

BEFORE THE MISSOURI SUPREME COURT

No. SC90790

CITY OF LAKE SAINT LOUIS, MISSOURI

Plaintiff / Appellant

vs.

CITY OF O'FALLON, MISSOURI

Defendant / Respondent.

On Transfer from the Missouri Court of Appeals, Eastern District
Appeal No. ED93289

On Appeal from the Circuit Court of St. Charles County
Honorable Ted House, Circuit Judge
Cause No. 0911-CV03131

RESPONDENT'S SUBSTITUTE BRIEF AND APPENDIX

CURTIS, HEINZ,
GARRETT & O'KEEFE, P.C.

Kevin M. O'Keefe, #23381
Stephanie E. Karr, #39593
130 South Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725 – 8788
(314) 725 – 8789 (Fax)
Attorneys for Respondent
City of O'Fallon, Missouri

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Jurisdictional Statement.....	1
Statement of Facts.....	2
Point Relied Upon.....	3
Argument.....	4
Conclusion.....	26
Rule 84.06 Certificate.....	28
Certificate of Service.....	29

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Cherry v. City of Hayti Heights</u> , 563 S.W.2d 72, 80 (Mo. 1978)	3, 6, 9, 21, 23
<u>City of Fulton v. Dawson</u> , 325 S.W.2d 505, 518 (Mo.App. 1957)	23
<u>City of St. Joseph v. Village of Country Club</u> , 163 S.W.3d 905 (Mo.banc 2005)	21
<u>City of Sugar Creek v. Standard Oil Co.</u> , 163 F.2d 320 (8 th Cir. 1947)	23
<u>Moynihan v. Gunn</u> , 204 S.W.3d 230 (Mo.App.E.D. 2006).....	4
<u>Oak Ridge Reorganized School District No. R-6 v. Jackson Reorganized School District No. R-2</u> , 830 S.W.2d 45 (Mo.App.E.D. 1992).....	18, 19
<u>Randolph v. Moberly Hunting and Fishing Club</u> , 15 S.W.2d 834 (Mo. 1929)	8
<u>Reorganized School District R-1 of Crawford County v. Reorganized School District R-III of Washington County</u> , 360 S.W.2d 376 (Mo.App.St.L. 1962).....	19
<u>Shuffit v. Wade</u> , 13 S.W.3d 329 (Mo.App.S.D. 2000).....	15
<u>Southern Missouri District Council of the Assemblies of God v. Hendricks</u> , 807 S.W.2d 141 (Mo.App.S.D. 1991).....	15
<u>Spiking School District v. Purported “Enlarged School District R-11”, DeKalb County Missouri</u> , 245 S.W.2d 13 (Mo. 1952).....	9
<u>State ex inf. Dorian v. Taylor</u> , 106 S.W. 1023, 1026 (Mo. 1907)	10
<u>State on inf. Eagleton v. Champ</u> , 393 S.W.2d 516 (Mo. banc 1965)	23
<u>State ex inf. Sanders ex rel. City of Lee’s Summit v. City of Lake Lotawana</u> , 220 S.W.3d 794 (Mo.App.W.D. 2007)	3, 13, 14, 15
<u>State ex rel. City of Town & Country v. Goldman</u> , 778 S.W.2d 300, 302 (Mo.App.E.D. 1989).....	6
<u>State ex rel. Junior College District of Sedalia v. Barker</u> , 418 S.W.2d 62	

(Mo. 1967)	3, 9, 10, 17, 18, 21
<u>State ex rel. Kansas City v. Harris</u> , 212 S.W.2d 733 (Mo. 1948).....	14
<u>State ex rel. Kelley Properties, Inc. v. City of Town and Country</u> , 797 S.W.2d 519 (Mo.App.E.D. 1990).....	13
<u>State ex rel. King v. Village of Praethersville</u> , 542 S.W.2d 578 (Mo. App. 1976)	23
<u>State ex rel. Members of Board of Education of Everton R-III School District v. Members of Board of Education of Greenfield R-IV School District</u> , 572 S.W.2d 899 (Mo.App. 1978)	14
<u>State of Missouri ex inf. Larry Nesslage, et. al v. City of Lake St. Louis</u> , 718 S.W.2d 214 (Mo.App.E.D. 1986).....	21
<u>State ex rel. Richey v. McGrath</u> , 8 S.W.425 (Mo. 1888)	7
<u>Three Rivers Junior College District of Poplar Bluff v. Statler</u> , 421 S.W.2d 235 (Mo.1967).....	9
<u>Weber v. Weber</u> , 908 S.W.2d 356 (Mo.banc 1995)	7
<u>Walker Reorganized School Dist. R-4 v. Flint</u> , 303 S.W.2d 200 (Mo.App.K.C. 1957).....	16, 17, 18
<u>White v. City of Columbia</u> , 461 S.W.2d 806 (Mo. 1970)	9
<u>Witter v. County of St. Charles</u> , 528 S.W.2d 160 (Mo.App.St.L. 1975).....	20
 <u>Constitutional and Statutory Provisions</u>	
Mo.Const. art. V, Section 10	1
Section 165.673, R.S.Mo. 1949	20
Section 527.060 R.S.Mo.....	25
Rule 55.27 (g) (2), Missouri Rules of Civil Procedure.....	24

JURISDICTIONAL STATEMENT

Following opinion by the Missouri Court of Appeals for the Eastern District, this Court ordered transfer of the matter; this Court has jurisdiction to hear appeals on transfer from the Court of Appeals. Mo.Const. art. V, Section 10.

STATEMENT OF FACTS

On March 26, 2009, Appellant City of Lake St. Louis filed a Petition for Declaratory Judgment in the Circuit Court of St. Charles County [L.F. 3] concerning a purported jurisdictional dispute between Appellant and Respondent City of O’Fallon. [L.F. 4, Paragraph 5].

In its Petition, Lake St. Louis claims that O’Fallon, between 1982 and the present, has “annexed property, issued permits, and taken other actions within” an area now sought by Lake St. Louis on the basis of an asserted annexation by that city in 1982. [L.F. 4, Paragraph 5]

Lake St. Louis seeks a Court order declaring that the “City of O’Fallon has not annexed property within the” territory claimed by Lake St. Louis so that Lake St. Louis may hereafter enforce its ordinances, collect and administer taxes and otherwise exercise municipal jurisdictional within the disputed territory. [L.F. 4]

Respondent timely filed a Motion to Dismiss asserting that Lake St. Louis lacked capacity to sue for the relief requested and lacked standing and, furthermore, that the action is barred by the statute of limitations and laches. [L.F. 16 – 17].

The trial court dismissed Appellant’s Petition on June 15, 2009, [L.F. 21] and a timely appeal followed. The Court of Appeals for the Eastern District of Missouri reversed the judgment of the trial court and this Court ordered transfer of the appeal.

POINT RELIED ON

I. THE TRIAL COURT WAS CORRECT IN DISMISSING APPELLANT’S PETITION FOR THE REASONS THAT (i) APPELLANT LACKED CAPACITY AND STANDING TO SUE BECAUSE APPELLANT EFFECTIVELY SOUGHT THE INVALIDATION OF ANNEXATIONS BY ANOTHER CITY AND OUSTER OF THAT CITY FROM JURISDICTION IN THE SUBJECT TERRITORY AND SUCH RELIEF CAN ONLY BE OBTAINED THROUGH THE STATE IN A QUO WARRANTO ACTION; AND (ii) THE PETITION FAILS TO STATE A CLAIM IF APPELLANT IS NOT ATTEMPTING TO INVALIDATE ANNEXATIONS BY THE CITY OF O’FALLON OR OUST O’FALLON FROM JURISDICTION WITHIN THE SUBJECT TERRITORY.

Cherry v. City of Hayti Heights, 563 S.W.2d 72, 80 (Mo. 1978)

State ex rel. Junior College District of Sedalia v. Barker, 418 S.W.2d 62 (Mo. 1967)

State ex inf. Sanders ex rel. City of Lee’s Summit v. City of Lake Lotawana, 220 S.W.3d 794 (Mo.App.W.D. 2007)

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN DISMISSING APPELLANT’S PETITION FOR THE REASONS THAT (i) APPELLANT LACKED CAPACITY AND STANDING TO SUE BECAUSE APPELLANT EFFECTIVELY SOUGHT THE INVALIDATION OF ANNEXATIONS BY ANOTHER CITY AND OUSTER OF THAT CITY FROM JURISDICTION IN THE SUBJECT TERRITORY AND SUCH RELIEF CAN ONLY BE OBTAINED THROUGH THE STATE IN A QUO WARRANTO ACTION; AND (ii) THE PETITION FAILS TO STATE A CLAIM IF APPELLANT IS NOT ATTEMPTING TO INVALIDATE ANNEXATIONS BY THE CITY OF O’FALLON OR OUST O’FALLON FROM JURISDICTION WITHIN THE SUBJECT TERRITORY.

STANDARD OF REVIEW

The appellate standard of review when considering a trial court’s grant of a motion to dismiss is *de novo*. Moynihan v. Gunn, 204 S.W.3d 230 (Mo.App.E.D. 2006).

APPELLANT LACKS CAPACITY AND STANDING TO SUE FOR REQUESTED RELIEF

Lake St. Louis would like to characterize this case as a simple property boundary dispute; however, a boundary dispute between two governmental entities unavoidably means that each is claiming sovereignty over the same area. Otherwise, there would be no

dispute or controversy between them.

O'Fallon is the established government within the area in question

Lake St. Louis admits that O'Fallon, between 1982 and the present, has annexed property, established a presence and exercised jurisdiction within an area sought by Lake St. Louis. [Appellant's Petition, L.F. 4, Paragraph 5, O'Fallon has "annexed property, issued permits and taken other actions"].

Appellant's pleadings, at a minimum¹, establish that O'Fallon's actions to annex property and the exercise of jurisdiction and authority within the annexed area, as alleged in Appellant's Petition, constitute, at the very least, a *de facto* annexation and uninterrupted exercise of governmental jurisdiction by O'Fallon.

An annexation or incorporation by a city achieves *de facto* status if the following elements are present:

- (1) a law under which it might lawfully have been incorporated;
- (2) an attempted compliance in good faith with the requirements of the statute as to incorporation;
- (3) a colorable compliance with the statutory requirements; and
- (4) an assumption

¹ O'Fallon does not admit Lake St. Louis' annexation of the disputed area was valid; nor does it concede there was any irregularity or infirmity in its own annexation of any area now claimed by Lake St. Louis. However, since this matter is before the Court following a motion to dismiss the pleadings O'Fallon's arguments will be limited to facts drawn from Lake St. Louis's Petition.

of user of corporate powers.

State ex rel. City of Town and Country v. Goldman, 778 S.W.2d 300, 302 (Mo.App.E.D. 1989) (citing Cherry v. City of Hayti Heights, 563 S.W.2d 72 (Mo.banc 1978)).

Thus, whether O'Fallon's acquisition of jurisdiction over the "disputed area" is the result of a de jure annexation process or de facto exercise of governmental responsibility, both of which Lake St. Louis avers in its petition, O'Fallon is, in fact and in law, the established and operating incumbent municipal government for the area in question.

On the other hand, Lake St. Louis never alleges that it has ever attempted to exercise jurisdiction within the same area² or that Lake St. Louis objected to annexation of the area by O'Fallon when it occurred.

Lake St. Louis seeks to oust O'Fallon from jurisdiction

² Appellant asks in its Brief at Page 9, "How can it be that Lake Saint Louis is required to file a quo warranto action but O'Fallon was not?" The reason is simple. Lake St. Louis never asserted jurisdiction over the territory at issue; therefore, for more than a quarter of a century, there were no jurisdictional conflicts and there was no need for ouster. During those many years, O'Fallon exercised governance – it annexed property, approved permits and took other actions - within the area without objection from Lake St. Louis. It is only now that Lake St. Louis seeks to oust O'Fallon from the area sought by Lake St. Louis.

Appellant's Petition asks for a judgment "declaring that City of O'Fallon has not annexed property within the boundary" [L.F. 4]. It is ineluctable that such a declaration would nullify and, therefore, invalidate any annexation that the City of O'Fallon has ever undertaken within the area at issue. The judgment Lake St. Louis seeks would thereby usurp O'Fallon's authority within the area and prevent it from exercising jurisdiction over the disputed property.

Ouster is ouster, regardless of the titular nomenclature Lake St. Louis seeks to attach to it. Weber v. Weber, 908 S.W.2d 356 (Mo.banc 1995)("The legal character of a pleading is determined by its subject matter and not its designation to the extent that courts ignore the denomination of a pleading and look to its substance to determine its nature."). To borrow from a current metaphor, a pig with lipstick is still a pig.³

After all, if Lake St. Louis is not disputing the efficacy of annexations by the City of O'Fallon, and if it is not challenging the sovereignty and jurisdiction of O'Fallon within the disputed area and seeking to displace O'Fallon from the territory described in the Petition, then there is no justiceable controversy between the parties. And the Petition

³ *See, also, State ex rel. Richey v. McGrath*, 8 S.W.425 (Mo. 1888) ('the declaration of the legislature that it is a benevolent corporation does not make it so, any more than a legislative declaration that a horse is a cow would alter the fact, and convert the horse into a cow...The nature or character of corporations authorized to be created by the act of 1887 is to be determined from the purpose to be accomplished...')

fails to state a claim because Lake St. Louis has not plead any legally protected interest affected by an action of the City of O’Fallon.

Quo Warranto is the exclusive remedy to achieve the relief sought by Lake St. Louis

Ousting an incumbent political subdivision from jurisdiction it has exercised for decades without apparent objection⁴ is the exclusive province of an action in quo warranto. Lake St. Louis lacks standing to bring such an action in its own right. And the representatives of the state, who are exclusively authorized to act, have not chosen to do so.

Repeatedly, this court has recognized and applied the doctrine that the existence,

⁴Lake St. Louis is now, also, estopped from attempts to change boundary lines which have been recognized for decades. *See, Randolph v. Moberly Hunting and Fishing Club, 15 S.W.2d 834 (Mo. 1929)* (In that case, the Missouri River constituted the boundary line between Saline County and Chariton County. Movements of the river bed caused fluctuations in the boundaries of those two counties – the movements of the river bed were documented and could be ascertained. Chariton County assumed jurisdiction over additional land on its side caused by the fluctuations. For several years, the two counties operated as if the current site of the river was the boundary between the counties *even though* under the principles of accretion and avulsion, the land should have been considered as a part of Saline County. Therefore, Saline County was estopped from attacking the jurisdiction of Chariton County over the land.).

use and exercise of a franchise granted by the state including the existence and legality of a municipal corporation can only be challenged directly by the sovereign through the use of an information in the nature of quo warranto...We here affirm our holding in the foregoing cases.

Cherry v. City of Hayti Heights, 563 S.W.2d 72, 80 (Mo. 1978) (citing White v. City of Columbia, 461 S.W.2d 806 (Mo. 1970); Three Rivers Junior College District of Poplar Bluff v. Statler, 421 S.W.2d 235 (Mo. 1967); State ex rel. Junior College District of Sedalia v. Barker, 418 S.W.2d 62 (Mo. 1967); and Spiking School District v. Purported “Enlarged School District R-11, DeKalb County Missouri, 245 S.W.2d 13 (Mo. 1952)).

See, also:

It is our opinion that the facts alleged in the petition show a de facto annexation which can only be questioned by the proper State authority in a direct proceeding for that purpose...*when a public body has, under color of authority, assumed to exercise the powers of a public corporation of a kind recognized by law*, so as to become at least a de facto corporation, the validity of its organization can be challenged only by direct proceedings in quo warranto by the state...

White v. City of Columbia, 461 S.W.2d 806 (Mo. 1970) (*expressly reaffirmed in Cherry v. City of Hayti Heights, supra*) (Emphasis added).

The underlying rationale for Hayti Heights and the similar cases that preceded and follow is two-fold: 1) corporate franchises are grants of sovereignty, and, if the state acquiesces in the usurpation of that sovereignty, the rights and complaints of affected

individuals will not be considered or heard; and 2) public policy must be considered, emphasizing the importance of stability and certainty in such matters, and the serious consequences which might follow if the existence of a public corporation could be called into question by others rather than the State itself. State ex rel. Junior College District of Sedalia v. Barker, 418 S.W.2d 62 (Mo. 1967) (Judge exceeded jurisdiction in entertaining petition for declaratory judgment, injunction and administrative review in action challenging area included within Junior College District because quo warranto was exclusive remedy).

For, be it remembered, the State is the reservoir of all power...and...the State alone may inquire into the right of person **or corporation** to usurp or intrude into the powers and duties of a governmental agency...or a body corporate for public purposes.

State ex inf. Dorian v. Taylor, 106 S.W. 1023, 1026 (Mo. 1907) (Emphasis added).

Therefore, in the interests of (i) preserving governmental stability and certainty for the residents and businesses within the affected area and the entire community and (ii) preventing the usurpation of a municipality's exercise of jurisdiction in accordance with its franchise from the State without the State's involvement, quo warranto has been found to be the exclusive remedy to resolve territorial disputes such as that in the present case.

Challenges to a city's established jurisdiction over territory have broad public interest concerns – governmental services, development of property, citizens' expectations of the established governmental structure, and other matters typically

involving a city and its residents – which are all affected by a challenge to that city’s jurisdiction. These concerns become increasingly critical as more time elapses between the exercise of governmental authority and the challenge to that jurisdiction.

The governmental entity would budget, hire manpower and construct infrastructure in order to provide services to the territory. It would appropriate funding for public services and projects based on the certainty of tax and other revenue, a portion of which is attributed to the territory in question. It undertakes reapportionment by establishing City Council district boundaries consisting of substantially equal populations. It may have annexed additional areas made contiguous by its jurisdiction over the now-disputed territory. These decisions are made on a community-wide basis considering that the territory at issue is a part of the entire community.

Property owners, residents and citizens have acquired certain rights such as permits for the development of property within the territory; have acted in accordance with the laws and regulations which have governed the area, and have engaged with the governmental entity asserting jurisdiction – and may even be elected or appointed to municipal office.

Authorization by the State for a territorial challenge gives greater assurance the challenge is brought upon appropriate grounds and that important public policy considerations, including the public interests referenced above, will be borne in mind. And that these factors will be taken into account before action is initiated and before the challenged government and its citizens are put to the expense, disruption and uncertainty

of defending their integrity. A declaratory judgment action is initiated without the State's review and can be brought upon a variety of grounds which may or may not consider the public interest or be appropriate given the serious consequences of the relief sought.

Taking the allegations of the Petition as true for purposes of this appeal, the size of the territory in dispute is unspecified and an indefinite number of residents, business owners, and elected or appointed officials of O'Fallon may be included within the disputed territory and, therefore, affected by this action. In the absence of more detailed pleadings by the Appellant, the Court can reasonably posit that a number of businesses and/or residents have a substantial stake in the availability and quality of municipal services, tax rates and structures, compatibility of land use regulations and community planning, eligibility for and association with elected office, etc. While all these interests are implicated and affected by the issues in this case, none of these parties are in the case or before the Court and, in this declaratory judgment action, these interests and stakeholders have been reduced to spectator status only.

In quo warranto, the state is vested with the responsibility for consideration of these interests in deciding whether to exercise its prerogative to bring an action.

Furthermore, actions in quo warranto assure an essential timeliness of a challenge. A timely challenge greatly reduces the grievous effects of a change in governmental authority. Even the State's limitation on its own authority to disrupt established

jurisdiction of a governmental entity after a certain period of time⁵ underscores the State's public policy and the priority for stability and certainty in such matters.

If such challenges can be brought in the guise of declaratory judgment actions, untimely or delayed challenges are more likely. Such an action could be filed a decade after a city annexed property, began the exercise of jurisdiction and, perhaps, even completed expensive infrastructure improvements such as the construction of streets or installation of sewer lines. Also during this lapse of time, more and more residents will have obtained building permits and developed property; engaged or petitioned their city council; obtained and relied upon utility, trash collection, police, fire and other services; and possibly even been elected to a public office within the city.

Therefore, declaratory judgment actions do not afford the same protections with regard to ensuring the stability and certainty of governance for both the property owners and residents within the area and the rest of the city's taxpayers who have supported the infrastructure and services to the area.

The aforementioned public interest concerns were inherently protected in the case of State ex inf. Sanders ex rel. City of Lee's Summit v. City of Lake Lotawana, 220 S.W.3d 794 (Mo.App.W.D. 2007). In that case, two cities both sought to assert jurisdiction over the property. Lake Lotawana completed its annexation first and began

⁵ See, State ex rel. Kelley Properties, Inc. v. City of Town and Country, 797 S.W.2d 519 (Mo.App.E.D. 1990).

exercising jurisdiction. Lee's Summit initiated the quo warranto action, authorized by Jackson County Prosecuting Attorney Michael Sanders, and also included a request for declaratory judgment and injunctive relief. The Appellate Court held quo warranto to be the exclusive remedy.

Quo warranto and not injunction is the proper action for testing the City's right to the disputed territory in a dispute over annexation...The circuit court, therefore, should have dismissed Lee's Summit's action for declaratory judgment and injunction.

220 S.W.3d at 808 (quoting State ex rel. Kansas City v. Harris, 212 S.W.2d 733 (Mo. 1948) and citing State ex rel. Members of Board of Education of Everton R-III School District v. Members of Board of Education of Greenfield R-IV School District, 572 S.W.2d 899 (Mo.App. 1978) (as holding that "quo warranto was the only proper remedy to resolve a dispute over the change of school boundaries when two school districts claimed jurisdiction over the same property"))).

In the cases cited by the Lake Lotawana court, the opposing entity had already asserted jurisdiction in some manner within the disputed territory. For instance, in Everton, the opposing school district completed the statutory process for changing its boundaries, even pursuing its request through a State Board of Arbitration. Following the State's decision on the boundary change, the disputed territory was included within the boundaries of the school district and the district began exercising jurisdiction with respect to the territory. It wasn't until afterward that Everton filed its lawsuit.

The Lake Lotawana court was correct that quo warranto is the exclusive remedy to challenge the jurisdiction of another governmental entity, especially when that entity *has previously established itself within the disputed territory and has exercised governance*.

Lake St. Louis misplaces its reliance on a few cases from the Court of Appeals which do not involve disruption to an established governmental structure. The cases relied upon by Lake St. Louis involved challenges brought *before* the opposing governmental entity had established itself within the disputed territory.

This is the difference between Appellant's cited cases and those cases requiring the use of quo warranto. Because Appellant's lawsuit was brought many years after one or more annexations by O'Fallon had occurred, and many years after O'Fallon had established a municipal presence and governmental structure within the area, the cases cited by Lake St. Louis are not persuasive and are inapplicable to the case at bar.

The first two cases cited by Appellant, Shuffit v. Wade, 13 S.W.3d 329 (Mo.App.S.D. 2000) and Southern Missouri District Council of the Assemblies of God v. Hendricks, 807 S.W.2d 141 (Mo.App.S.D. 1991), both involved claims by adjoining landowners concerning the location of fences, trespass, fraud, property damage, assault and other similar disputes. These cases provide absolutely no guidance with regard to issues concerning jurisdictional disputes between two governmental entities and the exercise of governmental authority within the affected areas.

In the case principally relied on by Lake St. Louis, Walker Reorganized School District R-4 v. Flint, 303 S.W.2d 200 (Mo.App.K.C. 1957), two school districts

simultaneously took action to include the former Coal Creek District in their respective districts. The case was filed immediately after the actions by the school districts. The actions occurred as follows:

- April 17, 1956 – Vernon County Board of Education adopts plan to submit question of include former Coal Creek District within the Vernon County District
- April 18, 1956 - Walker School District notifies public of annexation election pertaining to former Coal Creek District
- May 3 & 10, 1956- Election by Walker School District within existing District and within territory proposed for annexation
- June 20, 1956 - Walker School District files declaratory judgment action
- June 28, 1956 - Election held by Vernon County Board of Education with regard to former Coal Creek District area
- August 10, 1956 - Vernon County intervenes in Walker’s lawsuit
- August 30, 1956 - Case tried by the trial court

303 S.W.2d at 201-203.

In the Walker case, the challenge was immediate and, therefore, timely. Neither school district had an opportunity during that time to assert jurisdiction or take action within the new territory. Therefore, neither school district had established itself within the area. Given the lack of an existing governmental structure by a school district, there were no worries about maintaining the stability of an existing structure or other concerns which

would require the use of quo warranto.

The Court of Appeals in Walker, nonetheless, discussed the reasons for quo warranto, including the “importance of stability and certainty” within the territory, and weighed whether such rule should be applied in the case. Recall that neither school district had established itself by asserting jurisdiction within the disputed area. The court concluded: “Since the reason for that rule fails *as applied to this case we do not apply the rule.*” 303 S.W.2d at 206 (Emphasis added).

The Walker case is a fact-specific case, as noted in the opinion itself. It cannot be used as support for a general proposition that a municipal corporation’s jurisdiction in annexed territory can be challenged by means other than quo warranto.

In furtherance of its misplaced reliance on Walker, Appellant references a footnote in the opinion of State ex rel. Junior College District of Sedalia v. Barker, 418 S.W.2d 62 (Mo.banc 1967).

In Sedalia, the Court found that the challenge to the existence and operation of the Junior College District came after the District had attained de facto status:

Plaintiffs’ Petition in the trial court and relators’ petition for the writ of prohibition allege, and respondent’s return to the provisional rule admits, the detailed steps taken and the procedure followed pursuant to §178.800 to effect the organization of the District; relators and respondent have stipulated to facts showing an assumption of corporate powers by the District and its trustees. We conclude from this record that the District is a public corporation, subsection 2 of §178.770,

having at least a de facto existence.

418 S.W.2d at 65.

And, therefore, this Court discussed the rule mandating direct proceedings in quo warranto and held that the validity of the Junior College District could not be attacked by way of the petition for review which had been filed.

In footnote 1 of the Sedalia opinion, the Court referenced the Walker opinion in comparison. Despite this Court's single reference to Walker seized upon by Appellant, this Court, in fact held:

The law is settled that when a public body has, under color of authority, *assumed to exercise the powers of a public corporation of a kind recognized by law, so as to become at least a de facto corporation*, the validity of its organization can be challenged only by direct proceedings in quo warranto by the state...

418 S.W.2d at 65.

Appellant also cites to Oak Ridge Reorganized School District No. R-6 v. Jackson Reorganized School District No. R-2, 830 S.W.2d 45 (Mo.App.E.D. 1992). The question in that case was not a challenge to the jurisdiction of another school district. Instead, the issue arose following implementation of reassessment procedures; there were deficiencies in the maps created by the County Assessor's Office for use during the assessment of property for *ad valorem* tax purposes. The purpose and the result of the Oak Ridge lawsuit were not to displace the existing governmental structure. In fact, the Court of Appeals recounted that "it became apparent the boundary line between Oak Ridge and

Jackson was not clearly delineated at the assessor's office. . . . Many of the records showed the change of property from one district to another [through the years]" and "many of the property owners confirmed the variations in the boundary line as they existed at the time of reorganization..." 830 S.W.2d at 46.

The public interest and sovereignty considerations which require the use of quo warranto were not present in the Oak Ridge case. Therefore, it must be distinguished from the issues, making it inapposite from the circumstances in the case at bar. Furthermore, the issue of quo warranto was not even raised in the Oak Ridge case. There is nothing in the opinion which supports Appellant's argument.

Similarly, in Reorganized School District R-1 of Crawford County v. Reorganized School District R-III of Washington County, 360 S.W.2d 376 (Mo.App.St.L. 1962), the question was the inconsistent distribution of taxes. The Court of Appeals stated:

...the establishment of public school systems is primarily a function of the state, and on questions of organizational disputes involving a district extending into an adjoining county, the *final* solution rests with the State Board of Education under Section 165.673, R.S.Mo. 1949...***Certainly a plan approved without dispute – and here there was none – must have the same finality...***

and, therefore, the taxes should be distributed accordingly. 360 S.W.2d at 381 (Emphasis added).

Lastly, Lake St. Louis references Witter v. County of St. Charles, 528 S.W.2d 160 (Mo.App.St.L. 1975) which was a declaratory judgment regarding the application of the

principles of accretion and avulsion to certain man-made movements of the Missouri River and any affect those movements would have to the boundary between St. Louis County and St. Charles County. Because of the Court's sole focus on the doctrines of accretion and avulsion⁶, this case has no applicability to the present case.

Lake St. Louis relies only on cases which do not involve the existence, or de facto existence, of an incumbent governance which was established by the opposing governmental entity long prior to the challenge. Of course, the concerns mandating the use of quo warranto are not prevalent and are often not even considered in those cases which do not involve the displacement of an existing governmental structure. Lake St. Louis completely ignores the rationale for requiring quo warranto in cases involving an established governmental structure and the potential invalidation or ouster of that established government.⁷ Again, the stability and certainty in governmental functions

⁶ It should be noted that St. Charles County had continually exercised jurisdiction over the disputed "island" in the middle of the River both prior to and following the movement of the river. But, the Court of Appeals found that because of the end result (the island remained in St. Charles County under the rules of accretion and avulsion), it was unnecessary to elaborate on aspects of the case relating to St. Charles County's continued jurisdiction.

⁷ Interestingly, in a previous dispute involving a more timely challenge to another neighboring city, Appellant Lake St. Louis recognized the requirement and filed its

within the area in question is a paramount consideration in jurisdictional disputes. State ex rel. Junior College District of Sedalia v. Barker, 418 S.W.2d 62 (Mo. 1967); Cherry v. City of Hayti Heights, 563 S.W.2d 72, 80 (Mo. 1978).

If an exception has evolved with regard to the use of quo warranto to challenge or attack the jurisdiction or organization of a governmental entity, the exception has clearly been limited to cases which do not involve replacement of an established and ongoing governmental structure within the disputed territory. For instance, *see*, City of St. Joseph v. Village of Country Club, 163 S.W.3d 905 (Mo.banc 2005) (Both cities attempted annexation efforts at the same time; a declaratory judgment was sought to determine which city took the first valid step and which city should move forward in the annexation procedure. Neither city had completed the annexation process nor had exercised jurisdiction or established any kind of governmental structure within the area in question).

Lake St. Louis argues for a simplistic and myopic exception to the quo warranto requirement based on the identity of the challenger alone, and without consideration to the length of time that the challenged government has been in place. And, in its Opinion, the Eastern District unwisely accepted this hypothesis.

Appellant's argument and the Eastern District's Opinion are contradictory to the

counterclaim in quo warranto. *See*, State of Missouri ex inf. Larry Nessler, et. al v. City of Lake St. Louis, 718 S.W.2d 214 (Mo.App.E.D. 1986).

precedents and rationale dictating the use of quo warranto.

Concerns mandating the traditional use of quo warranto are just as compelling in territorial disputes between two governments, particularly when those disputes are untimely and one entity has already established itself by prolonged and unchallenged exercise of jurisdiction within the disputed territory.

The stability and certainty which are so important to both the incumbent entity and the citizenry are just as much at risk in this city versus city type of challenge. Any attempted usurpation of the jurisdiction affects the incumbent government and the property owners, residents and citizens within the questioned territory—and in the broader community—in the same manner *regardless of the identity of the challenger*.

Even where a challenge is made by a competing city, public policy still dictates an emphasis on stability and certainty with regard to property development, governmental infrastructure and services within the territory, taxation, rights of the residents and citizens, and other matters consequent to the governmental structure which has been in place and recognized by the citizenry for some time. And, just because the action involves a governmental Plaintiff does not mean it must be without mischief or ill motive.⁸

⁸ It is certainly not beyond experience to suggest that a municipality might undertake territorial expansion or seek to displace an incumbent government in order to selfishly capture taxes currently going elsewhere. City of Fulton v. Dawson, 325 S.W.2d 505, 518 (Mo.App. 1957); City of Sugar Creek v. Standard Oil Co., 163 F.2d 320 (8th Cir.

In fact:

Even in quo warranto, where the state itself is challenging the existence of the municipality, the state must show some ‘detriment to accrue from permitting the municipality to continue.’ ... ‘Generally speaking, the state should show some equity in favor of suddenly blotting out the legal existence of a town after long tolerating it as a working municipality.’

Cherry v. City of Hayti Heights, 563 S.W.2d 72, 79 (Mo.banc 1978) (quoting State on inf. Eagleton v. Champ, 393 S.W.2d 516 (Mo. banc 1965) and State ex rel. King v. Village of Praethersville, 542 S.W.2d 578 (Mo. App. 1976)).

And, again, as more time goes on, the concerns related to the stability and certainty of governmental structure and the services and rights recognized by its citizenry become more and more crucial as the government exercising jurisdiction becomes established and the rights and engagement of the citizenry develop into a deep-rooted structure.

Therefore, if, indeed, an exception has been carved out of the quo warranto requirement by the cases cited by Lake St. Louis, it should be limited so as to prohibit untimely challenges when one governmental entity has established itself within the disputed territory by exercising jurisdiction. Such exception is not appropriate in the present case.

PETITION'S FAILURE TO STATE A CLAIM

1947).

A defendant may assert the defense of failure to state a claim upon which relief can be granted at any time, including the trial on the merits and on appeal. Rule 55.27 (g) (2), Missouri Rules of Civil Procedure.

Appellant's effort is plagued by an unavoidable conflict. Either Lake St. Louis wants O'Fallon out of the disputed area or it doesn't.

If Lake St. Louis is challenging the ongoing jurisdiction by O'Fallon within the disputed territory, then this action is one for ouster and that requires a quo warranto action exclusively under the auspices of the State.

If Lake St. Louis is not seeking a court ruling that will change jurisdiction over the area in the future, the relief sought by Lake St. Louis is meaningless. A mere declaration of where a boundary line ought to have been would be futile and ineffectual if the City of O'Fallon, which has governed for years, is not thereby ousted from jurisdiction within the area. Meaningless and ineffectual declarations are not the role or purpose of a declaratory judgment. Section 527.060 R.S.Mo. ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.")

Thus, Appellant is in a classic and fatal Catch 22 situation. Either Lake St. Louis wants to displace O'Fallon, in which case the Petition pleads the wrong action and is brought by an unauthorized party, or it fails to state a cause of action for want of a justiceable controversy and meaningful relief. Either way, the trial court's judgment of

dismissal was correct.

CONCLUSION

Respondent respectfully requests that the decision of the trial court to dismiss Appellant's Petition be affirmed.

CURTIS, HEINZ, GARRETT &
O'KEEFE, P.C.

Kevin M. O'Keefe, #23381
Stephanie E. Karr, #39593
130 South Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725-8788
(314) 725-8789 (Fax)

Attorneys for Respondent City of O'Fallon

Rule 84.06 Certificate

I hereby certify that Appellant's Brief contains 5,735 words and 623 lines and complies with the limitations contained in Rule 84.06(b). In addition, I hereby certify that Appellant's Brief has been transferred in Microsoft Word format to a CD Rom, and IBM-PC compatible; the attached disk has been scanned for viruses using Symantec Endpoint Protection virus detection software and the CD is virus-free.

Stephanie E. Karr

Certificate of Service

I hereby certify that two copies of Respondent's Brief in printed form and a copy of Respondent's Brief in electronic form was mailed on this 29th day of July, 2010, by placing same in the U.S. Mail, postage paid, to: Jay Summerville, Jeffery T. McPherson and Jonathan D. Valentino, Attorneys for Appellant, One Metropolitan Square, Suite 2600, St. Louis, Missouri 63102-2740.

Stephanie E. Karr