IN THE MISSOURI SUPREME COURT

No. SC91454

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

v.

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

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

DIVISION NO. 1
HON. ROBERT COHEN

Substitute Brief of Defendant/Respondent St. Louis County, Missouri

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PATRICIA REDINGTON #33143
COUNTY COUNSELOR
41 South Central, 9th Floor
Clayton, MO 63105
(314) 615-7042
Fax (314) 615-3732
Attorney for St. Louis County, Missouri

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JURISDICTIONAL STATEMENT

Plaintiffs/Appellants appeal the trial court's judgment dismissing their Class Action Amended Petition for failure to state a claim, which judgment was affirmed in part and reversed and remanded in part by the Missouri Court of Appeals, Eastern District, on November 16, 2010. This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution in that the Supreme Court may transfer cases by order after issuance of an opinion by an appellate court, which the Court did by order dated March 1, 2011.

STATEMENT OF FACTS

Imbued with a constitutional grant of authority to legislate pertaining to municipal services and functions, *see Mo. Const. Art. VI, Section 18(c),* Respondent St. Louis County ("County") in 2006 enacted a comprehensive Waste Management Code which dictated the establishment of a waste collection program for the unincorporated area of the county. *Ordinance No. 23,023, LF pp.41-146.* Specifically, the 2006 Code directed the County Executive to "establish areas within the unincorporated County for the collection and transfer of waste and recovered materials" by January 15, 2008, after which he was authorized to advertise for bids and the County Council was to award contracts to the lowest bidders for those services. *Id. at 146.*

The County Council's authority to exercise this constitutional grant of power was

premised upon Article II, Section 2.180 of the St. Louis County Charter.[1] That section provides:

> **Section 2.180** Pursuant to and in conformity with the constitution of Missouri and without limiting the generality of the powers vested in the council by this charter, the council shall have, ***by ordinance***, the power to . . .
>
> 11. Collect and dispose of sewage, offal, ashes, garbage and refuse, or license and regulate such collection and disposal . . .
>
> 22. Furnish or provide within the part of the county outside incorporated cities any service or function of any municipality or political subdivision . . .
>
> [and]
>
> 23. Exercise legislative power pertaining to public health, police and traffic . . . and on such other subjects as may be authorized by the constitution or by law . . . .

Respondent's Appendix 2-5, subsections 11, 22 and 23 (emphasis added).

Following establishment of its new waste collection program in 2006, County very publicly began to implement the program. Specifically, County worked to improve the program by enacting various modifications, *Class Action Amended Petition ("Petition"), LF at 27*, while at the same time establishing the required collection areas, publishing

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[1] The Court may take judicial notice of St. Louis County's Charter, *see* Mo. Const. Art. VI, Section 18(j), and a copy of Section 2.180 of the Charter is included in County's Appendix at A-2 through A-6.

maps which showed the collection areas, and publishing information on the program for distribution to County residents. *Petition, LF at 27-28 and 291-97*. In 2008 County executed contracts with Respondent waste collection businesses ("Haulers") for the collection of waste in the eight established collection areas. *Petition Exhs. 6-13, LF at 298-331*.

All eight contracts called for Haulers to be paid for their services directly by each customer served; none of the contracts contemplated the raising of funds for collective payment of the service charges by the residents of the eight different collection areas. *Id.* None of the contracts provided for the payment of any money by County residents to County or to any other political subdivision. *Id*. The program was fully implemented as of October 1, 2008, which was the date upon which waste collection services began in the last of the eight waste collection areas. *Id., LF at 299, 303, 307, 311, 315, 319, 324 and 329.* Thus, the named Appellants all began receiving waste collection services from Haulers on or before October 1, 2008.[2] *Id; Petition ¶¶ 2-4 and 21-23, LF at 24-25, 28.*

[2] Appellants erroneously contend that the Missouri Court of Appeals "decided and announced" on October 28, 2008, prior to County's waste collection program having become operational, that County was required to give two-year notice per Section 260.247 RSMo. *Substitute Brief of Appellants at pp. 18 and 33*. As is evident from Appellants' Petition, however, collection in each of the eight areas had begun on or before October 1, 2008. *LF at 299, 303, 307, 311, 315, 319, 324 and 329*. Further, the appellate opinion was *dicta* to the extent it interpreted the requirements of Section

Approximately three years after County's waste collection program was established in December of 2006 and one year they had begun receiving waste collection services from Haulers, Appellants filed suit seeking a declaration that County's waste collection program was void and illegal. *LF at 1.* Appellants contended in Count 1 that County lacked authority to implement its program due to Section 2.180.24 of County's Charter, which requires a vote by proposed "district" members before establishment of political subdivisions with the power to impose taxes for the provision and collective funding of "garbage and refuse collection" services to its members. *LF at 35-36.* Under that section, a vote is required prior to creation of districts wherein collective payment for authorized services is to be made "from funds raised by special assessment, general taxation or service charge, or any combination thereof within such districts . . . ." *County Charter Section 2.180.24, Appendix at A-5.*

Appellants further contended in Count 1 that County's waste collection program is void because County did not provide two-year notice to existing waste haulers before implementing its program to organize and regulate waste collection throughout unincorporated County. *LF at 35-36.* The referenced notice requirement had been imposed upon political subdivisions by Section 260.247 RSMo. as amended by S.B. 54

260.247 RSMo. rather than the simple fact of whether its requirements were even applicable to County.

(2007) effective January 1, 2008.[3] *Appendix at A-9*.

In addition to requesting a declaration of the invalidity of County's waste collection program and the evisceration of their payment obligations thereunder, Appellants also requested damages from Haulers for money had and received (*Count 2, LF at 36-37*), for alleged violations of the Missouri Merchandising Practices Act (*Count 3, LF at 37-39*), and for unjust enrichment (*Count 4, LF at 39*). County and Haulers separately moved to dismiss Appellants' Class Action Amended Petition for failure to state a claim for which relief could be granted, *LF at 6-8*, and their motions were granted by the Hon. Robert Cohen. *LF at 352.* This appeal followed.

[3] The Court may take judicial notice of S.B. 54 (2007), the relevant portions of which are included in County's Appendix at A-7 through A-9. Prior to the General Assembly's amendment of that provision in 2007, Section 260.247 RSMo addressed only the provision of waste services by cities. *See* Section 260.247 RSMo (2000).

ARGUMENT

"The standard of review for a trial court's grant of a motion to dismiss is *de novo*." *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008).

I TRIAL COURT'S DISMISSAL OF APPELLANTS' REQUEST IN COUNT 1 FOR A DECLARATION THAT COUNTY'S WASTE COLLECTION PROGRAM WAS VOID FOR FAILURE TO PRECEDE IT WITH A POPULAR ELECTION SHOULD BE AFFIRMED, BECAUSE TRIAL COURT APPROPRIATELY REACHED THE MERITS AND CORRECTLY DETERMINED THAT COUNTY'S CHARTER DOES NOT REQUIRE AN ELECTION FOR THE PROVISION OF MUNICIPAL SERVICES SUCH AS WASTE COLLECTION. (POINTS 1 AND 3)

A. Trial Court Appropriately Reached The Merits Of Appellants' Declaratory Judgment Claim In Resolving County's Motion To Dismiss.

When faced with a motion to dismiss a request for declaratory relief, the general rule is that courts will not perform the statutory construction underlying the claim. *City of Creve Coeur v. Creve Coeur Fire Protection District*, 355 S.W.2d 857, 859 (Mo. banc 1962) (citation omitted). This rule, however, is not absolute.

In *City of Creve Coeur*, the Court suggested that dismissal would be appropriate "if it is obvious beyond peradventure of doubt that any claim for a declaration of rights under any construction of the statutes in question is wholly without substance." *Id.* That is the case here. Because the Charter provision at issue is not susceptible of any

construction that would require a popular vote prior to County establishing a waste collection program by ordinance, *see infra*, it is "beyond peradventure" that Appellants cannot prevail, and County's motion to dismiss was therefore properly addressed on the merits.

Moreover, the general rule against performing statutory construction on a motion to dismiss appears to be based at least in part upon the need to develop facts. Thus in *City of Creve Coeur*, the trial court's dismissal of a petition for declaratory judgment was deemed erroneous where the Court determined that the plaintiff should be "afforded an opportunity to adduce evidence to sustain its allegations." *Id.*, 355 S.W.2d at 860. Such is not the case here, where even on appeal Appellants have claimed no error by virtue of the trial court's decision to address the merits of County's motion to dismiss. Remanding the case to the trial court so that County and Haulers may retitle their motions to dismiss as motions for summary judgment would unnecessarily waste judicial resources. In the interest of avoiding prolongation of this litigation, the Court should proceed to decide the merits underlying County's' motion to dismiss.

B. County's Charter Does Not Require An Election For The Provision Of Municipal Services Such As Waste Collection.

Appellants contend that the St. Louis County Charter required pre-approval by popular vote of the waste collection program which has been implemented by County. Appellants' contention is premised upon their misinterpretation of Section 2.180.24 of County's Charter. Section 2.180.24 enables the creation of political subdivisions ("districts") for the purpose of providing various municipal services, but only after

approval by the voters within the proposed districts. Specifically, Section 2.180.24 authorizes the County Council to:

> Provide for the creation of districts in the unincorporated areas of the county within which may be provided police protection, fire protection, public water supply, streets, sidewalks, street lighting, sewers, sewage disposal facilities, garbage and refuse collection and disposal, and such kindred facilities as the voters therein by a majority of those voting thereon may approve, **the same to be paid for from funds raised by special assessment, general taxation or service charge**, or any combination thereof within such districts. . . .

Appendix at A-5 (emphasis added). Appellants erroneously contend that County's waste collection program includes the establishment of such "districts" and therefore comes within the limitation of Section 2.180.24.

The "districts" of Section 2.180.24 bear no resemblance to the areas that were administratively designated by County for the purpose of soliciting bids for services under its program. Instead, Section 2.180.24 districts are literally new political subdivisions, cloaked with the immense power of taxation to raise funds from which the districts may then pay for governmental services. *See* Section 70.210(3) RSMo., defining a political subdivision as "counties, townships, cities, towns, villages . . . and any other public subdivision or public authority *having the power to tax*" (emphasis added).

No wonder, then, that County residents chose in their Charter to retain the power to approve by vote the creation of these powerful political subdivisions. Missouri citizens have a long tradition, even prior to adoption of the limitations contained in the Hancock Amendment, of requiring voter approval before handing over to a government the power to tax. *See, i.e., Section 235.070 RSMo (1947)* (requiring election for establishment of street light maintenance districts); *Section 204.250 RSMo. (1967)* (requiring election for establishment of common sewer districts); *Section 206.070 RSMo. (1967)* (requiring election for establishment of hospital districts).

Indeed, County's Charter could not have provided otherwise in contemplating the creation of new political subdivisions with the power to tax. County's powers as a constitutional charter county do not include the authority to create by ordinance new taxing districts, *see* Mo. Const. Art. VI, §§18(a)-(e), and Section 18(d) specifically limits a charter county's taxing power by providing that it "shall only impose such taxes as it is authorized to impose by the constitution or by law." If charter counties lack the independent power to impose new taxes directly, then obviously they may not do so indirectly by establishing "districts" with the power to do so.

As a corollary to their power to tax, the political subdivisions contemplated by Section 2.180.24 must then procure the services which prompted their creation, and pay for those services using the funds they have raised by having imposed "special assessment[s], general taxation or service charge[s], or any combination thereof" upon their members. The collective payment for services by the district, rather than by the individuals therein, is another significant component of these voter-approved districts.

These definitive characteristics – the power to tax, and the duty to provide and collectively pay for services for their members – contrast sharply with the attributes of the waste collection program established by County. In establishing a program to provide for more efficient waste collection services to its residents, County merely divided the unincorporated County into areas in which haulers were designated to provide collection services. Those services are provided to and paid for directly by individual households, without the need or authority for any taxation by County.

Clearly, Section 2.180.24 does not govern establishment of the waste collection program approved by the County Council via Ordinance No. 23,023. Instead, County's authority to establish the waste collection program at issue derives "both from Missouri Constitution article VI, section 18(c), *and from the St. Louis County Charter, section 2.180.11."* *State ex rel. American Eagle Waste Industries v. St. Louis County*, 272 S.W.3d 336, 343 n. 7 (Mo.App. 2008) (emphasis added). The power conferred upon the County Council "by ordinance" in Section 2.180.11, to "[c]ollect and dispose of . . . garbage and refuse, **or license and regulate such collection**," *Appendix at A-3 (emhasis added),* describes exactly what County has done via Ordinance No. 23,023. Accordingly, County's waste collection program does not require approval by popular vote but instead may be exercised "by ordinance." Section 2.180. *See also F.W. Disposal South LLC v. St. Louis County*, 168 S.W.3d 607, 609 (Mo.App. 2005) (County's Charter "gives the St. Louis County Council power to license and regulate the collection and disposal of solid waste *by enacting ordinances*") (emphasis added). That being the case, the Court need look no further for support to validate County's waste collection

program as established by Ordinance No. 23,023.

But although the Court need not look any further for support, further support does in fact exist. The County Council is also authorized "by ordinance" to perform municipal functions and services, *see* Section 2.180.22, *Appendix at A-4*, and to exercise legislative power pertaining to public health, *see* Section 2.180.23. *Appendix at A-5*. Provision for the collection of waste is clearly both a health issue and a municipal function, as is acknowledged by an abundance of cases to that effect. *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. 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").

Additionally, Missouri statutes offer even more support for the fact that collection of trash is a municipal function, and thus coming under County's subsection .23 authority to exercise legislative power by ordinance. *See, i.e.*, Section 71.680.1 RSMo (2000) (stating that "each city . . . may provide for the gathering, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste accumulating in such cities

either by itself, or by contract with others. . ."); Section 260.215 RSMo (2000) (providing that "each city and each county . . . shall provide individually or collectively for the collection and disposal of solid wastes for those areas within its boundaries that are to be served by the solid waste management system. . . ."). There is no room to debate the fact that waste collection is a traditional municipal function, and that as such it may be furnished or provided by County by enacting ordinances.

Appellants also argue that County Charter Section 2.180.24 is a special grant of power, and cite *Childress v. Anderson*, 865 S.W.2d 384 (Mo. App. 1993), for the proposition that a special grant of power supersedes general grant when a conflict exists. *Substitute Brief of Appellants p. 33*. In *Childress*, relators sought to compel by mandamus the placement on the ballot of an initiative petition to rezone particular property. The charter under which relators claimed authority to file their initiative petition also provided that any zoning ordinance was to be "first submitted to the [planning and zoning] commission for its examination and recommendation" before being passed. *Id.* at 388-89. Thus, the two relevant charter provisions presented an irreconciliable conflict; either the initiative process was not available to the relators despite a charter provision stating that it was, or a zoning ordinance could be enacted – also contrary to a charter provision - without prior review by the zoning commission. The court resolved this "inherent conflict," *id.* at 389, by concluding that the special provision pertaining to public improvements "trumped" the general provision relating to the initiative process.

The *Childress* decision is inapplicable to the case at hand, where no conflict exists

between the various St. Louis County Charter provisions. As noted *supra*, subsection .24 is wholly inapplicable to the waste collection program established by County, in that County's program does not provide for the creation of new political subdivisions, for taxing authority within any of the areas established for waste collection, or for the collective payment for services from any public fund. Insofar as subsection .24 does not purport to regulate the type of activity at issue herein, it does not conflict with those subsections that do; subsection 24 districts, which are formal districts that provide for self-taxation and the collective payment of waste collection services, are consistent and may co-exist with the establishment of collection areas within which designated haulers are licensed to provide services pursuant to subsections .11, .22 and .23 of Section 2.180.

But apart from the fact that County's waste collection program does not fit the description of districts for which a vote is required under subsection .24, it is further true that subsection .24 is no more a special grant of power than is subsection .11 under which authority County's waste collection program was established. It is hard to imagine a more specific grant of power than the one in subsection .11 relating to the collection and disposition of "sewage, offal, ashes, garbage and refuse" and to the licensing and regulation of same. The provision relied on by Appellants for voter-approved districts for "fire protection, public water supply, streets sidewalks, street lighting, sewers, sewage disposal facilities, garbage and refuse collection and disposal, *and such kindred facilities*" (emphasis added) is no less general than a provision authorizing the County to provide for the collection and disposition of "garbage and refuse." Appellants' bald assertion that subsection .24 is a special grant of authority and that subsections .11, .22 and .23 are

general grants, is unsupported by any case citation or, indeed, even any argument by Appellants as to why this is so.

Appellants' interpretation of Section 2.180.24 would render meaningless the grants of authority under subsections .11, .22 and .23 of Section 2.180 to provide for the collection and disposition of garbage, to enact ordinances to protect public health, and to furnish municipal services including waste 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. 1977); *see also State ex rel. McNary v. Hais*, 670 S.W.2d 494, 495 (Mo. banc 1984) (courts "favor a construction that avoids unjust or unreasonable results").

The absurd result for which Appellants advocate appears to be based upon casual use of the word "district" in literature describing County's waste collection program. For instance, Appellants contend that County "admitted to creating trash district through party admissions. . ." and cite in support of this statement County Health Department materials which refer to "districts" in published information titled "Frequently Asked Questions about Recycling, Recycling Carts, and Basic Trash Service in St. Louis County." *LF at 291-297.* Appellants seem to believe that use of the word "district" in County materials answers the question whether County's program includes "districts" as that term is used in Section 2.180.24.

Such is not the case. Words frequently have multiple meanings, and it is the context in which words are used that their meaning may be found. *See, i.e., Paddock*

Forest Residents Assoc., Inc. v. Ladue Service Corp., 613 S.W.2d 474, 477 (Mo.App. 1981) ("The meaning of the term 'said lots' in Paragraph II(7) is not ascertainable without regard to the circumstances surrounding the use of the word 'lot'."). The use of the word "district" as a synonym for the word "area" is not relevant to determining whether an election was required for the establishment of County's waste collection program. Indeed, County would prevail if that were the case, because the official term used by County in establishing its program was "area." *Ordinance 23,023, LF at 146.*

Furthermore, County's interpretation of Ordinance No. 23,023 as establishing the kind of program that is authorized by ordinance under County's Charter is entitled to great weight by the courts. "Although the contemporaneous construction adopted by the parties interested in the enforcement of the ordinances is not controlling or binding upon the courts it is entitled to great weight . . . '[A] construction placed upon [the ordinances] by the officers charged with their execution should be favored by the courts.'" *City of Joplin v. Joplin Water Works Factory*, 386 S.W.2d 369, 374 (Mo. 1965) (citations omitted). "[T]he interpretation given to the language by the body in charge of its enactment and application is . . . entitled to great weight." *HHC Medical Group, P.C. v. City of Creve Coeur Bd. of Adjustment*, 99 S.W.3d 68, 71 (Mo.App. 2003). Appellants' attempt to produce an absurd or unreasonable result, in derogation of County's own interpretation of its ordinances, must be rejected and the County's ordinance authority to establish its waste collection program affirmed.

II TRIAL COURT'S DISMISSAL OF APPELLANTS' COUNT 1 REQUEST FOR A DECLARATION THAT COUNTY'S WASTE COLLECTION PROGRAM WAS VOID FOR FAILURE TO COMPLY WITH SECTION 260.247 RSMo. SHOULD BE AFFIRMED, BECAUSE SECTION 260.247 RSMo. DOES NOT APPLY TO COUNTY AND IS THEREFORE WHOLLY IRRELEVANT TO A DETERMINATION OF ANY MATTERS BETWEEN APPELLANTS AND COUNTY, AND APPELLANTS HAVE THEREFORE FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED. (POINT 2)

A. Trial Court Appropriately Reached The Merits Of Appellants' Declaratory Judgment Claim In Resolving County's Motion To Dismiss.

As noted *supra*, the sufficiency of a petition for declaratory relief is judged by whether the petition states facts from which it appears that the petitioner "is entitled to a declaration of rights at all." *City of Creve Coeur*, 355 S.W.2d at 859. To the extent their request for declaratory relief is based on County's alleged failure to comply with the notice provisions set forth in Section 260.247 RSMo., Appellants have failed to state facts showing that they are entitled to a declaration of rights and the trial court acted correctly in dismissing that portion of Appellants' petition.

Appellants' claim for relief under Section 260.247 RSMo. falls squarely within the approved grounds for dismissal of a petition for declaratory relief:

> We have no doubt that a plaintiff may not sufficiently state a claim for

> declaratory relief by simply averring that a proper construction of specified statutes entitles him to certain rights and places certain obligations on a defendant, if it is apparent that the statutes in question are, for example, wholly irrelevant to a determination of any matters between plaintiff and defendant.

City of Creve Coeur, 355 S.W.2d at 859. Here, County's constitutional grant of legislative power with respect to municipal functions such as waste collection prevents the General Assembly from suspending county's power to provide for waste collection services in St. Louis County. Additionally, the provisions of Section 260.247 as amended to include political subdivisions in 2008, do not operate retrospectively to bar County's completion of the waste collection program that had been initiated in 2006. Accordingly, Section 260.247 RSMo. imposes no duty upon County. Because Section 260.247 RSMo. imposes no duty upon County, it is wholly irrelevant to a determination of any matters between Appellants and County and dismissal of Appellants' petition for alleged violation of Section 260.247 RSMo. should be affirmed.

B. Section 260.247 RSMo. Is Inapplicable to County Because The General Assembly Cannot Negate Or Impair County's Superior Constitutional Authority to Legislate With Respect To Waste Collection.

Although the General Assembly has vast power with respect to enactment of legislation, its power is not unlimited. The General Assembly "has the power to enact any law not prohibited by the constitution, and the state constitution . . . is a limitation on

legislative power." *State ex inf. Danforth v. Merrell*, 530 S.W.2d 209, 213 (Mo. banc 1975). Thus the General Assembly may legislate only absent a constitutional prohibition to the contrary. *See Committee for Educational Equality v. State*, 294 S.W.3d 477, 488 (Mo. banc 2009). "Regardless of legislative intent, it should be obvious that a statute cannot supercede a constitutional provision." *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. banc 1993).

The General Assembly's legislative power is limited with respect to waste collection services in the unincorporated area of a constitutional charter county, in that Mo. Const. Art. VI §18(c) vests legislative power over such matters in charter counties rather than the General Assembly. Here, it is irrefutable that 1) the Constitution confers upon charter counties (including St. Louis County) superior legislative power with respect to municipal functions; 2) waste collection is a municipal function; and 3) Section 260.247 RSMo. acts to revoke the right of political subdivisions to control waste collection for a two-year period. It follows inevitably from those facts that Section 260.247 RSMo. is not applicable to County and cannot serve as the basis for any claim against County.

1) County has superior legislative power pertaining to municipal functions.

St. Louis County is a constitutional charter county. It is beyond dispute that St. Louis County, as a constitutional charter county, may perform functions of a local or municipal nature without interference from the General Assembly:

> A county under the special charter provisions of our constitution . . . may perform functions of a local or municipal nature at least in the unincorporated

parts of the county. ***These are constitutional grants which are not subject to, but take precedence over, the legislative power***.

State ex rel. Shepley v. Gamble, 280 S.W.2d 656, 660 (Mo. *banc* 1955) (emphasis added).

This superior legislative authority as to municipal functions derives directly and explicitly from Art. VI, Section 18(c) of the Missouri Constitution. Section 18(c) states, clearly and succinctly, that a county's charter "may provide for the vesting and exercise of legislative power pertaining to any and all services of a municipality or political subdivision . . . in the part of the county outside incorporated cities . . . ."[4]

The court's determination in *Shepley v. Gamble*, that the legislative power with respect to municipal functions had been vested in charter counties by the explicit language of Section 18(c), was itself explicit and dispositive of that issue. The *Shepley* decision alone provides ample support for County's contention that its power to regulate local matters (such as trash collection) takes precedence over State legislative enactments.

But County need not rely only upon *Shepley v. Gamble*. Time after time, this Court has reiterated the fact of County precedence over the General Assembly in local matters. *See Casper v. Hetlage*, 359 S.W.2d 781 (Mo. 1962) (upholding County zoning ordinances which did not conform to the procedural requirements dictated for counties by

[4] The court may take judicial notice pursuant to Mo. Const. Art. VI, Section 18(j), that County's Charter provides for the exercise of that power by County. *St. Louis County Section 2.180.22 and .23, Exh. 18.*

state statute); *St. Louis County v. City of Manchester*, 360 S.W.2d 638, 642 (Mo. banc 1962) ("the grant of municipal powers to charter counties under §18 of Art. VI is meaningful and vests rights which cannot be taken away ***or impaired*** by the general assembly. . . .") (emphasis added). The power conferred by Section 18(c) is real and substantial. *See Chesterfield Fire Protection District v. St. Louis County*, 645 S.W.2d 367 (Mo. banc 1983) (establishment of a fire standards commission held authorized by Section 18(c)); *State ex rel. Walmar Investment Co. v. Mueller*, 512 S.W.2d 180, 185 (Mo. App. 1974) (County found to have authority under Section 18(c) to impose building regulations, which "regulations by a municipality are an exercise of the police power").

2. Waste collection is a municipal function.

Just as it is indisputable that a constitutional charter county may perform municipal functions without interference from the General Assembly, so, too, it is impossible to deny that the regulation and disposition of trash, garbage and other waste is a municipal function. If the court does not wish to take judicial notice of the many municipalities in St. Louis County that provide either directly or by contract for trash collection for its residents,[5] it may instead refer to the Revised Statutes of Missouri; the General Assembly has itself regularly recognized and treated trash collection as a municipal function.

Section 71.680.1, Chapter 71 RSMo, "Provisions Relative to all Cities and

[5] "A court may take judicial notice of events that are common knowledge." *Colvin v. Carr*, 799 S.W.2d 153, 158 (Mo. App. 1990).

Towns," states that "[i]n addition to their other powers for the protection of the public health, each city . . . may provide for the gathering, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste accumulating in such cities either by itself, or by contract with others . . . ." Section 71.690 RSMo. broadly authorizes cities to "pass all ordinances necessary for the carrying into effect of the powers granted in section 71.680." And the statute at issue in this case, Section 260.247 RSMo., regulated only cities for twenty years before its recent amendment to include political subdivisions - signaling the General Assembly's understanding that solid waste services are a municipal function and that regulation thereof would logically be imposed upon cities.

Moreover, a plethora of cases reflect the courts' awareness that trash collection and the disposition of waste are municipal functions. In *Valley Spring Hog Ranch Co. v. Plagmann*, 220 S.W. 1 (Mo. banc 1920), for example, a garbage collector under contract with the City of Joplin sued to enjoin the collection of garbage by others in violation of the ordinance granting him an exclusive contract. The court upheld the ordinance, specifically rejecting characterization of the contract as a "monopoly" and noting that cities such as Joplin had "broad authority under their police power" to act on behalf of the public health by regulating garbage collection. *Id.*

Consistently therewith, the Supreme Court in *State ex rel. City of Macon v. Belt*, 561 S.W.2d 117 (Mo. banc 1978), reiterated the concept that "the exclusive privilege to collect and dispose of solid waste . . . was 'fairly referable' to the comfort, health and general welfare of the inhabitants of the City . . . and is a valid exercise of the police power." *Id.* at 118. And in *Campbell v. City of Frontenac*, 527 S.W.2d 643, 645 (Mo.

App. 1975), the court stated that "[w]e entertain no doubt that a city of the fourth class 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." *See also State ex rel. Birk v. City of Jackson*, 907 S.W.2d 181, 185 (Mo. App. 1995) (noting statutory authority of cities to provide for the gathering and disposition of waste).

It is, therefore, manifest that St. Louis County possesses the constitutional power under Section 18(c) - superior to that of the General Assembly - to legislate with respect to waste collection, because waste collection is a municipal function as to which County's power under Mo. Const. Section 18(c) supersedes the power of the General Assembly.

3) Section 260.247 RSMo. impairs the power of political subdivisions to control waste collection and its restrictions are therefore inapplicable to County.

Section 260.247 RSMo., as amended by S.B. 54 (2007), purports to limit a county's power to regulate waste collection by prohibiting counties from collecting or providing for waste collection until they give existing waste haulers two-year notice of their intent to do so. The effect of Section 260.247 RSMo. is, quite simply, to revoke the power of political subdivisions to control waste collection for a two-year period. As to County, this revocation would be contrary to County's constitutional grant which prohibits the General Assembly not just from taking away, but even from merely **impairing**, the grant of municipal powers conferred upon charter counties by Mo. Const. Art. VI, Section 18(c). *See St. Louis County v. City of Manchester*, 360 S.W.2d at 642.

Despite the impermissible impairment that would be caused by application of Section 260.247 RSMo. to County, the Eastern District in *State ex rel. American Eagle Waste Industries LLC v. St. Louis County*, 272 S.W.3d 336 (Mo.App. 2008), suggested that County is subject to Section 260.247RSMo. and was therefore obligated to comply with the notice provisions therein when implementing a waste collection program in unincorporated St. Louis County. The appellate court in *American Eagle* overturned the trial court's dismissal of a petition for declaratory relief to that effect, and opined "in order to guide the court's determination on remand" that Section 260.247 RSMo. pertained to a matter of statewide policy and therefore superseded County's constitutional grant of power.

The appellate court's failure to recognize the unconstitutional impairment of County's legislative power caused by its interpretation of Section 260.247 stemmed from the court's erroneous focus on the General Assembly's presumed intent, rather than its actual action. The court speculated that the General Assembly's *purpose* in enacting Section 260.247 RSMo. was to protect business entities, and concluded that such a purpose evinced a statewide policy to which even charter counties must adhere. *American Eagle*, 272 S.W.3d at 343. But in doing so, the appellate court ignored that the *effect* of the General Assembly's enactment would be to revoke, for two years, County's prerogative to legislate with respect to waste collection in St. Louis County. By virtue of Mo. Const. Art. VI §23, "statewide policy" is irrelevant when it comes to municipal services over which a charter county has chosen to exercise control; the General Assembly simply lacks the power to impose a statewide policy on a charter county's

decisions pertaining to the provisions of those services.

However laudable the General Assembly's intent might have been, the General Assembly lacked the power to override County's constitutional grant with respect to the municipal function of waste collection. As noted *supra*, "a statute cannot supercede a constitutional provision." *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d at 341. Any construction of Section 260.247 RSMo. which permits such a result is palpably wrong and creates precedent which is completely at odds with this Court's past, and consistent, pronouncements to the contrary.

Further underscoring the error of the appellate court's opinion in *American Eagle* is that its interpretation of Section 260.247 would render the amendment of that section via S.B. 54 (2007) unconstitutional, and it is a "well accepted" principle in construing statutes that "if one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. banc 1991). Were the appellate court's interpretation of Section 260.247 RSMo. allowed to stand, the entire statute would be invalid for violation of the constitutional requirement that no bill contain more than one subject which shall be clearly expressed in its title.[6]

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[6] Mo. Const. Art. III, §23 requires that no bill contain more than one subject which shall be clearly expressed in its title; this is a mandatory, not directory, limitation on the legislature. *Carmack v. Director, Mo. Dept. of Agriculture*, 945 S.W.2d 956 (Mo. 1997).

Accordingly, the Court should issue an opinion which corrects the Eastern District's *dicta* interpreting Section 260.247 RSMo. and which recognizes the legislative power conferred upon charter counties by Mo. Const. Art. VI, §18(c).

S.B. 54 (2007), which amended Section 260.247 RSMo. to include political subdivisions in addition to cities, was titled "An Act . . . relating to environmental regulation . . ." and contained no reference to any other subject. The incongruous insertion of a general "market regulation" into a statute purporting to address only environmental regulation would render the act void under Section 23. "The purpose of this section is to prevent hodge podge or logrolling legislation, to prevent surprise or fraud upon legislature by means of provisions in bills of which titles give no intimation, and to fairly apprise the people, through such publication of legislative proceedings as is usually made, of subjects of legislation being considered . . . ." *Graff v. Priest*, 201 S.W.2d 945, 952 (Mo. 1947).

The second limitation of Section 23 is that the subject of the bill must be clearly expressed in its title. *See C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. 2000). The "clear title" requirement is intended to prevent fraudulent, misleading and improper legislation, by providing that the title of the bill should indicate "in a general way the kind of legislation being enacted." *Fust v. Attorney General for the State of Mo.*, 947 S.W.2d 424 (Mo. 1997). Because the title of S.B. 54 is devoid of any reference to business or market regulations therein, the interpretation set forth by the *American Eagle* court would render the act unconstitutional and void.

C. Section 260.247 RSMo. As Amended By S.B. 54 (2007) Is Inapplicable To County Because It Does Not Operate Retrospectively To Bar County From Continued Implementation Of The Waste Collection Program Previously Begun By County In 2006.

It is well-established that substantive statutory provisions "are generally presumed to operate prospectively, 'unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication.'" *Dept. of Social Services v. Villa Capri Homes*, 684 S.W.2d 327, 332 (Mo. banc 1985) (citation omitted); *see also Utilicorp United, Inc. v. Dir. of Revenue*, 785 S.W.2d 277, 278 (Mo. banc 1990). Although the General Assembly is not constitutionally barred from passing laws that operate retrospectively against the state or its political subdivisions, *Savannah R-III School Distr. v. Public School Retirement System of Mo.*, 950 S.W.2d 854, 858 (Mo. banc 1997), the presumption still favors prospective application of substantive statutes: "we will normally apply a law retrospectively only where it is procedural in nature or where it waives the rights of the state and the legislature has provided that it will have retrospective effect." *Wellner v. Dir. of Revenue*, 16 S.W.3d 352, 354 (Mo.App. 2000).

A law is retrospective when "it imposes a new obligation, duty or disability with respect to transactions or considerations already past." *State ex rel. Koster v. Olive*, 282 S.W.3d 842, 848 (Mo. banc 2009). Certainly the January 1, 2008 amendment of Section 260.247 RSMo. is retrospective if it is interpreted as

applying to County and imposing a new obligation on County's 2006 enactment of a waste collection program. County's adoption of an ordinance *requiring* the establishment of waste collection areas and establishing a procedure for the provision of waste collection constituted a public announcement of its intent to provide for waste collection services in unincorporated St. Louis County.[7] At that point in 2006, County was free to continue with implementation of its program. The 2008 amendment, if applied to County, would mean that the new obligation of waiting two years before going forward with a waste collection program (which was already ongoing) was being imposed on a transaction already past.

"The underlying repugnance to the retrospective application of laws is that an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto." *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. banc 1974). Additionally, "notions of justice and fair play in a particular case are always germane." *Id.* When County enacted its waste collection program in 2006, County had no obligation to advise existing haulers by certified mail of its decision to

[7] As noted in *Schnuck Markets, Inc. v. City of Bridgeton*, 895 S.W.2d 163, 168 (Mo. App. 1995) (citation omitted), even if people are not actually aware of the enactment of an ordinance, they are "conclusively presumed to know the law and that presumption applies to municipal ordinances."

begin providing for waste collection services, and then to wait two years before doing so. The notice provisions of Section 260.247 RSMo., if applied to County, would "give to something already done a different effect from that which it had when it transpired." *Doe v. Blunt*, 225 S.W.3d 421, 422 (Mo. banc 2007), and would not satisfy notions of justice and fair play.

Further, there is no basis for concluding that the General Assembly intended for S.B. 54 to apply retrospectively. Far from expressing an intent for the bill to apply retrospectively, the General Assembly in enacting S.B 54 actually **postponed** the effective date from the "default" effective date of August 28, 2007[8] to January 1, 2008. *Appendix at A-9.* The retrospective application of S.B. 54 to County's act in 2006 of approving an ordinance that had already begun the process of providing for waste collection services would be inconsistent with the expressed intent of the General Assembly and would adversely impact County's substantive and pre-existing right to go forward with the program as to which no restrictions were applicable when the program was enacted. To the extent Section 260.247 RSMo. is deemed applicable even to constitutional charter counties, its amendment as of 2008 should not be applied retrospectively to create a cause of action against County for non-compliance therewith.

[8] Mo. Const. Art. III, §29 states that new laws generally become effective no sooner than ninety days after adjournment of the legislative session, which under §20(a) is required to occur at midnight on May 30th.

III TRIAL COURT'S DISMISSAL OF APPELLANTS' REQUEST IN COUNT 1 FOR A DECLARATION THAT COUNTY'S WASTE COLLECTION PROGRAM WAS VOID FOR FAILURE TO COMPLY WITH SECTION 260.247 RSMo. SHOULD BE AFFIRMED BACAUSE EVEN IF THE PROVISIONS OF SECTION 260.247 RSMo ARE DEEMED APPLICABLE TO COUNTY, APPELLANTS LACK STANDING AND ARE NOT PRUDENTITALLY ENTITLED TO CHALLENGE COUNTY'S COMPLIANCE WITH THAT STATUTE. (POINT 2)

Appellants have claimed in Count 1 that the ordinance creating County's waste collection program was rendered void *ab initio* by County's non-compliance with the subsequently- enacted statute requiring two-year notice to existing waste haulers prior to providing for waste collection services.[9] However, Appellants lack standing to assert

[9] County notes initially that its program cannot be found "void *ab initio*" by virtue of a subsequently enacted statute, in that "to declare a statute 'void' means that it never had the authority to create any legal rights or responsibilities whatsoever." *R.E.J., Inc. v. City of Sikeston*, 142 S.W.3d 744 (Mo. banc 2004). Presumably Appellants seek to have the County's plan for program implementation deemed to have become prospectively subject to the requirements of Section 260.247 RSMo., although this, too, had become impossibleby the time Appellants requested it because County's program was already fully implemented.

such non-compliance as the basis for their claim, even if the notice provisions of Section 260.247 RSMo. are determined by the Court to be applicable to County. And even were Appellants found to have taxpayer standing, they would not be prudentially entitled to invoke the courts' jurisdiction.

Although Missouri courts have long recognized taxpayers' right to file suit to enjoin the illegal expenditure of public funds, "the mere filing of a lawsuit does not automatically confer standing on a taxpayer." *Eastern Mo. Laborers District Council v. St. Louis County*, 781 S.W.2d 43, 46 (Mo. banc 1989). The test for taxpayer standing was announced in *Eastern Mo. Laborers District Council*:

> Absent fraud or other compelling circumstances, to have standing a taxpayer must be able to demonstrate a direct expenditure of funds generated through taxation, or an increased levy in taxes, or a pecuniary loss *attributable to the challenged transaction* of a municipality.

Id. at 47 (emphasis added). This test continues to operate as the standard for taxpayer standing. *See, i.e., Ste. Genevieve School District R II v. Board of Aldermen of City of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. banc 2002); *Citizens For Preservation of Buehler Park v. City of Rolla*, 187 S.W.3d 359, 362 (Mo.App. 2006).

Although Appellants have asserted taxpayer standing, they have failed to plead facts suggesting any expenditure of public funds attributable to lack of notice to the former haulers. Appellants have alleged the use of public funds for the waste collection program itself, but those funds would have been expended for the program regardless of whether or not the program was preceded by two-year notice to then-existing haulers. It

is not the manner in which the program was implemented that has arguably caused the expenditure of any public funds, but only the fact of the program's operation at all. Lacking that connection between the challenged transaction and the claimed pecuniary loss, Appellants have not shown a possibility that they were "directly and adversely affected," *Ste. Genevieve School District R II*, 66 S.W.3d at 10, by the alleged non-compliance with Section 260.247 RSMo.

Appellants have also failed to allege facts which, if proved, would show they are "prudentially entitled" to invoke the courts' jurisdiction with respect to the requirements of Section 260.247 RSMo. The question of standing has a component other than mere justiciability; there is also the question whether courts *should* address the issue sought to be adjudicated:

> [P]rudential limitations - born of a concern that courts refrain from addressing abstract questions of wide public significance which are more appropriately addressed by other governmental institutions . . . include the requirement, in cases where the claim is based on a statute or constitutional provision, that "the constitutional or statutory provision on which the claim [to relief] rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." . . . A more familiar expression of this same concept is the statement that "the interest sought to be protected by the complainant" must arguably be "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Assoc. of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S.

150, 153 . . . (1970).

Harrison v. Monroe County, 716 S.W.2d 263, 266 (Mo. 1986) (citation omitted).

Appellants in this case are not within the "zone of interests" with which Section 260.247 RSMo. concerns itself. While Section 260.247 RSMo. *impacts* political subdivisions' ability to regulate waste collection in their jurisdiction, the *purpose* of the statute is to give advance notice to existing haulers, *see Christian Disposal, Inc. v. Village of Eolia*, 895 S.W.2d 632, 634 (Mo.App. 1995), not to their customers. Appellants were not engaged in waste collecting and their claimed injury is therefore not "within the 'zone of interests' created by statutes which plaintiffs contend are being violated." *Hudson v. School Dist. of Kansas City*, 578 S.W.2d 301, 313-14 (Mo.App. 1979).

Instead, Appellants are situated as were the plaintiffs in *West County Care Center, Inc. v. Missouri Health Facilities Review Committee*, 773 S.W.2d 474 (Mo.App. 1989), wherein a health care provider sought to challenge the jurisdiction of the Missouri Health Facilities Review Committee ("the Committee") to consider a competitor's application for a certificate of need after the expiration of the statutory review period. Although the competitor had waived compliance with the time period, the plaintiff provider sought to invoke the statutory limitation as a basis for prohibiting the Committee from exercising further jurisdiction over the matter. The court rejected the plaintiff's claim of taxpayer standing for the reason that the action complained of did not involve the expenditure of public funds, *id.* at 478, and rejected the plaintiff's claim of statutory standing for the reason that the time constraints raised by the plaintiff did not raise "a concern . . . within

the zone of interests which the statute accords a competitor affected person . . . ." *Id.*[10]

Appellants have not demonstrated that they are "adversely affected by the statute in question." *Ryder v. County of St. Charles*, 552 S.W.2d 705, 707 (Mo. banc 1977). *See also Liberman v. Cervantes*, 511 S.W.2d 835, 839 (Mo. banc 1974) (finding that pawnbrokers lacked standing to challenge as an invasion of their customers' privacy the requirement that pawnbrokers photograph all customers); *Union Electric Co. v. City of St. Charles*, 181 S.W.2d 526, 528 (Mo. 1944) ("Only those adversely affected by legislation may question its validity."). Appellants do not have standing as taxpayers to assert County's alleged failure to give notice to existing trash haulers before implementing County's program, and they are not within the zone of interests protected by the two-year notice provisions of Section 260.247 RSMo. Accordingly, it is apparent from Appellants' Petition alone that they are not entitled to a declaratory judgment based on Section 260.247 RSMo. and the trial court did not err in dismissing their request for same.

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[10] Interestingly, the *West County Care Center* plaintiff sought to invoke a right (to timely review) which had been waived by the very entity for whose benefit the right existed. In seeking to invalidate County's waste collection program based on alleged failure to give former haulers sufficient notice, Appellants are likewise invoking a right which the former haulers would themselves be free to waive, which provides still more support for the argument that they are not "prudentially entitled" to assert the former haulers' alleged rights under Section 260.247 RSMo.

IV TRIAL COURT DID NOT ERR IN DISMISSING APPELLANTS' REQUEST IN COUNT 1 FOR A DECLARATION THAT COUNTY'S WASTE COLLECTION PROGRAM WAS VOID FOR FAILURE TO COMPLY WITH SECTION 260.247 RSMo., BECAUSE EVEN IF THE PROVISIONS OF SECTION 260.247 RSMo ARE DEEMED APPLICABLE TO COUNTY, COMPLIANCE WITH THE PRE-PROGRAM NOTICE REQUIREMENTS OF SECTION 260.247 HAD BEEN RENDERED MOOT BY FULL IMPLEMENTATION OF THE WASTE COLLECTION PROGRAM. (POINT 5)

"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). Appellants' challenge to the manner in which County implemented its waste collection program, *i.e.* County's alleged failure to give two years' pre-program notice to then-existing haulers, has become moot due to full implementation of the program. Accordingly, the trial court's dismissal of that challenge should be affirmed, even if the Court finds that Section 260.247 RSMo. was applicable to County and that Appellants have standing to assert the benefits afforded to former haulers thereunder.

In this case, full implementation of the waste collection program had occurred

long before Appellants filed suit. *LF at 28.* Because Section 260.247 RSMo. merely addresses the manner in which new waste collection programs are to be implemented rather than the authority to maintain such a program at all, the question of whether former waste haulers should have received notice prior to implementation of the program was moot; it would now be impossible to give two years' notice to former waste haulers prior to implementing the program. The only haulers providing service at the present time are doing so under County's program. Because effectual relief was no longer available, the trial court did not err by dismissing Count 1.

"As Shakespeare would have it, 'What's done cannot be undone.'… This court cannot unring a bell and return the parties to the *status quo ante . . . .*" *Kinsky v. Steiger*, 109 S.W.3d 194, 196 (Mo.App. 2003). The *status quo ante* cannot be recreated with respect to the requirement of Section 260.247 RSMo. that existing haulers be given two years' notice for the purpose of making necessary business adjustments, because the then-existing haulers are no longer providing services within the program area. There are simply no "existing haulers" to whom notice could be given.

The facts herein are analogous to those in *State ex rel. Acoff v. City of University City*, 180 S.W.3d 83 (Mo.App. 2005). In *Acoff*, a group of firefighters sought a mandamus order "directing the City to cancel a promotional examination for the position of battalion chief." Their request was denied and they filed an appeal, but in the meantime the city proceeded with its examination and made the promotion. Pointing out that the matter had become moot by virtue of the examination and selection sought to be enjoined, the appellate court dismissed the appeal. And in *Eicholz v. Davis*, 289 S.W.2d

433, 435 (Mo.App. 1956), the trial court dismissed a petition and denied injunctive relief to a plaintiff seeking to prevent the sheriff from proceeding with the sale of realty. The sheriff then sold the property, after which the plaintiff's appeal was dismissed as moot. In dismissing the appeal, the court observed that:

> The sale sought to be enjoined has been held. If we should determine on this appeal that the lower court erred in dismissing the petition and rule that an injunction should have issued to stop the sale our order of reversal and remand would be an empty, vain and futile thing for we cannot set the clock back to enable the lower court to enjoin the conduct of a sale which has already been conducted, correct injuries that have already been committed or restore parties to rights of which they have already been deprived.

The court's observations in *Eicholz* are apt in the matter at hand; the clock cannot be set back to delay implementation of a program which has already been implemented, and Appellants' failure to seek timely injunctive relief has rendered their claims moot. Appellants are similarly situated to the appellants in *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890 (8th Cir. 2004), wherein an action to halt a construction project based on alleged procedural deficiencies was held moot upon completion of construction. As the court noted in *One Thousand Friends*, "[Appellant] could have avoided this result by seeking a stay pending this appeal, but it chose not to do so." *Id.* at 894. Here, Appellants could have sought declaratory or equitable relief back when the program was announced by ordinance in 2006 but did not do so, and their claims for same have

become moot and were properly dismissed by the trial court.

V TRIAL COURT DID NOT ERR IN DISMISSING APPELLANTS' REQUEST IN COUNT 1 FOR A DECLARATION THAT COUNTY'S WASTE COLLECTION PROGRAM WAS VOID FOR FAILURE TO PRECEDE IT WITH A COUNTYWIDE ELECTION OR TO PROVIDE TWO-YEAR NOTICE TO EXISTING HAULERS, BECAUSE APPELLANTS ARE BARRED FROM SEEKING SUCH RELIEF BY THE DOCTRINE OF LACHES. (POINT 4)

As Appellants acknowledged in their Petition, County authorized the program at issue back in December of 2006, and proceeded thereafter to implement it. *LF at 27*. It was nearly three years later, in September of 2009, that Appellants filed suit seeking a declaration that the Program was void. *LF at 1*. It is evident from the petition alone that the defense of laches applies and that Appellants' case was properly dismissed.

" '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, 558 (Mo.App. 2003) (citation omitted). Inexcusable delay can give rise to a defense of laches. *See Lee v. Spellings*, 447 F.3d 1087 (8th Cir. 2006). In order for a party to prevail on a motion to dismiss based on this defense, the petition must "show on its face that the action is barred by . . . laches." *City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 764 (Mo. banc 2010). " 'The prejudice and disadvantage which supports laches [includes] . . . a change in position in a way that would not have occurred but for the delay.' " *Ste.*

Genevieve County Levee Dist. # 2 v. Luhr Bros., Inc., 288 S.W.3d 779, 785 (Mo.App. 2009) (citation omitted).

It is apparent from the face of Appellants' Petition that they delayed unreasonably in challenging the implementation of County's waste collection program. As the Appellants admitted in their Petition, County's waste collection program was established and set in motion by Ordinance 23,023, which was approved by the County Council on December 12, 2006. *Petition ¶14, LF 27* . Appellants were all County residents at that time, *Petition ¶¶ 2-4, LF 24-25*, and as such were "conclusively presumed to know the law [including] . . . municipal ordinances." *Schnuck Markets, Inc. v. City of Bridgeton*, 895 S.W.2d at 168. And beyond their presumed knowledge of the program, Appellants all allege to have participated in the program by making payments to the Haulers who were providing waste collection services to Appellants during the one-year period preceding their initiation of this lawsuit. *Petition ¶50, LF 32*.

It was clear from the face of Ordinance 23,023 that the Council was not calling for an election to approve the program. It is also clear from Appellants' Petition that the County had materially changed its position by entering into contracts with Haulers for the provision of waste collection services during the interim between passage of Ordinance 23,023 and the initiation of Appellants' lawsuit. *Petition ¶ ¶ 39-46, LF 30-32*. Based on those contracts, Appellants seek to maintain a class action for damages, *Petition Counts 2, 3 and 4*, clearly to the detriment of County's already-implemented program.

It is also evident from the Petition itself that by waiting until nearly a year after the program was fully implemented to file suit, Appellants rendered it impossible for County

to comply with the two-year, pre-program notice which Appellants claim is required by Section 260.247 RSMo. It is evident beyond doubt that Appellants' substantial delay in seeking judicial relief prejudiced County. Had Appellants timely asserted their claims for declaratory relief back in 2006, when the Program complained of was established and implementation begun, Appellants could have been afforded any appropriate relief. Instead, Appellants chose to sit on their rights until the program was fully implemented, apparently hoping to create an opportunity to seek monetary relief or, at a minimum, to retain the benefit of years of waste collection without having to pay for that service.

"Equity aids the vigilant, not those who slumber on their rights." *Townsend v. Maplewood Investment & Loan Co.*, 173 S.W.2d 911, 913 (Mo. 1943). Declaratory judgments are based on and governed by equitable principles, and are subject to equitable defenses. *City of St. Joseph v. Lake Contrary Sewer Dist.*, 251 S.W.3d 362, 369 (Mo.App. 2008). Appellants were not vigilant in protecting their alleged rights and their claims for declaratory relief were properly dismissed based on the doctrine of laches.

CONCLUSION

The trial court's judgment dismissing the petition should be affirmed.

PATRICIA REDINGTON
COUNTY COUNSELOR

_____
Patricia Redington #33143
41 South Central Ave., 9th Floor
Clayton, Missouri 63105
(314) 615-7042
(314) 615-3732 (fax)
Attorney for St. Louis County

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2000 and contains 13,900 words. The font is Times New Roman, proportional spacing, 13-point type. A CD rom (which has been scanned for viruses and is virus-free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

_____
Patricia Redington

CERTIFICATE OF SERVICE

I certify that copies of this brief were mailed this 5th day of April, 2011, to E. Robert Schultz and Ronald J. Eisenberg, Schultz & Assoc. LLP,.640 Cepi Dr., Suite A, Chesterfield, MO 63005-1221; Scott J. Dickenson, John D. Ryan and Clayton E. Gillette, Lathrop & Gage LLP, 10 S. Broadway, Suite 1300, St. Louis, MO 63102; Edward Dowd, Jr., Robert F. Epperson and James E. Crowe, III, Dowd Bennett LLP, 7733 Forsyth, Suite 1410, Clayton, MO 63105; and Brian E. McGovern and James A. Hajek, McCarthy, Leonard & Kaemmerer, L.C., 400 South Woods Mill Road, Suite 250, Chesterfield, MO 63017.

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Patricia Redington