have been afforded the relief they now seek (assuming, counterfactually, that they were entitled to such relief in the first place).

Instead, Appellants chose to unreasonably delay the assertion of their rights until the question of injunctive relief became moot and barred by laches. By sitting on their claims for so long, Appellants created the damages issue of which they now complain. “[E]quity aids the vigilant, not those who slumber on their rights.” *Townsend v. Maplewood Investment & Loan Co.*, 173 S.W.2d 911, 913 (Mo. 1943). Appellants were not vigilant in protecting their alleged rights and their claims should be dismissed for that reason. *See City of St. Joseph v. Lake Contrary Sewer Dist.*, 251 S.W.3d 362, 369 (Mo. App. W.D. 2008) (Declaratory judgments are based on and governed by equitable principles, and are subject to equitable defenses).

In addition to delaying the assertion of their rights unreasonably, Appellants' First Amended Petition incorporates documents which make it clear that Appellants' delay caused disadvantage and prejudice to the Haulers. *See e.g., Ewing v. Ewing*, 901 S.W.2d 330, 334 (Mo. App. W.D. 1995); L.F. at 285-331. Appellants' First Amended Petition

and the supporting documents show that the Haulers were undertaking a large investment in order to service each Area created by the Program. It is clear from the face of Appellant First Amended Petition that the Haulers relied upon the Ordinances to make substantial investments in equipment and that the Haulers have been unreasonably disadvantaged by Appellants' delay of over three years to bring their action challenging the Ordinances.

Because Appellants' challenge to the Program is barred by laches, the Trial Court correctly dismissed Appellants' Amended Petition and this Court should affirm the Trial Court's Order and Judgment.

**V. The Trial Court did not err in dismissing the Amended Petition, because Appellants' claims are moot now that St. Louis County has implemented the Program and the Respondent Haulers have relied on that implementation of the Program in good faith.**

The Trial Court also correctly dismissed Appellants' Amended Petition because Appellants' claims became moot when St. Louis County implemented the Program. Further, the Respondent Haulers have relied in good faith upon the Program ordinances and obtained a vested interest in the Program, such that the Trial Court cannot now undo the implementation of the Program. "A threshold question in any ... review of a controversy is the mootness of the controversy." *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001) (citation omitted). "When an event occurs that makes a court's decision unnecessary or makes granting effectual relief by the court impossible, the case is moot and generally should be dismissed." *Local Union 1287 v. Kansas City*

*Area Transportation Authority*, 848 S.,W.2d 462, 463 (Mo. banc 1993) (citation omitted). Because the full implementation of the Program has occurred, the granting of effectual relief by this Court is now impossible.

In *Jackson County Board of Election Commissioners v. City of Lee's Summit*, 277 S.W.3d 740, 744 (Mo. App. W.D. 2009), although the parties agreed not to assert the mootness issue, the court took it up *sua sponte*. Because the challengers to a particular ballot issue waited until after the election had occurred and the ordinance had been passed, the issue became moot. *Id.* Similarly, Appellants herein admit that St. Louis County – at least – purported to enact the Program via ordinances enacted “on or about December 12, 2006”; “[o]n or about May 29, 2007”; and “[o]n or about November 24, 2008.” Br. of Appellant at 3-4. Appellants also admit that St. Louis County contracted with the Respondent Haulers between June and August of 2008. Br. of Appellant at 4. Appellants then admit that they waited ***over a year after the contracts were entered into and almost three years after the first ordinances of the Program were enacted*** before seeking to invalidate the program via a Petition filed on September 11, 2009. Br. of Appellant at 7; L.F. at 1. By waiting to challenge the Program, until after the ordinance had been passed, implemented, and relied upon, Appellants permitted the issue to become moot. *See Jackson County*, 277 S.W.3d at 744.

Furthermore, a third party's reliance in good faith upon an ordinance in making a substantial investment can moot a challenge to an ordinance, because the third party will obtain a vested interest in the ordinance. *See e.g., May Dept. Stores Co. v. County of St. Louis*, 607 S.W.2d 857 (Mo. App. E.D. 1980). In *May Department Stores*, certain real

estate was purchased by May in good faith reliance on a zoning ordinance and May proceeded to expend considerable funds to develop the property before the zoning ordinance was repealed. *Id.* at 863-69. The Court of Appeals affirmed the trial court's holding that May had obtained a vested interest in the zoning ordinance because of its good faith expenditure of substantial funds in reliance on the zoning ordinance. *Id.* at 869; *see also State ex rel. Great Lakes Pipe Line Co. v. Hendrickson*, 393 S.W.2d 481, 484 (Mo. 1965) (substantial investment in a pumping station created vested interest in zoning); *Fields v. Millsap and Singer, P.C.*, 295 S.W.3d 567, 570 (Mo. App. W.D. 2009) (purchase of a home in foreclosure mooted rescission arguments).

Respondent Haulers relied in good faith upon St. Louis County's enactment of the ordinances of the Program to invest in additional equipment and other costs to implement the Program. Respondent Haulers contracted with St. Louis County during June and August 2008 to implement the Program; however, Appellants then waited over a year to challenge the Program. Respondent Haulers have obtained a vested interest in the Program, because of their good faith reliance on the Program, which moots Count 1 of Appellants' Amended Petition.

While Appellants continue to assert that this Court can grant them effectual relief from the Program by declaring the Ordinances invalid, they are simply incorrect. Appellants' delay in bringing this action, and the Haulers reasonable and good faith reliance on the Ordinances, has granted the Haulers a vested interest in St. Louis County's Ordinances establishing the Program. Appellants' delay has, at best, put St. Louis County in the position that *if* this Court agrees with Appellants and invalidates the Ordinances,

then St. Louis County will be forced to violate the rights of the Haulers. Under these circumstances, it cannot be the just outcome for the Haulers to suffer for the party which unreasonably delayed the assertion of their rights (Appellants).

Because Appellants' challenge to the Program is moot, the Trial Court correctly dismissed Appellants' Amended Petition and this Court should affirm the Trial Court's Order and Judgment.

**VI. The Trial Court did not err in dismissing Count 2 (“Money Had and Received”) and Count 4 (“Unjust Enrichment”) of the Amended Petition because dismissal of Count 1 required dismissal of all remaining Counts and further because dismissal of Counts 2 and 4 was proper for reasons independent of Count 1.**

As already discussed herein, Count 1 of the Amended Petition sought to have the ordinances creating the Program declared illegal and void *ab initio* because St. Louis County failed to hold an election regarding said ordinances and because St. Louis County failed to give the required two-year notice to preexisting waste collection businesses before starting the Program. Sections I, II and V set forth why the Trial Court did not err in dismissing Count 1, and establish that the ordinances creating the Program were neither illegal nor should they be declared void *ab initio*. The Hauler Respondents incorporate those arguments by reference here.

**A. Counts 2 and 4 Are Derivative of Count 1 and Were Correctly Dismissed.**

Counts 2 and 4 of Appellants' Amended Petition are predicated on the argument that the ordinances are illegal and invalid, and are therefore derivative of Count 1. L.F. at 10, 15. More specifically, those Counts seek money damages on the basis that (per Count 1) Appellants made payments to the Hauler Respondents under illegal ordinances. L.F. at 24-40. It follows, then, that if Appellants are wrong on that point, and the ordinances are legal and valid, Appellants cannot state any claim for money damages under any theory, including the theories of money had and received and unjust enrichment as alleged in Counts 2 and 4. Consequently, the failure of Count 1 necessarily means the failure of Counts 2 and 4.

It is clear not only from the Amended Petition, but from Appellants' Brief, that Appellants' claims for money had and received and unjust enrichment (Counts 2 and 4, respectively) absolutely rely on the success of Count 1. *See* Br. of Appellant at 31-32 ("In the instant case, it is unjust for Defendants . . . to keep money they have collected pursuant to an illegal and void *ab initio* trash ordinance scheme."). Those claims cannot stand independent of Count 1, but rather are completely dependent on Count 1 and its assertion that the ordinances are illegal and void *ab initio*.

Because Count 1 was properly dismissed (as set forth in Sections I, II and V), the Trial Court correctly dismissed Counts 2 and 4 of Appellants' Amended Petition as derivative of Count 1, and this Court should affirm the Trial Court's Order and Judgment.

**B. Counts 2 and 4 Were Correctly Dismissed for Reasons Independent of the Correct Dismissal of Count 1.**

Appellants completely ignore the fact that Counts 2 and 4 rely on and are derivative of Count 1, and instead simply argue that the Amended Petition properly pled theories of unjust enrichment and money had and received. Their argument, though, assumes the success of Count 1. *See* Br. of Appellant at 31-34. Even putting aside the interplay between these Counts, though, the Trial Court did not err in dismissing Counts 2 and 4. As established in the Respondent Haulers' Motion to Dismiss, Appellants failed to state a claim for either money had and received or unjust enrichment in the Amended Petition, and thus those Counts were independently fatally defective. L.F. at 15.

A claim for money had and received is essentially a claim for unjust enrichment. *Fulton Nat'l Bank v. The Calloway Memorial Hospital*, 465 S.W.2d 549, 553 (Mo. 1971). "Unjust enrichment occurs when a person retains the benefit and enjoys the benefit conferred upon him without paying its reasonable value." *Webcon Group, Inc. v. S.M. Properties, L.P.*, 1 S.W.3d 538, 542 (Mo. App. E.D. 1999).

In the instant case, the only benefit conferred has been upon Appellants, and not the Respondent Haulers. L.F. at 15. Appellants acknowledged in their Amended Petition that waste removal services were provided to Appellants by the Respondent Haulers. L.F. at 16. They take issue, however, with St. Louis County's requirement that they obtain such services from the Respondent Haulers. L.F. at 16. This does not, however, create a viable equitable claim against the Respondent Haulers. *See Union Pacific R. Co. v. Midland Equities Inc.*, 45 F.Supp.2d 685, 693-94 (E.D.Mo. 1999), *aff'd in part and*

rev'd in part on other grounds 212 F.3d 386 (8th Cir. 2000) (noting that the elements of any implied contract claim are “(1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the fact of such benefit; (3) acceptance and retention by the defendant of that benefit under circumstances in which retention without payment would be inequitable.”).

Nothing in Appellants’ Amended Petition suggested that they did not receive the benefit of required services from the Respondent Haulers, or that their payments were made by inadvertent mistake. *See Investors Title Co. v. St. Louis County*, 217 S.W.3d 288, 293-94 (Mo. banc 2007), *citing Blue Cross Health Services, Inc. v. Sauer*, 800 S.W.2d 72, 75-76 (Mo. App. E.D. 1990) (observing that money had and received is an appropriate action “when one party has been *unjustly* enriched through the *mistaken payment* of money by the other party”) (emphasis added). Moreover, if not receiving these services from the Respondent Haulers, Appellants were required by ordinance to receive them from somebody (i.e. trash haulers not party to this action), and would likewise be paying for those services. L.F. at 19. That being the case, Appellants have no claim for unjust enrichment of any kind. Accordingly, Counts 2 and 4 were properly dismissed. L.F. at 16.

Because Appellants’ Amended Petition fails to appropriately plead “Money Had and Received” or “Unjust Enrichment,” the Trial Court correctly dismissed Counts 2 and 4 of Appellants’ Amended Petition and this Court should affirm the Trial Court’s Order and Judgment.

**VII. The Trial Court did not err in dismissing Count 3 of the Amended Petition because dismissal of Count 1 required dismissal of all remaining Counts and further because dismissal of Count 3 was proper for reasons independent of Count 1.**

For much the same reason that dismissal of Counts 2 and 4 were proper, the Trial Court likewise correctly dismissed Count 3 of Appellants' Amended Petition. Count 3 ("Missouri Merchandising Practices Act" or "MMPA") was necessarily dependent upon and derivative of Count 1's assertion that the ordinances creating the Program were illegal and invalid. L.F. at 17, 37, 38; *see also* Br. of Appellant at 36 ("Defendants employed the unfair practice of coercing citizens to transact business via illegal and void ordinances."). Again, as discussed in Sections I, II, and V, the Trial Court did not err in dismissing Count 1 because the ordinances are legal and valid. As made clear in Appellants' Amended Petition and Brief, Count 3 cannot survive absent survival of Count 1.

**A. Count 3 Is Derivative of Count 1 and Was Correctly Dismissed.**

Count 3 of Appellants' Amended Petition is also predicated on the argument that the ordinances are illegal and invalid, and is therefore derivative of Count 1. L.F. at 17, 37, 38. Count 3 seeks money damages on the basis that (per Count 1) Appellants made payments to the Respondent Haulers under illegal ordinances. L.F. at 24-40. Once again, if Appellants are wrong on that point, and the ordinances are legal and valid, Appellants cannot state any claim for money damages under any theory, including

violation of the Missouri Merchandising Practices Act. Consequently, the failure of Count 1 necessarily means the failure of Count 3.

Because Count 1 was properly dismissed (as set forth in Sections I, II, and V), the Trial Court correctly dismissed Count 3 of Appellants' Amended Petition as derivative of Count 1, and this Court should affirm the Trial Court's Order and Judgment.

**B. Count 3 Was Correctly Dismissed for Reasons Independent of the Correct Dismissal of Count 1.**

Even putting aside this interplay between Counts 1 and 3, though, the Trial Court did not err in dismissing Count 3. As established in the Respondent Haulers' Motion to Dismiss, Appellants' purported MMPA claim failed because there was no deceptive conduct and Appellants did not sustain an ascertainable loss. L.F. at 17-19. Thus, their MMPA claim was independently, and fatally, defective. L.F. at 17-19.

The MMPA confers a private right of action upon consumers who have suffered an ascertainable loss of money or property as a result of deceptive conduct in connection with the sale of merchandise. R.S.Mo. § 407.025. In order to succeed on a claim under the MMPA, a plaintiff must prove the following elements: 1) the act, use, or employment of a deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or a concealment, suppression or omission of a material fact; 2) occurring in connection with the sale or advertisement of any merchandise in trade or commerce; 3) resulting in an ascertainable loss of money or real or personal property; 4) occurring to a person who purchases or leases merchandise primarily for personal, family or household purposes.

*Id.* L.F. at 17.

Missouri courts have repeatedly and unambiguously held that in order for a plaintiff to establish a claim under the MMPA, the plaintiff must prove that he was actually deceived by a defendant's violation of the MMPA; in other words, that a misrepresentation or concealment caused the plaintiff to purchase the product or service at issue. *See Kiechle v. Drago*, 694 S.W.2d 292 (Mo. App. W.D. 1995). The only allegations of deceptive conduct by Appellants consisted of alleged misrepresentations concerning conclusions of law. L.F. at 18. Specifically, Appellants claimed that the Respondent Haulers stated that the trash ordinances at issue were legal and enforceable; that Appellants must obtain and pay for trash services from the Respondent Haulers or face criminal charges and possible imprisonment; and that no election was required before application or enforcement of the ordinances. L.F. at 37-38. None of these alleged statements gives rise to an actionable claim for deceptive conduct under the MMPA. *See Fredrick v. Bensen*, 436 S.W.2d 765, 770 (Mo. App. 1968).

The statements are all in the nature of legal opinions and conclusions and thus cannot serve as the basis for an MMPA claim:

A statement of what the law will or will not allow to be done is a matter of opinion, albeit on a legal matter. . . . As generally elsewhere, it is the law in Missouri that fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law. This is predicated upon the rule that everyone is presumed to know the law and is bound to take notice of the law and therefore, in legal contemplation, cannot be deceived by representations concerning the law or permitted to say he has been misled.

*Id.* (citation omitted); *see also Bowles v. All Counties Investment Corp.*, 46 S.W.3d 636, 640 (Mo. App. S.D. 2001). Because the alleged false and misleading statements allegedly made by the Respondent Haulers are all inarguably predicated upon alleged misrepresentations of law or matters of law, they do not give rise to a cause of action under the MMPA. Accordingly, the Trial Court did not err in dismissing Count 3.

Additionally, to recover under the MMPA, Appellants must first establish that they suffered an ascertainable loss of money or property. R.S.Mo. § 407.025. The measure of damages for an MMPA claim is limited to the difference between the actual value of the property purchased and what its value would have been if it had been as represented, i.e., the benefit of the bargain. *Freeman Health System v. Wass*, 124 S.W.3d 504, 507 (Mo. App. S.D. 2004). Appellants cannot establish an ascertainable loss of money or property. The Respondent Haulers provided services to Appellants and Appellants paid value for those services. L.F. at 19. If not receiving these services from the Respondent Haulers, Appellants would be receiving them from trash haulers not party to this action, and would likewise be paying for those services, since trash removal is required by ordinance. L.F. at 19.

Paying for services provided by the Respondent Haulers as opposed to those provided by other haulers does not cause Appellants to sustain an ascertainable loss of money or property. L.F. at 19. Under the MMPA, “[a] private cause of action is given only to one who purchases and suffers damage.” *Ziglin v. Players MH, L.P.*, 36 S.W.3d 786, 790 (Mo. App. E.D. 2001). Since Appellants suffered no damages here, the Trial Court did not err in dismissing their MMPA claims against the Respondent Haulers.

Because Appellants' Amended Petition fails to appropriately plead a cause of action under the MMPA, the Trial Court correctly dismissed Count 3 of Appellants' Amended Petition and this Court should affirm the Trial Court's Order and Judgment.

**VIII. The Trial Court did not err in dismissing Count 3 of the Amended Petition regardless of the application of the voluntary payment doctrine to an MMPA claim because Count 3 was merely derivative of and contingent upon Count 1, and the Trial Court did not err in dismissing Count 1.**

While Appellants are correct that the Missouri Supreme Court recently ruled that the voluntary payment doctrine does not provide an affirmative defense to claims brought under the MMPA, Count 3 was nevertheless properly dismissed for the reasons already stated in Sections VI and VII herein. Specifically, because Count 3 was inarguably contingent upon the success of Count 1, the Trial Court's appropriate dismissal of Count 1 effectively rendered Count 3 moot. As discussed in Sections I, II and V herein, the Trial Court did not err in dismissing Count 1, and thus cannot be found to have erred in dismissing Count 3, or any of the remaining Counts for that matter.

For these reasons, and for those more fully set forth in Sections VI and VII herein, this Court should affirm the Trial Court's Judgment and Order dismissing Appellants' Amended Petition as it relates to Count 3.

**CONCLUSION**

Based upon the foregoing reasons the Trial Courts Order and Judgment dismissing Appellants' Amended Petition should be upheld in its entirety.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06; and (3) contains 8,252 words, exclusive of the sections exempted by Rule 84.06, based on the word count that is part of Microsoft Word. The undersigned counsel further certifies that the CD has been scanned and is free of viruses.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing was mailed this 11th day of April, 2011 to the following:

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