IN THE SUPREME COURT OF MISSOURI

SC93848

MISSOURI BANKERS ASSOCIATION AND
JONESBURG STATE BANK,

Appellants,

v.

ST. LOUIS COUNTY, MISSOURI AND
CHARLIE A. DOOLEY, IN HIS OFFICIAL CAPACITY AS
COUNTY EXECUTIVE,

Respondents.

Appeal from the Circuit Court of St. Louis County, Missouri
Division Number 33
The Honorable Brenda Stith Loftin, Presiding

SUBSTITUTE BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

Appellants Missouri Bankers Association, Inc. and Jonesburg State Bank (collectively "Appellants") challenge St. Louis County's ("County") enactment of Ordinance 25,190 of 2012, as amended by Ordinance 25,239 of 2012 ("Ordinance"). The Ordinance purports to amend Title VII of the Revised St. Louis County Code ("County Code") by requiring mediation prior to any foreclosure on a deed a trust. The Ordinance violates the Missouri Constitution, Missouri statutes and the County's own charter.

On September 24, 2012, Appellants filed suit for declaratory judgment and injunctive relief in the Circuit Court of the County of St. Louis. On September 27, 2012, the trial court entered a temporary restraining order ("TRO") enjoining the County and Charlie A. Dooley (collectively "Respondents") from enforcing the Ordinance. On November 14, 2012, after briefing on cross motions for summary judgment, the trial court entered judgment in favor of Respondents and dissolved the TRO.

Appellants timely appealed the trial court's judgment, and on October 15, 2013, the Court of Appeals for the Eastern District issued its opinion. The opinion held that the Ordinance conflicted with Missouri Revised Statute § 443.454, but dismissed the appeal as moot because the County represented it would not enforce the Ordinance. Based on the County's "concession" that it would not enforce the Ordinance, the Court of Appeals deemed it unnecessary to consider this controversy. The appellate court opinion did not void the Ordinance or direct the County to repeal the Ordinance. The opinion also failed to address the other grounds for appeal presented by Appellants. On October 30, 2013, Appellants filed a Motion for Rehearing or, In the Alternative, to Modify, as well as a

Motion to Transfer pursuant to Missouri Rule of Civil Procedure 83.02. The Motion and Application were denied on November 25, 2013.

In accordance with Missouri Rule of Civil Procedure 83.04, Appellants timely sought transfer to this Court. This Court granted Appellants' Application on February 25, 2014. The Court has jurisdiction pursuant to Missouri Constitution Article V, § 10, which provides in pertinent part:

> Cases pending in the court of appeals may be transferred to the supreme court . . . by order of the supreme court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.

MO. CONST., art. V, § 10 (emphasis added). *See also* Mo. R. Civ. P. 83.09 (2014) ("Any case coming to this Court from a district of the Court of Appeals, whether by certification, transfer or certiorari, may be finally determined the same as on original appeal.")

STATEMENT OF FACTS

I. The Appellants

Missouri Bankers Association ("MBA") is a non-profit association comprised of commercial banks and savings and loan associations that serves as the principal advocate for the banking industry within the State of Missouri. (L.F.17.)[1] MBA brought suit on behalf of members who would be adversely affected by implementation of the Ordinance. (Id.)

Jonesburg State Bank ("JSB") is a lending and deposit-taking entity subject to state laws and regulations, as well as supervision by the Missouri Division of Finance. (L.F. 18.) JSB is a taxpayer. (L.F. 21.) JSB has contracts with homeowners that will be subject to the Ordinance if not invalidated. (Id.)

II. The Ordinance

A. Purpose and Scope

The County Council purportedly enacted the Ordinance to address the "national residential property foreclosure crisis," and to reduce its impact on the County's property values, tax base, budget and collection of real property taxes. (L.F. 84.) To accomplish this monumental feat, the Ordinance dictates that any lender who made a residential property loan secured by a deed of trust ("Lender") and any defaulting owner of said

[1] Citations labeled "L.F." refer to the "Legal File" from the Court of Appeals. The Court of Appeals Legal File was transferred in its entirety to this Court.

property ("Homeowner") must participate in a mandatory mediation program ("Mediation Program") before a foreclosure deed may be filed in St. Louis County. (L.F. 91-98.)

B. Mediation Program Implementation

Under the Ordinance, a single individual manages and oversees the Mediation Program ("Mediation Coordinator"). (L.F. 86.) The Mediation Coordinator is a contractor for the County, rather than a County officer or employee. (Id.) Additionally, appointed mediators conduct the mediation conferences. (Id.) Both the Mediation Coordinator and mediators are appointed by the County Executive. (Id.)

The Ordinance requires the Lender to notify the Homeowner, in writing, about the Mediation Program and his/her rights thereunder ("Mediation Notice"). (L.F. 92-93.) The Mediation Notice must be provided to the Homeowner along with the Notice of Foreclosure. (Id.) A copy of this Notice must also be sent to the Mediation Coordinator. (L.F.92.) The Coordinator is then required to make at least three (3) attempts to contact the Homeowner regarding participation in the Mediation Program. (L.F. 93.)

If the Homeowner foregoes mediation, the Lender is deemed to have satisfied its obligations under the Mediation Program, and the Mediation Coordinator must issue the Lender a Certificate of Compliance. (Id.) If the Homeowner decides to mediate, Ordinance § 727.500 governs. (L.F. 94-97.) Under that section, the Mediation Coordinator must schedule mediation within sixty (60) days of receiving the Homeowner's notice of intent to participate. (L.F. 94.) If the Lender and Homeowner reach a settlement at the mediation, the Mediation Coordinator must issue a Certificate of Compliance within one (1) business day of the conference. (L.F. 96.)

If no settlement is reached, the Lender nevertheless satisfies the Mediation Program's requirements so long as the Lender made a "good faith effort" to settle. (L.F. 96-97.) The "good faith" determination is made by the Mediation Coordinator and/or the County Counselor. (Id.) In that instance, a Certificate of Compliance will issue within one (1) business day of the mediation conference if the Lender submitted all "necessary" paperwork, all required payments and was represented at the Mediation Conference by a person with the "authority to negotiate and modify the loan in question and the ability to review and approve options for the Homeowner's specific type of loan as required by Section 727.500(6)." (Id.)

C. Taxes Collected Under the Mediation Program

In conjunction with a copy of the Mediation Notice, the Lender must also send a $100 payment to the Mediation Coordinator. (L.F. 93.) This payment is non-refundable. (L.F. 93-94.) If the Homeowner elects to mediate, the Lender must pay an additional $350 not less than seven (7) business days before the mediation. (L.F. 94.) The payments are made directly to the Mediation Coordinator—the funds are never paid to, nor accounted for, by the County Treasurer. (L.F. 86.) These flat taxes are collected without regard for whether the Homeowner actually participates in the mediation and/or how much time the mediator spends on a particular mediation. (L.F. 94.)

D. Consequences of Non-Compliance

To receive a Certificate of Compliance, the Lender is required to participate in the Mediation Program. (L.F. 97.) The Lender must comply with all of the Ordinance's requirements to obtain a Certificate. (Id.) This Certificate must be filed with the St.

Louis County Assessor ("Assessor") simultaneously with the filing of a conveyance of the foreclosed property with the St. Louis County Recorder of Deeds ("Recorder"). (Id.) Although the Recorder cannot refuse to file a conveyance without a Certificate of Compliance, any Lender filing a non-certified conveyance is subject to prosecution and a fine of up to $1,000. (L.F. 97-98.)

If a Lender faces prosecution under the Ordinance for failure to comply, it is a "complete defense to prosecution [under the Ordinance] that the Lender . . . complied with the requirements set forth in Section 727.500.10(a)-(d)." (L.F. 97.) Section 727.500.13 of the Ordinance, however, states that "[a]ll documents and discussions presented during the Mediation Conference shall be deemed confidential and inadmissible in subsequent actions or proceedings as provided in Section 435.014, R.S.Mo. and Missouri Supreme Court Rule 17 except to the extent needed to prosecute a violation of Section 727.700." (Id.) (emphasis added). The Ordinance also does not require the mediator to issue findings of fact or conclusions of law to support a finding that a Lender violated the Ordinance. (L.F. 94-97.)

III. Procedural History

Appellants filed suit for declaratory judgment and injunctive relief in the Circuit Court of St. Louis County on September 24, 2012. On September 27, 2012, the trial court entered a TRO enjoining Respondents from enforcing the Ordinance. On November 14, 2012, the trial court entered summary judgment in favor of Respondents and dissolved the TRO.

Appellants timely appealed the trial court's judgment. On January 18, 2013, the Court of Appeals for the Eastern District of Missouri granted Appellants injunctive relief and delayed the Ordinance's implementation and enforcement during the appeal. On October 15, 2013, the Court of Appeals ruled that the Ordinance conflicted with Missouri Revised Statute § 443.454. The majority opinion, however, did not void the Ordinance. Instead, the court accepted a representation by the County Counselor that the County would not enforce the Ordinance and dismissed all of Appellant's claims as moot. The Court of Appeals then remanded the case to the trial court with instructions to vacate the underlying judgment.

On October 30, 2013, Appellants filed a Motion for Rehearing or, In the Alternative, to Modify, as well as an Application for Transfer to the Supreme Court of Missouri. The Motion and Application were denied on November 25, 2013.

Pursuant to Missouri Rule of Civil Procedure 83.04, Appellants timely filed their Application for Transfer to the Supreme Court of Missouri on December 10, 2013. This Court granted Appellants' Application on February 25, 2014. As indicated in the Jurisdictional Statement, *supra*, this Court is empowered to grant Appellants a final determination on their claims.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS SUMMARY JUDGMENT BECAUSE ENACTING THE ORDINANCE EXCEEDS THE COUNTY'S CHARTER AUTHORITY UNDER MISSOURI CONSTITUTION ARTICLE VI, § 18(B) IN THAT THE ORDINANCE CONFLICTS WITH STATUTES OF GENERAL STATEWIDE APPLICABILITY.

Flower Valley Shopping Ctr., Inc. v. St. Louis County, 528 S.W.2d 749, 754 (Mo. banc 1975)

Jackson County v. State, 207 S.W.3d 608, 612 (Mo. banc 2006)

State ex rel. Am. Eagle v. St. Louis County, 272 S.W.3d 336, 341 (Mo. Ct. App. 2008)

State ex rel. St. Louis County v. Edwards, 589 S.W.2d 283, 287 (Mo. banc 1979)

MO. CONST., art. VI, §§ 18(b), 18(c)

MO. REV. STAT. §§ 443.454, 362.109, 361.020.1, 408.554, 408.555, 443.300, 442.020, 443.310, 443.320, 443.325, 443.327 (2014)

II. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS SUMMARY JUDGMENT BECAUSE ENACTING THE ORDINANCE VIOLATES CONSTITUTIONAL PROVISIONS IN THAT THE ORDINANCE IMPOSES NEW TAXES AND FEES WITHOUT A VOTE OF THE PEOPLE, CREATES A REAL ESTATE TRANSFER TAX, IMPOSES A TYPE OF TAX NOT AUTHORIZED FOR THE COUNTY, LEGISLATIVELY DELEGATES JUDICIAL AUTHORITY, USES COUNTY RESOURCES TO BENEFIT INDIVIDUALS AND COMPENSATES THE APPOINTED COUNTY MEDIATION COORDINATOR AND MEDIATORS WITH A PER-MEDIATION FEE RATHER THAN BY SALARY.

Arbor Inv. Co., LLC v. City of Hermann, 341 S.W.3d 673, 679 (Mo. banc 2011)

Beatty v. Metro. St. Louis Sewer Dist., 867 S.W.2d 217, 221 (Mo. banc 1993)

Feese v. City of Lake Ozark, Missouri, 893 S.W.2d 810 (Mo. banc 1995)

State ex rel. Goldberg v. Barber & Sons Tobacco, Inc., 649 S.W.2d 859, 861 (Mo. banc 1983)

MO. CONST., art. II, § 1; art. V, § 1; art. VI, §§ 12, 18(d), 23; art. X, §§ 1, 22(a), 25

MO. REV. STAT. §§ 67.042, 67.110, 137.035 (2014)

III. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS SUMMARY JUDGMENT BECAUSE ENACTING THE ORDINANCE EXCEEDS THE COUNTY'S CHARTER AUTHORITY UNDER MISSOURI CONSTITUTION ARTICLE VI, § 18(C) IN THAT THE ORDINANCE IS NOT A VALID EXERCISE OF THE COUNTY'S POLICE POWER.

Casper v. Hetlage, 359 S.W.2d 781, 789 (Mo. 1962)

Chesterfield Fire Prot. v. St. Louis County, 645 S.W.2d 367, 371 (Mo. banc 1983)

Flower Valley Shopping Ctr., Inc. v. St. Louis County, 528 S.W.2d 749, 754 (Mo. banc 1975)

IV. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS SUMMARY JUDGMENT BECAUSE THE ORDINANCE VIOLATES APPELLANTS' CONSTITUTIONAL RIGHTS IN THAT THE ORDINANCE CONSTITUTES AN IMPAIRMENT OF CONTRACT, A RETROSPECTIVE LAW, A TAKING WITHOUT COMPENSATION AND A DEPRIVATION OF APPELLANTS' DUE PROCESS RIGHTS.

City of Creve Coeur v. Nottebrok, 356 S.W.3d 252, 257 (Mo. Ct. App. 2011)

Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758, 769 (Mo. banc. 2007)

Missouri Real Estate Comm'n v. Rayford, 307 S.W.3d 686, 690 (Mo. Ct. App. 2010)

State ex rel. Nixon v. Jewell, 70 S.W.3d 465, 467 (Mo. Ct. App. 2001)

MO. CONST., art. I, §§ 10, 13, 26

V. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS SUMMARY JUDGMENT BECAUSE THE ORDINANCE CONFLICTS WITH THE ST. LOUIS COUNTY CHARTER IN THAT THE ST. LOUIS COUNTY CHARTER DOES NOT GRANT THE ST. LOUIS COUNTY COUNCIL THE AUTHORITY TO ENACT THIS TYPE OF LEGISLATION.

Avanti Petroleum, Inc. v. St. Louis County, 974 S.W.2d 506, 512 (Mo. Ct. App. 1998)

Schmoll v. Housing Authority of St. Louis County, 321 S.W.2d 494, 498 (Mo. 1959)

Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights of City of Springfield, 791 S.W.2d 382, 385 (Mo. banc 1990)

MO. CONST., art. VI, § 18(a)

VI. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT THE ORDINANCE CONFLICTS WITH PROVISIONS OF THE MISSOURI CONSTITUTION, MISSOURI STATUTES OF GENERAL STATEWIDE APPLICABILITY AND THE COUNTY'S OWN CHARTER.

James v. Paul, 49 S.W.3d 678, 682 (Mo. Ct. App. 2011)

State v. Nationwide Life Ins. Co., 340 S.W.3d 161, 179 (Mo. Ct. App. 2011)

STANDARD OF REVIEW

I. Standard of Review for Summary Judgment Ruling

The standard of review for appeal from a grant of summary judgment was well-stated in *ITT Commercial Fin. v. Mid-Am. Marine*: "When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered. . . . We accord the non-movant the benefit of all reasonable inferences from the record. . . . Our review is essentially *de novo.*" 854 S.W.2d 371, 376 (Mo. banc 1993). The facts in this case are undisputed because the Ordinance speaks for itself. The issue before this Court is therefore one of law. This standard of review is applicable to all of Appellants' Points Relied On.

"[T]he denial of a motion for summary judgment may be reviewed when its merits are completely intertwined with a grant of summary judgment to the opposing party." *State v. Nationwide Life Ins. Co.*, 340 S.W.3d 161, 179 (Mo. Ct. App. 2011). In such a case, this Court may direct the judgment that the trial court should have entered. *Id.* Summary judgment should be granted where "the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *ITT*, 854 S.W.2d at 378. Review of a summary judgment's denial is done under the same standard set forth above. *See Thiemann v. Columbia Pub. Sch. Dist.*, 338 S.W.3d 835 (Mo. Ct. App. 2011); *Sauvain v. Acceptance Indem. Ins. Co.*, 339 S.W.3d 555 (Mo. Ct. App. 2011).

II. Severability

When evaluating the validity of a law, the issue of severability must be addressed. To determine whether an ordinance provision is severable, courts apply the following test:

> [T]he [ordinance] is valid, regardless of invalid provisions, unless the Court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed [the County] would have enacted the valid provisions without the void one; or unless the Court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Avanti Petroleum, Inc. v. St. Louis County, 974 S.W.2d 506, 512 (Mo. Ct. App. 1998). Here, the Ordinance contains no severability clause. (L.F. 84-98.) In fact, because the Ordinance creates an integrated mediation scheme where each provision is necessary for the system to function, invalidating any part of the Ordinance would defeat its goal. Additionally, the Ordinance expressly requires a Lender's satisfaction of all its obligations under the Ordinance to receive a Certificate of Compliance and avoid prosecution. (L.F. 97.)

For example, without the charges to the Lender, the program is unfunded and cannot proceed. Similarly, any change to the notice and timing provisions would leave participants without any substantive guidelines for how the program should function. In short, no provision is severable because they are all integral to the Mediation Program's

effectiveness. Appellants can think of no argument which results in only a portion of the Ordinance being stricken while the remainder is allowed to stand. The lack of a severability clause could be considered as evidence that the County would concur.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS SUMMARY JUDGMENT BECAUSE ENACTING THE ORDINANCE EXCEEDS THE COUNTY'S CHARTER AUTHORITY UNDER MISSOURI CONSTITUTION ARTICLE VI, § 18(B) IN THAT THE ORDINANCE CONFLICTS WITH STATUTES OF GENERAL STATEWIDE APPLICABILITY.

A. Missouri's Constitution and Case Law Prohibit the County From Enacting an Ordinance that Conflicts With Statutes of General Statewide Applicability.

In Missouri, two specific provisions of the Missouri Constitution grant charter counties their power. The provisions state, in pertinent part:

> Article VI, § 18(b). The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of this state.
>
> Article VI, § 18(c). The charter may provide for the vesting and exercise of legislative power pertaining to any and all services and functions of any municipality or political subdivision, except school districts, in the part of the county outside incorporated cities…

MO. CONST., art. VI, §§ 18(b) and (c). Although charter counties possess wide authority under § 18(c) to regulate municipal functions, a county cannot enact legislation that "invade[s] the province of general legislation involving the public policy of the state as a whole." *Flower Valley Shopping Ctr., Inc. v. St. Louis County*, 528 S.W.2d 749, 754 (Mo. banc 1975). *See also State ex rel. Am. Eagle v. St. Louis County*, 272 S.W.3d 336, 341 (Mo. App. 2008) (charter counties cannot enact legislation conflicting with "general legislation involving the public policy of the state as a whole.") The Missouri Constitution "clearly envisions the laws of the state prescribing the powers and duties of [its] charter county officers" under Article VI, § 18(b). *Jackson County v. State*, 207 S.W.3d 608, 612 (Mo. banc 2006). *See also State ex rel. St. Louis County v. Edwards*, 589 S.W.2d 283, 287 (Mo. banc 1979) (charter county might change personnel or methods, but cannot ignore responsibilities imposed by Constitution and/or state law); *State ex rel. St. Louis County v. Campbell*, 498 S.W.2d 833, 836 (Mo. Ct. App. 1973) (charter counties are amenable to state control in matters concerning the general public).

The County is indisputably a charter county subject to statewide general laws and public policy. As such, the County exceeded its authority by enacting the Ordinance, which is "out of harmony with the general laws of the state and amount[s] to an attempt to change the policy of the state as declared for the people at large." *Am. Eagle*, 272 S.W.3d at 343. "A charter county's exercise of power that produces this result is impermissible." *Id.* (emphasis added).

The Ordinance is admittedly designed to remedy a national—not local—crisis. (L.F. 84.) The County tries to camouflage this scope by arguing the Ordinance addresses

local unsecured and unmaintained properties. L.F. 84. Yet the Ordinance contains no specific provisions for "unsecured and unmaintained properties." (L.F. 84-98.) Rather, the Ordinance addresses all residential properties where the Homeowner is in default under a mortgage or deed of trust.[2] (Id.) Merely reciting an alleged municipal function cannot hide the Ordinance's true goal—changing mortgage foreclosure procedures that are already governed by a myriad of general, statewide statutes.

From a policy perspective, it is unimaginable that charter counties have constitutional authority to subject banks and lenders to local regulations. Banking regulations must be the subject of generally applicable, statewide legislation; otherwise, a city and/or county might enact banking regulations purporting to trump or add to state statutes or that conflict with one another—leaving a lender to decide whether to comply

[2] Notably, a Homeowner's failure to secure or maintain a property is often a default under a deed of trust that triggers a Lender's right to take legal possession of that property. For example, the FannieMae standard Missouri deed of trust form 3026 provides that failure to maintain the subject property to prevent deterioration and waste is a default. Missouri Deed of Trust Form 3026, §§ 7 and 22 (*see* https://www.fanniemae.com/s/ more?query =form+3026 (last visited Feb. 11, 2013)). Upon this type of default, the Lender becomes responsible for securing and maintaining the property. The Ordinance, therefore, actually delays corrective action by suspending foreclosure for mediation because the Lender cannot promptly foreclose, secure and maintain a property, as currently allowed under state law.

with state, county or city law. Any local ordinance subjecting banks and lenders to regulations that vary, or even conflict, with other state and/or local regulations, would create chaos and uncertainty in the banking industry. Further, this result would nullify the State's comprehensive, generally applicable statutes on these same topics. As a matter of law, policy and common sense, the County does not have the constitutional authority to enact an Ordinance that exceeds its charter powers and directly conflicts with Missouri statutes declaring comprehensive, statewide policy.

B. The Ordinance is Inconsistent with Missouri Revised Statute § 443.454, Which Became Effective on August 28, 2013.

1. Under the plain language of Missouri Revised Statute § 443.454, the Ordinance is invalid and must be declared void.

Section 443.454 was passed by the Missouri General Assembly in House Bills 446 and 211 (collectively "HB 446") of the 97th General Assembly, during its first regular session. The Governor neither signed nor vetoed HB446, so pursuant to Article III, § 31 of the Missouri Constitution, HB446 became law on August 28, 2013. Section 443.454 provides:

> The enforcement and servicing of real estate loans secured by mortgage or deed of trust or other security instrument shall be pursuant only to state and federal law and no local law or ordinance may add to, change, delay enforcement, or interfere with, any loan agreement, security instrument, mortgage or deed of trust. No local law or ordinance may add, change, or delay any rights or obligations or impose fees or taxes of any kind or

> require payment of fees to any government contractor related to any real estate loan agreement, mortgage or deed of trust, other security instrument, or affect the enforcement and servicing thereof.

MO. REV. STAT. § 443.454 (2014).

There is no dispute that the Ordinance conflicts with § 443.454, or that the statute is a law of general, statewide applicability. The Court of Appeals declared that "Section 443.454 expressly prohibits local government from enforcing the type of regulation that has been enacted by the County." (10/15/13 Mo. Ct. App. E.D. Op. at p. 4, App. p. A61.) Even the County Counselor conceded this point, stating in a letter brief to the Court of Appeals: "[T]he Mortgage Foreclosure Intervention Code at issue is clearly inconsistent with the newly stated policy of the State and cannot be enforced by St. Louis County."[3]

[3] Judge Van Amburg's dissent argues that the Ordinance is a proper expression of the County's authority under Article VI, § 18(c) because "[t]he ambit of 'general legislation involving the public policy of the state as a whole' must end where charter counties' constitutional authority over municipal 'functions and services' begins." (10/15/13 Mo. Ct. App. E.D. Op. at p. 5, App. p. A67.) (Van Amburg, J. dissenting). That is not the law. Well-settled precedent holds that a charter county's authority must surrender to statewide policy expressed in generally applicable legislation. *Flower Valley Shopping Ctr., Inc.*, 528 S.W.2d at 754; *Am. Eagle*, 272 S.W.3d at 341; *Jackson County*, 207 S.W.3d at 612; *St. Louis County*, 589 S.W.2d at 287; *Campbell*, 498 S.W.2d at 836.

(Resp. 8/15/13 Letter Brief at p. 2, App. p. A57.) Therefore, Appellants, Respondents and the Court of Appeals all agree that the conflict with § 443.454 is dispositive and renders the Ordinance unenforceable.

2. The Court of Appeals Opinion did not render this case moot.

Relying on the County's representation that it would not enforce the Ordinance, the appellate court dismissed the entire case as moot and ordered the trial court to vacate its judgment. (10/15/13 Mo. Ct. App. E.D. Op. at p. 5, App. p. A62.) The Court of Appeals did not declare the Ordinance void. The Court of Appeals did not address any of Appellants' other claims regarding the invalidity of the Ordinance. Nor did the Court of Appeals rule on Appellants' request for attorneys' fees in Counts I and IV of the Petition. Thus, the result of the appellate court's opinion is an express finding that the Ordinance conflicts with § 443.454, but no opinion or judgment declaring the Ordinance void or addressing Appellants' other grounds and requests for relief. The Court of Appeals' dissenting opinion correctly noted that the County did not repeal the Ordinance and thus

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Further, if charter counties could vary or contradict generally applicable state laws under the guise of municipal services, chaos—particularly in regulated industries—would ensue. This is why the Missouri Constitution and courts interpreting the Constitution have held that the powers of charter counties are secondary to statewide laws of general applicability passed for the health and welfare of all Missourians. If Judge Van Amburg's expansive view of charter power were adopted by this Court, it would essentially destroy the legislature's ability to set statewide general policy.

remains free to resume enforcement at any time. (10/15/13 Mo. Ct. App. E.D. Op. at pp. 5-6, App. pp. A67-68.) (Van Amburg, J. dissenting).

The appellate court should have entered a judgment that the Ordinance is void. *Am. Eagle*, 272 S.W.3d at 341. Without that judgment, a live, justiciable controversy exists between Appellants and Respondents.[4] The case of *Bratton v. Mitchell*, 979 S.W.2d 232 (Mo. Ct. App. 1998), is instructive on this point. There, appellant challenged how the department of corrections calculated her parole eligibility. *Id*. at 234. After briefing, but before argument, the department of corrections issued a memo that, in effect, agreed with appellant's position. *Id*. at 235. The department then argued the appeal was moot because the memo granted plaintiff the relief she sought. *Id*.

The *Bratton* court held that appellant's request for a declaration was not moot and that appellant was entitled to a judgment confirming her status as agreed to in the memo. *Id*. The court stated: "This court rules the post-judgment memo, which is in the nature of a confession of judgment, still does not satisfy the mootness litmus test language of

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[4] Appellants' case is also not moot because legislation renders a challenge to existing law moot only if the legislation itself repeals the challenged law. *See, e.g., C.C. Dillon Com. v. City of Eureka*, 12 S.W.3d 322 (Mo. 2000); *Comm. for Educ. Equality v. State*, 878 S.W.2d 446 (Mo. 1994); *Bank of Washington v. McAuliffe*, 676 S.W.2d 483, 487 (Mo. 1984); *State v. Salter*, 250 S.W.3d 705, 715 n. 4 (Mo. 2008). Accordingly, the General Assembly's enactment of § 443.454 did not, by itself, moot this case because the statute's language did not expressly repeal the Ordinance.

rendering the issue (regarding parole eligibility) academic." *Id.* The court reversed the judgment of the trial court and remanded with directions to enter judgment in favor of appellant. *Id*. at 237.

Like the appellant in *Bratton*, Appellants here are entitled to a judgment on the merits that the Ordinance is void. As Judge Van Amburg recognized, "[a]s long the ordinance remains in effect, [the] County is free to resume enforcement at any time . . . By dismissing this case as moot, the majority leaves the ordinance in limbo, and denies [Appellants] a resolution of the issue over which they brought suit." (10/15/13 Mo. Ct. App. E.D. Op. at p. 6, App. pp. A67-68) (Van Amburg, J., dissenting). The County's stipulation that it will not enforce the Ordinance in no way binds future County Counselors, Executives, Councils, or other separately elected officials like the assessor, who have duties and obligations under the Ordinance. Without a judgment, property transferred after foreclosure without the required Certificate of Compliance has a cloud on its title. Homeowners subject to a foreclosure may assert rights to mediation under the Ordinance. The Ordinance might even become the basis for class action lawsuits against lenders who conduct foreclosures without mediations. Simply put, regardless of the County's pledge not to enforce the Ordinance, the law remains a valid part of the County Code absent a judgment declaring it void. And so long as the Ordinance remains in the Code, this case is not moot.

This remains true despite the Court of Appeals' attempt to dismiss Appellants' case because that dismissal is procedurally questionable. Both the Eastern District and Western District Courts of Appeal contend that it is "procedurally contradictory" for a

trial court to rule on the merits of a claim by granting a motion to dismiss. *Sandy v. Schriro*, 39 S.W.3d 853, 857 (Mo. Ct. App. 2001). Similarly, a trial court cannot properly decide the merits of a declaratory relief action via dismissal. *City of St. Peters v. Concrete Holding Co.*, 896 S.W.2d 501, 503 (Mo. Ct. App. 1995) (*citing Moutray v. Perry State Bank*, 748 S.W.2d 749, 753 (Mo. Ct. App. 1988)). Here the Court of Appeals' opinion and order to the trial court to vacate and dismiss the case did exactly that – purported to dismiss a properly plead declaratory relief action for mootness. Given existing Missouri law, *see supra*, the appellate court's action was improper. Rather than a dismissal, Appellants are entitled to a judgment on the merits that the Ordinance is void. *Bratton*, 979 S.W.2d at 234-237.

Equally questionable is the Court of Appeals' reliance on the County Counselor's letter brief concession as the grounds for dismissal. By accepting that representation and finding the case moot, the Court of Appeals avoided entering an adverse judgment against the County, avoided addressing the merits of Appellants' remaining grounds for relief and avoided the question of whether Appellants are entitled to the attorneys' fees. Specifically, an adverse judgment on Count I (as opposed to a dismissal) could have resulted in an award of attorneys' fees. *Goellner v. Goellner Printing*, 226 S.W.3d 176, 179 (Mo. Ct. App. 2007). The same is true of an adverse judgment on Count IV of the

Petition, Appellants' Hancock Amendment claim, where a successful challenge entitles the victor to fees as well.[5] MO. CONST., art. X, §23.

In short, the Court of Appeals' decision to dismiss Appellants' case allowed the County to stipulate its way out of a potential award of attorney fees and avoid repealing the Ordinance. This gambit also left Appellants' other grounds for relief unresolved. But Appellants, like the appellant in *Bratton*, are entitled to a judgment on the merits, particularly where, as here, everyone concedes that the Ordinance impermissibly conflicts with § 443.454. *Bratton*, 979 S.W.2d at 237.

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[5] *See Missouri Bankers Ass'n, et al. v. City of St. Louis, et al.*, No. 1322-CC00511, Mem. Order & Op. (22nd Circuit Court for City of St. Louis Jan. 17, 2014.) There, the City of St. Louis enacted an ordinance virtually identical to the one at issue here. The court held the ordinance conflicted with § 443.454 and awarded plaintiffs attorneys' fees under the Hancock Amendment. *Id.* at p. 6. The court reasoned that the Hancock Amendment "should be liberally construed to warrant an award of fees whenever taxpayers prosecute an action to enforce the constitutional provision and are successful in any material respect." *Id.* at p. 4. Finding that "there is no question that plaintiffs had secured relief to preclude the collection of the illegal mediation fee, and the record is clear that plaintiffs were likely to succeed on the merits of their claim had not the General Assembly intervened," the court granted plaintiffs attorneys' fees commensurate with their successful effort to "secure[] significant relief on the basis of the Hancock claim, at least in part." *Id.* at p. 5.

As the remaining Points Relied On demonstrate, the Ordinance fails for a number of reasons beyond its conflict with § 443.454. However Point I, standing alone, and Respondents' concession that the Ordinance conflicts with § 443.454, is grounds for entering judgment in Appellants' favor and voiding the Ordinance. This case could then be fully disposed of by addressing the award of attorneys' fees under the Hancock Amendment or general law. This Court should, therefore, enter a judgment that the Ordinance is void because it conflicts with Missouri Statute § 443.454, and directing the Circuit Court to award Appellants attorneys' fees.

C. The Ordinance is Inconsistent With and More Restrictive Than State Laws Governing Lenders in Violation of Missouri Revised Statute § 362.109.

The Ordinance also directly conflicts with Missouri statute § 362.109. Section 362.109 provides that any ordinance enacted by a political subdivision "shall be consistent with and not more restrictive than state law and regulations governing lending or deposit-taking entities regulated by the Division of Finance." MO. REV. STAT. § 362.109 (2014). Appellants represent Lenders chartered by the State of Missouri who seek to foreclose upon defaulting properties in a manner regulated by the Missouri Division of Finance. MO. REV. STAT. § 361.020.1 (2014). By enacting § 362.109, the Legislature explicitly precluded the application of the Ordinance to Appellants.

The plain language of § 362.109 prohibits political subdivisions, including charter counties, from passing ordinances that are inconsistent with or create greater obligations on banks than any state statute or regulation. As discussed below, the Ordinance imposes

greater restrictions on the method and manner in which Lenders foreclose upon Homeowners' property. (L.F. 84-98.) Therefore, the Ordinance violates § 362.109, exceeds the County's charter authority under the Missouri Constitution and must be declared invalid. *O'Brien v. Roos*, 397 S.W.2d 578 (Mo. 1965); *Am. Eagle*, 272 S.W.3d 336.

D. The Ordinance Directly Conflicts With Missouri Revised Statute Chapter 443 Which Regulates Mortgages, Deeds of Trust and Foreclosure Proceedings.

The General Assembly enacted a body of comprehensive and extremely specific legislation regulating mortgages, deeds of trust and foreclosure proceedings in Missouri. Codified in Missouri Revised Statutes Chapter 443, these provisions in no way require mediation prior to foreclosure. MO. REV. STAT. Chapter 443 (2014). Chapter 443 does, however, specify how and in what manner a lender must notify a debtor of a foreclosure and sale. MO. REV. STAT. §§ 443.310 – 443.327 (2014). Chapter 443 also mandates that the only circumstance staying a foreclosure is the debtor's death. MO. REV. STAT. § 443.300.[6] By requiring mediation prior to foreclosure, mandating notice requirements

[6] Section 443.300 states: "If any person shall die owning real estate on which there is an outstanding deed of trust or mortgage of real estate, or having subjected personal property to a security interest with power of sale, shall die, no sale shall take place under the deed of trust or mortgage conveying real estate within six months after the death of such person, and no sale shall take place of personal property so subjected to a security interest

in conjunction with that mediation and adding an additional method for staying foreclosure, the Ordinance directly conflicts with, and is more restrictive than, the provisions of Chapter 443. Therefore, the Ordinance exceeds the County's charter authority under the Missouri Constitution, conflicts with the provisions of Chapter 443 and must be declared invalid. *O'Brien*, 397 S.W.2d 578; *Am. Eagle*, 272 S.W.3d 336.

E. The Ordinance Contradicts the Provisions of Missouri Revised Statutes Chapter 408 Relating to the Enforcement of Security Instruments.

Chapter 408 of the Missouri Statutes codifies the standards for enforcement of security instruments, particularly when a debtor is in default. Pursuant to § 408.555, a lender is entitled to take possession of property subject to a security interest after a 20-day notice period. MO. REV. STAT. § 408.555 (2014). Section 408.554 also specifies the type of notice a lender must give to a defaulting debtor. Id.

Under the Ordinance, if a Lender takes possession of a Homeowner's property at the end of the 20-day notice period—as expressly allowed by state statute—the Lender is subject to municipal prosecution and a fine. (L.F. 84-98.) Similarly, if the Lender gives the notice authorized by state law (as opposed to the notice required by the Ordinance), the Lender is subject to prosecution. (Id.) The Ordinance, therefore, clearly exceeds the

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within four months after the death of the person." It is a general principle of statutory interpretation that "the mention of one thing implies the exclusion of another thing; *expressio unius est exclusio alterius.*" *Kansas City v. J.I. Case Threshing Mach. Co.*, 87 S.W.2d 195, 205 (Mo. 1935) (en banc).

County's charter authority under the Missouri Constitution, is contrary to the provisions of Chapter 408 and must be declared invalid. *O'Brien*, 397 S.W.2d 578; *Am. Eagle*, 272 S.W.3d 336.

F. The Ordinance Creates Additional Preconditions for Conveying a Deed That Directly Conflict With the Provisions of Missouri Statute § 442.020.

Section 442.020 provides that "conveyances of lands, or of any estate or interest therein, may be made by deed . . . without any other act or ceremony whatever." MO. REV. STAT. § 442.020 (2014). The Ordinance contradicts this statute by requiring Lenders to mediate and obtain a Certificate of Compliance prior to conveying the foreclosed property or face monetary penalties.[7] (L.F. 97-98.) Therefore, the type of

[7] The term "Lender," as used in the Ordinance, is defined as "a person or entity which has advanced funds for a loan to a Homeowner secured by a deed of trust on a Residential Property. For the purpose of this Chapter, 'Lender' shall also include any servicer of mortgage loans, trustee named in the deed of trust or a duly appointed successor trustee." (L.F. 91-92.) The Ordinance applies to a much broader group of individuals than just the entity extending the loan. So the Ordinance sets up the possible scenario that a successful bidder at the trustee's sale could be someone other than the Lender, as defined by the Ordinance. In this situation, it may be impossible for the purchaser to obtain a Certificate of Compliance and, therefore, the purchaser could be subject to prosecution and a fine of $1,000.

transfer authorized by § 442.020 is directly prohibited by the Ordinance. So, yet again, the Ordinance exceeds the County's charter authority under the Missouri Constitution, violates § 442.020 and must be declared invalid. *O'Brien*, 397 S.W.2d 578; *Am. Eagle*, 272 S.W.3d 336.

G. The Ordinance Creates Responsibilities for County Assessors in Addition to Those Outlined in Missouri Revised Statutes Chapter 53.

Missouri Revised Statutes Chapter 53 governs county assessors. MO. REV. STAT. Ch. 53 (2014). The Ordinance imposes requirements on the St. Louis County Assessor (related to recording transfer deeds, mortgages and conveyances of deeds of trust) in excess of the requirements codified in Chapter 53. Under the Ordinance, the Assessor must accept Certificate of Compliance filings for foreclosed properties and presumably maintain records related to those filings, although the Ordinance does not outline what sort of records must be maintained.[8] (L.F. 97.) None of these duties are imposed on county assessors under Chapter 53. Accordingly, the Ordinance exceeds the County's charter authority under the Missouri Constitution, the requirements established in Chapter 53 and must be declared invalid. *O'Brien*, 397 S.W.2d 578; *Am. Eagle*, 272 S.W.3d 336.

[8] As discussed above, a charter county may not alter the duties prescribed to county officers, although it may change the name of the officer or divide the duties between individuals. *See Edwards*, 589 S.W.2d at 287.

II. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS SUMMARY JUDGMENT BECAUSE ENACTING THE ORDINANCE VIOLATES CONSTITUTIONAL PROVISIONS IN THAT THE ORDINANCE IMPOSES NEW TAXES AND FEES WITHOUT A VOTE OF THE PEOPLE, CREATES A REAL ESTATE TRANSFER TAX, IMPOSES A TYPE OF TAX NOT AUTHORIZED FOR THE COUNTY, LEGISLATIVELY DELEGATES JUDICIAL AUTHORITY, USES COUNTY RESOURCES TO BENEFIT INDIVIDUALS, AND COMPENSATES THE APPOINTED COUNTY MEDIATION COORDINATOR AND MEDIATORS WITH A PER MEDIATION FEE RATHER THAN BY SALARY.

All County ordinances must comply with the Missouri Constitution. *See* Point I(A), *supra*. Here, as explained below, the Ordinance directly conflicts with several mandates set forth in the Missouri Constitution and must be declared invalid.

A. Because the Ordinance was Not Submitted for Voter Approval, It Violates the Hancock Amendment.

The Ordinance imposes a payment of $100 on all foreclosures in St. Louis County and an additional payment of $350 if the Homeowner requests mediation. (L.F. 93-94.) Despite these charges—which are actually taxes—the Ordinance was passed by the County Council and signed by the County Executive without submitting any portion of the law to a vote of the people. (L.F. 98.) Because the Ordinance creates new taxes that

were not approved by the residents of St. Louis County, the Ordinance violates the Hancock Amendment to the Missouri Constitution.[9]

Article X, § 22(a) of the Missouri Constitution (referred to as the "Hancock Amendment") provides in pertinent part:

> Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees . . . when this section is adopted or from increasing the current levy of an existing tax, license or fees . . . without the approval of the required majority of the qualified voters of that . . . political subdivision voting thereon.

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[9] An argument that the Hancock Amendment is not implicated here because the Ordinance increased a license or fee related to a pre-Hancock program must be rejected. The County's failure to comply with Missouri State § 67.042 essentially admits that the Ordinance enacts a new program, with new charges. To excuse compliance with the Hancock Amendment under § 67.042, a program must have existed prior to November 4, 1980, or been subsequently approved by the voters. MO. REV. STAT. § 67.042 (2014). No version of the Mediation Program existed prior to November 4, 1980, so any contention that Ordinance's fees merely adjust an existing program's requirements is inaccurate on its face. Further, the County failed to generate the required public statement identifying the program being funded by the fees and costs necessary to maintain the program. Id. These failures undermine any exemption argument.

MO. CONST., art. X, § 22(a). Under this Constitutional provision, "fee increases that are taxes in everything but name" are prohibited, while "fee increases which are general and special revenues but not a tax" are allowed. *Arbor Inv.*, 341 S.W.3d at 679 (*citing Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301 (Mo. banc 1991)).

To evaluate whether a charge is a fee or a tax, courts consider the five factors first set forth in *Keller*: (1) when the fee is paid, such as periodically (tax-like) or after provision of a good or service to the individual paying the fee (fee-like); (2) who pays the fee, such as a fee that is blanket billed to all (tax-like) or charged only to those using the service (fee-like); (3) if the amount of the fee is affected by the level of goods or services provided to the payer (fee-like); (4) if the government is providing the service or good (if someone unconnected with the government is providing the good or service, then the charge required by the government is probably subject to the Hancock Amendment); and (5) if the activity has historically and exclusively been provided by the government (and therefore likely subject to the Hancock Amendment). *See Arbor Inv.*, 341 S.W. 3d at 680. While these five factors guide a court's analysis, "[n]o specific criterion is independently controlling" and the list is not exhaustive. *Id.* at 680 & 682. In this case, however, *all five factors* align against the County.[10]

[10] When there is "genuine doubt" as to the nature of the charge, uncertainties must be resolved "in favor of the voter's [sic] right to exercise the guarantees they provided for themselves in the constitution." *Beatty v. Metro. St. Louis Sewer Dist.*, 867 S.W.2d 217, 221 (Mo. banc 1993).

First, fees subject to the Hancock Amendment are paid irrespective of the provision of a good or service. *Id.* at 679. There is no good or service provided to the Lender in exchange for the required payment of the $100. (L.F. 93.) This charge is paid before any contact with the Homeowner, regardless of whether mediation actually occurs and is non-refundable. (L.F. 93-94.)

Second, fees subject to the Hancock Amendment are blanket-billed and not charged only to those using the service. *Beatty,* 867 S.W.2d at 220. All Lenders (or any Servicer or Trustee) must pay $100 to the Mediation Coordinator before recording a trustee's deed and transferring title to real property. (L.F. 91-93.) This charge is not limited only to those Lenders utilizing mediation services. (L.F. 93-94.) The Ordinance, therefore, effectively imposes an illegal foreclosure tax.

Third, if the fee amount is unaffected by the level of service provided, the fee is likely subject to the Hancock Amendment. *Beatty,* 867 S.W.2d at 220. Under the Ordinance, the initial $100 payment is unrelated to any service, let alone the level of service provided. (L.F. 93-94.) The further assessment of $350 (levied if the Homeowner proceeds with mediation) has no relationship to the actual mediation services provided. (L.F. 94.) The Homeowner might fail to attend. If the Homeowner does attend, the Mediation Conference could take thirty minutes or two days. Document production and exchanges could be brief or voluminous. The possible resolutions presented and evaluated could be few or many. Given the wide range of mediation scenarios, it is clear the $350 payment bears no relationship to the services being provided.

Fourth, government-imposed fees for services provided by someone unconnected with the government are subject to the Hancock Amendment. *Arbor Inv.*, 341 S.W.3d at 680. Here, the Mediation Coordinator is a contractor selected or appointed by the County Executive, not a County employee or official. (L.F. 86.) The contract between the County Executive and the Mediation Coordinator outlines the Coordinator and mediators' duties, and guarantees that the Mediation Coordinator and mediators are compensated solely with money generated by the Ordinance. (Id.)

Finally, the Mediation Program payments are for services historically and exclusively provided by a governmental entity and are therefore subject to the Hancock Amendment. *Arbor Inv.*, 341 S.W.3d at 680. The initial $100 is essentially a real estate recording and transfer tax—a service historically and exclusively provided by the government. While the subsequent $350 payment allegedly relates to a mediation conference, this government required and sanctioned "mediation" is actually a skewed and prejudicial judicial proceeding that affects a Lenders' right to foreclose on property in compliance with established state law. Judicial proceedings are clearly and exclusively a governmental service.

Based on the foregoing, the mediation costs levied by the Ordinance are clearly a tax subject to the Hancock Amendment. There is no dispute that voter approval was not obtained for the Ordinance. Accordingly, the fee provisions cannot be enforced and the

Ordinance must be declared invalid.[11] *See Feese v. City of Lake Ozark, Missouri*, 893 S.W.2d 810 (Mo. banc 1995) (sewerage service charge without vote of people could not be levied); *Avanti Petroleum*, 974 S.W.2d at 512.

B. The Ordinance Violates Article X, § 25 of the Missouri Constitution Which Prohibits the Imposition of Any New Tax on the Transfer of Real Estate.

The Ordinance creates a new tax of at least $100 before a Lender may record a foreclosure deed with the County Recorder of Deeds. (L.F. 93.) If the Homeowner wants to mediate, this tax increases to $450. (L.F. 93-94.) This process creates an impermissible tax on the transfer of real estate.

Article X, §25 of the Missouri Constitution provides, in pertinent part, "the state, counties, and other political subdivisions are hereby prevented from imposing any new tax, including a sales tax, on the sale or transfer of homes or any other real estate." MO. CONST., art. X, § 25.

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[11] As set forth in the Standard of Review section, *supra*, the Ordinance contains no severability clause, which evidences legislative intent that the fee provisions are not severable. (L.F. 84-98.) The fees are the only source of funding for the Mediation Program. Without them, the entire Program—the sole means of accomplishing the Ordinance's purpose—collapses. Thus, to the extent the Court invalidates the Ordinance's fee provisions under any of the arguments presented in this brief, the entire Ordinance fails and must be invalidated.

By imposing the mediation charge on all Lenders, the Ordinance improperly imposes a tax on Lenders who are permitted by generally applicable state statutes to foreclose upon, sell and/or transfer residential properties in the event of default. (L.F. 94-97.) The Ordinance therefore violates Art. X, §25 of the Missouri Constitution and is invalid.

C. The General Assembly and Constitution Do Not Grant the County the Power to Tax Real Property as Outlined in the Ordinance.

As discussed above, the Ordinance creates a new tax on the transfer of real property. The County does not have the authority under the Missouri Constitution or state statutes, to impose such a tax. Accordingly, the Ordinance's fees are invalid.

Article X, §1 of the Missouri Constitution provides:

> The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes.

MO. CONST., art. X, § 1. Similarly, Article VI, §18(d) of the Missouri Constitution provides: "The county shall only impose such taxes as it is authorized to impose by the constitution or by law." MO. CONST., art. VI, § 18(d). Under these Constitutional provisions, the power to tax is a legislative function and its exercise by a political subdivision, such as a county, must be based on "specific or clearly implied" authority delegated by the general assembly. *State ex rel. Goldberg v. Barber & Sons Tobacco, Inc.*, 649 S.W.2d 859, 861 (Mo. banc 1983).

The General Assembly did not empower counties to resolve the national residential property crisis through taxes on local businesses. Further there is no provision in the Constitution or state law authorizing the taxes imposed by the Ordinance. In short, the stated purpose of the Ordinance far exceeds the scope of the County's ability to levy taxes. For instance, under Missouri statute § 137.035, the County may impose the following real property taxes:

> [T]he state tax and taxes necessary to pay the funded or bonded debt of the state, county, township, municipality, road district, or school district, the taxes for current expenditures for counties, townships, municipalities, road districts and school districts, including taxes which may be levied for library, hospitals, public health, recreation grounds and museum purposes, as authorized by law.

MO. REV. STAT. § 137.035 (2014). Nowhere in the Constitution or state statutes is the County authorized to impose the type of taxes created by the Ordinance. A county's power to to impose taxes, moreover, "is not the uncontrolled power to impose any tax except as limited by its charter, or general law. On the contrary, it is only the power to impose such taxes as have been authorized by the General Assembly in a general law, or by the people in its charter—if not in conflict with the Constitution." *Carter Carburetor Corp. v. St. Louis*, 356 Mo. 646, 655 (Mo. 1947) (en banc).

In summary, the Ordinance imposes unauthorized taxes that exceed the County's power and conflict with the Missouri Constitution. The Ordinance therefore violates Article X, §1 and Article VI, §18(d) of the Missouri Constitution and is invalid.

D. The Ordinance Constitutes an Illegal Legislative Delegation of Judicial Authority.

The Ordinance creates an impermissible judicial scheme whereby the County Executive appoints a Mediation Coordinator to make factual and legal determinations regarding Lenders' compliance with the terms of the Ordinance. (L.F. 84-98.) Neither the County Executive, who appoints the Mediation Coordinator, nor the County Council, who passed the Ordinance, has the authority under the Missouri Constitution to delegate judicial authority in this manner.

Article V, §1 of the Missouri Constitution provides: "The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts." MO. CONST., art. V, § 1. Similarly, Article II, §1 of the Missouri Constitution provides:

> The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

MO. CONST., art. II, § 1. Pursuant to these Constitutional provisions, the legislature "has no authority to create any other tribunal and invest it with judicial power," and cannot turn an administrative agency into a court by granting it power that has been

constitutionally reserved to the judiciary. *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 76 (Mo. banc 1982).

The Ordinance constitutes a legislative delegation of judicial authority because it vests adjudicative power in mediation officers appointed by the County Executive separate and apart from the judicial branch of state government. (L.F. 86.) In particular, the Mediation Coordinator is granted the power to enter an adjudication (in the form of a Certificate of Compliance) that a Lender complied with the Ordinance. (L.F. 92.) The Mediation Coordinator is further empowered to make findings that a Lender appeared for mediation, but did not make a "good faith effort" to resolve the matter. (L.F. 96-97.) The Mediation Coordinator, therefore, possesses the authority to find a Lender violated the Ordinance, refuse a Certificate of Compliance and, for all practical purposes, impose an Ordinance violation fine of $1,000.00. (L.F. 97.) A Lender cannot appeal the Coordinator's findings. (L.F. 84-98.)

Based on the foregoing, the Ordinance grants adjudicative power to a Mediation Coordinator appointed by the County Executive in violation of Article V, §1 and Article II, §1 of the Missouri Constitution. Ordinances that violate constitutional provisions are void and unenforceable. *E.g., Building Owners and Managers Ass'n of Metro. St. Louis, Inc. v. City of St. Louis*, 341 S.W.3d 143 (Mo. App. E.D. 2011).

E. The Ordinance Improperly Benefits Private Individuals in Violation of Missouri Constitution Article VI, § 23.

The Ordinance directly benefits Homeowners at the Lenders' expense by allowing a defaulting Homeowner to occupy the real property during the mediation process and

creating a remedy not contemplated by existing deeds of trust. (L.F. 84-98.) The Missouri Constitution prohibits creating this favored status for Homeowners in default.

Article VI, §23 of the Missouri Constitution provides:

> No county, city or other political corporation or subdivision of the state shall… grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution.

MO. CONST., art. VI, § 23. Under the Ordinance, the County may contract with mediators to meet County requirements under the Ordinance. (L.F. 86.) The mediation process, designed to exclusively benefit Homeowners, is funded exclusively by Lenders under color of County law. (L.F. 94-98.) Those funds, therefore, are County funds (which, as explained below, are required by Charter to be deposited into the County Treasury).

As such, the Ordinance grants public funds and valuable services to individuals, the Homeowners, in violation of the prohibition against counties granting public money or things of value to, or in aid of, any individual. The Ordinance therefore violates Article VI, §23 of the Missouri Constitution and is invalid. *See St. Louis Children's Hosp. v. Conway*, 582 S.W.2d 687 (Mo. banc 1979).

F. The Ordinance Violates the Requirement in Missouri Constitution Article VI, § 12 that County Officers be Compensated Exclusively by Salary.

By paying the Mediation Coordinator and Presiding Mediators with improper taxes levied on the Lenders rather than by salary, the Ordinance creates a bounty system. Only if the Homeowner is convinced to mediate does the Mediation Coordinator receive additional fees from Lenders. So, not surprisingly, the Ordinance requires that the Mediation Coordinator solicit each Homeowner a minimum of three (3) times. (L.F. 93.) The Ordinance is the type of bounty system specifically prohibited by Article VI, § 12 of the Missouri Constitution.

Article VI, §12 of the Missouri Constitution provides:

> All public officers in the city of St. Louis and all state and county officers in counties having 100,000 or more inhabitants, excepting public administrators and notaries public, shall be compensated for their services by salaries only.

MO. CONST., art. VI, § 12. By authorizing a bounty system to compensate the mediators, the Ordinance violates the Constitution's requirement that public officers in counties having a population greater than 100,000 be compensated only by salaries. Specifically, the Ordinance creates a payment system where County mediators are "compensated solely by the fees established by this Chapter," *i.e.*, the impermissible taxes imposed on the Lenders. (L.F. 94-97.) The Ordinance therefore violates Article VI, §12 of the Missouri Constitution and is invalid.

III. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS SUMMARY JUDGMENT BECAUSE ENACTING THE ORDINANCE EXCEEDS THE COUNTY'S CHARTER AUTHORITY UNDER MISSOURI CONSTITUTION ARTICLE VI, § 18(C) IN THAT THE ORDINANCE IS NOT A VALID EXERCISE OF THE COUNTY'S POLICE POWER.

The trial court incorrectly held that the Ordinance was a valid exercise of the County's police power. (L.F. 242-252.) The County's invocation of its police power to protect the "health, safety and welfare of the public" in the Ordinance's preamble was merely a pretext. Simply reciting those words does not permit the County to exceed its constitutional authority and invade the province of the Missouri General Assembly. Regardless of its Preamble, the Ordinance's Mediation Program far exceeds any grant of police power to the County.

Article VI, § 18(c) of the Missouri Constitution grants charter counties the power to exercise legislative authority over the services and functions of a municipality or political subdivision. *Chesterfield Fire Prot. v. St. Louis County*, 645 S.W.2d 367, 371 (Mo. banc 1983). Powers exercised under this provision are referred to as "police powers" and include, but are not limited to, public health, police and traffic, building construction and planning and zoning. *Casper v. Hetlage*, 359 S.W.2d 781, 789 (Mo. 1962). Article VI, § 18(c) allows local governments to exercise police powers to meet the "peculiar" needs of the county. *Id.* at 790.

The Ordinance is not a valid exercise of the County's police powers. The preamble clearly states that the Ordinance's purpose is addressing the "national residential property foreclosure crisis," as manifested in St. Louis County. (L.F. 84) (emphasis added). Addressing a national crisis is not a need "peculiar" to the County, and there is no local police power that authorizes the County to legislatively address such a crisis. Even though the preamble's second part recites the County's intent to address "unsecured and unmaintained properties," the Ordinance itself makes no distinction or effort to specifically address these alleged problems. (L.F. 84-98.) Instead, the Ordinance operates in the same manner for all residential properties where the Homeowner defaulted under a mortgage or deed of trust. (Id.) As described in Point I, *supra*, a Homeowner's failure to secure or maintain a property is oftentimes itself a default that triggers a Lender's right to promptly foreclosure, secure and maintain the property. In this respect, the Ordinance obstructs the very remediation it purports to promote.

Another cited purpose for the Ordinance is using mediations to "successfully facilitate mutually beneficial alternatives to foreclosure…." (L.F. 84.) But there is no constitutional provision or law authorizing a county to intervene in private contracts to resolve a default. In fact, a more appropriate exercise of the County's police power would be to promote the enforcement of lawful contracts, not to obstruct their enforcement.

Based on the foregoing, the Ordinance exceeds the County's authority. Because the County did not have authorization to enact such legislation, the Ordinance is not a

valid exercise of the County's police powers and must be declared invalid. *See Flower Valley*, 528 S.W.2d at 754.

IV. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS SUMMARY JUDGMENT BECAUSE THE ORDINANCE VIOLATES APPELLANTS' CONSTITUTIONAL RIGHTS IN THAT THE ORDINANCE CONSTITUTES AN IMPAIRMENT OF CONTRACT, A RETROSPECTIVE LAW, A TAKING WITHOUT COMPENSATION AND A DEPRIVATION OF APPELLANTS' DUE PROCESS RIGHTS.

A. The Ordinance Impairs Lenders' Contractual Rights Against Homeowners.

Article I, § 13 of the Missouri Constitution states that "no . . . law impairing the obligation of contracts, or retrospective in its operation . . . can be enacted." MO. CONST., art. I, § 13. In violation of this provision, the Ordinance impairs contractual rights between Lenders and Homeowners, including a charge of $100 to $450 to exercise those rights. The Mediation Program, at best, substantially interferes with and delays a Lender's enforcement rights under a valid security agreement, and, at worst, extinguishes those rights entirely. Simply put, the Ordinance is unenforceable because it forces Lenders to re-write the existing terms of security agreements with Homeowners in violation of Article I, § 13. *Howard County v. Fayette Bank*, 149 S.W.2d 841, 845 (Mo. 1941).

B. The Ordinance is a Constitutionally Impermissible Retrospective Law.

The Ordinance also violates the retrospective clause of the Article I, § 13. Although often used interchangeably, "retrospective" and "retroactive" have different meanings:

> A law is retroactive in its operation when it looks or acts backward from its effective date and is retrospective if it has the same effect as to past transactions or considerations as to future ones. In other words, the constitutional inhibition against laws retrospective in operation does not mean that no statute relating to past transactions can be constitutionally passed, but rather, that none can be allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice of the parties interested.

Missouri Real Estate Comm'n v. Rayford, 307 S.W.3d 686, 690 (Mo. Ct. App. 2010) (internal citations omitted). "A law is retrospective in operation if it takes away or impairs vested or substantial rights acquired under existing laws or imposes new obligations, duties or disabilities with respect to past transactions." *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769 (Mo. banc. 2007) (emphasis in original). Application of a procedural law that "prescribes a method of enforcing rights or obtaining redress" retrospectively does not run afoul of the constitutional ban, but retrospective application of a substantive law does. *Id.* "The distinction is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit." *Id.* (internal citations

omitted). Laws that provide for penalties where none existed before are substantive in nature. *Id.*

To determine whether retrospective application of a law is constitutionally permissible, courts ask whether the law "takes away or impairs a vested or substantial right or imposes a new obligation, duty, or disability with respect to a past transaction." *Rayford*, 307 S.W.3d at 690. "A vested right has been described as a right with an independent existence, in the sense that once it vests it is no longer dependent for its assertion upon the common law or statute under which it may have been acquired." *Id.* at 691.

The Ordinance is retrospective in operation and not merely procedural because it severely impairs Appellants' substantive rights to foreclose on real property. The mortgages entered into by Lenders and Homeowners contained specific contractual terms, including terms governing events of default. Now, to foreclose, Appellants and others similarly situated must participate in the County's Mediation Program, which did not exist when those contracts were executed. (L.F. 84-98.) Appellants cannot exercise their right to foreclose until they fully comply with the Ordinance. (Id.) If Appellants refuse to participate, they are subject to a fine of up to $1,000. (L.F. 97-98.)

The Ordinance, therefore, superimposes its obligations onto contracts executed before the law was ever enacted. Under such circumstances, there is no question that the Ordinance impairs Appellants' substantive rights. Thus, the Ordinance violates the Missouri Constitution's prohibition on laws that are retrospective in application and must be invalidated. *Fisher v. Reorganized Sch. Dist. No. R-V of Grundy County*, 567 S.W.2d

647, 649 (Mo. banc 1998); *cf. Am. Eagle Waste Ind., LLC v. St. Louis County*, 379 S.W.3d 813 (Mo banc 2012).

C. The Ordinance Constitutes a Partial Taking Without Just Compensation.

Article I, § 26 of the Missouri Constitution states that "private property shall not be taken or damaged for public use without just compensation." MO. CONST., art. I, § 26. In considering whether a taking occurred, courts will look to "(1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action." *State ex rel. Nixon v. Jewell*, 70 S.W.3d 465, 467 (Mo. Ct. App. 2001).

"A mortgagee with a security interest in real estate may have a right to compensation if the mortgaged property is taken or damaged for public use because the mortgagee's interest in real estate is considered 'property.'" *Barket v. City of St. Louis*, 903 S.W.2d 269, 271 (Mo. Ct. App. 1995) (internal citations omitted). "[T]he mortgagee's right to payment when the mortgaged property is damaged or taken for public use is contingent upon: (1) whether there has been a breach in the mortgage conditions and a default thereon, and (2) whether the mortgagee is able to show the security interest was impaired by reason of such damage or taking." *Id.* "A mortgagee in a deed of trust has a remedy for the taking in whole or in part of the mortgaged property for public use." *Guaranty Savings & Loan Ass'n v. City of Springfield*, 113 S.W.2d 147, 151 (Mo. Ct. App. 1938).

In *Jewell*, St. Louis County took ownership of an abandoned cemetery after the judicial dissolution of the nonprofit corporation holding title to the property. 70 S.W.3d at 466. When title was transferred to St. Louis County by the court, the court extinguished all security interests recorded against the property, including a deed of trust held by Jewell. *Id.* The court found that acquiring the cemetery free and clear of Jewell's lien constituted a taking by St. Louis County. *Id.* at 467.

Here, enforcing the County's Mediation Program would constitute a partial taking. The Ordinance amends the terms of the mortgage lending and security agreements between lenders and borrowers. Essentially, the County (through the Ordinance) takes an interest in the subject property and converts it to public housing for the duration of the Mediation Program. Allowing defaulting Homeowners to remain in the subject properties for months after the Lenders' right to foreclose accrued constitutes a partial taking for which the Lender must be compensated. Because the Ordinance violates Missouri Constitution Article VI, § 26, the Ordinance must be declared void and unenforceable.

D. The Ordinance Violates Appellants' Due Process Rights.

Article I, § 10 of the Missouri Constitution provides "[t]hat no person shall be deprived of life, liberty or property without due process of law." MO. CONST., art. I, § 10. "To determine what process is due in a particular case, the court first determines whether an individual has been deprived of a constitutionally protected liberty or property interest." *City of Creve Coeur v. Nottebrok*, 356 S.W.3d 252, 257 (Mo. Ct. App. 2011).

"If so, the court next examines whether the procedures leading to the deprivation of that interest were constitutionally sufficient." *Id.*

Here, the Ordinance fails to adequately protect Appellants' due process right to defend against criminal prosecution. The Ordinance does not require the Mediation Coordinator (or the mediators) to make and preserve a reviewable record, or to issue findings of fact or conclusions of law. (L.F. 91-98.) Yet the Mediation Coordinator is empowered to "find" an absence of good faith by the Lender and refuse to issue a Certificate of Compliance. (L.F. 96-97.) If a Lender files a foreclosure deed without the Certificate, that Lender may be fined up to $1,000. (L.F. 97-98.) Without a record or any findings to support (or refute) a good faith determination, the Ordinance deprives Appellants of their due process rights.

Furthermore, under the Ordinance's express terms, "[a]ll documents and discussions presented during the Mediation Conference shall be deemed confidential and inadmissible in subsequent actions or proceedings," in accordance with Missouri Statute § 435.014 and Missouri Supreme Court Rule 17. (L.F. 97.) Within the same sentence, however, the Ordinance waives and overrides these provisions for the prosecution of alleged violations for failure to file a Certificate of Compliance. (Id.) (emphasis added). Of course, the express provisions of this waiver do not allow the Lender being prosecuted to subpoena the mediator or Mediation Coordinator, or present evidence regarding the mediation, as part of the Lender's defense. (Id.) Nor are such rights given to Lenders in any other Ordinance provision.

Without the ability to defend themselves, Appellants have been denied due process of law. As such, the Ordinance violates of Article I, § 10 and must be declared void and unenforceable. *Div. of Family Serv. v. Cade*, 939 S.W.2d 546 (Mo. Ct. App. 1997).

V. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS SUMMARY JUDGMENT BECAUSE THE ORDINANCE CONFLICTS WITH THE ST. LOUIS COUNTY CHARTER IN THAT THE CHARTER DOES NOT GRANT THE ST. LOUIS COUNTY COUNCIL THE AUTHORITY TO ENACT THIS TYPE OF LEGISLATION.

A. The St. Louis County Charter Does Not Allow the St. Louis County Council to Alter the Common Law and/or Statutory Duties Between Private Citizens.

The County is a constitutional charter county pursuant to Art. VI, § 18(a) of the Missouri Constitution. MO. CONST., art. VI, § 18(a). The County operates under a charter approved by voters on November 6, 1979 ("Charter"). As a charter county, St. Louis County enjoys powers the legislature is authorized to grant and "possesses all powers which are not limited or denied by the constitution, by statute, or the charter itself." *Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights of City of Springfield*, 791 S.W.2d 382, 385 (Mo. banc 1990).

Charter Article II, Section 2.180 outlines the powers granted to the St. Louis County Council. (L.F. 198-201.) The Charter does not grant the County Council power to regulate foreclosures on residential property. (Id.) Stated more broadly, the County Charter does not grant authority to "...enlarge the common law or statutory duty or

liability of citizens among themselves." *Yellow Freight*, 791 S.W.2d at 385. That is because "[i]t has been repeatedly ruled in this state that a [county] has no power, by municipal ordinance, to create a civil liability from one citizen to another, nor to relieve one citizen from that liability by imposing it on another." *Id.* (citations omitted).

Altering the common law and statutory duties between lenders and borrowers is beyond the powers granted to a charter entity. Consequently, the Ordinance conflicts with the County's Charter and must be invalidated. *See Schmoll v. Housing Auth. of St. Louis County*, 321 S.W.2d 494, 498 (Mo. 1959) (stating that when a county has adopted a charter, "acts beyond the powers granted or necessarily implied therefrom are void").

B. Under the St. Louis County Charter, Fees Collected by Ordinance Must be Used for Services Provided by County Officers and Employees and Must be Deposited into the County Treasury.

If, as Respondents suggested in the trial court, the Mediation Program levies mandatory fees—as opposed to taxes—from Lenders, then the collection of those fees violates Article II, § 2.180.4 of the Charter.[12] Section 2.180.4 of the Charter empowers the County Council to "[e]stablish and collect fees for licenses, permits, inspections and services performed by county officers and employees; require all fees to be accounted for and paid into the county treasury . . ." (L.F. 198.) Thus, the Charter requires ordinance

[12] Appellants present this argument in the alternative, should the Court find that the monetary payments imposed by the Ordinance are fees rather than taxes. *See* Point Relied On II(A), *supra*.

fees be used for county officer and/or employee-supplied services, and, moreover, that all ordinance fees be deposited in the County treasury.

The Mediation Coordinator is a County contractor, not a County employee. (L.F. 86.) Further, the Ordinance requires Lenders to pay fees directly to the Mediation Coordinator. (Id.) These funds are never paid into, nor accounted for by, the County Treasurer. Thus, the Ordinance provisions relating to the payment of fees violate the County's charter and are null and void. *See Schmoll*, 321 S.W.2d at 498.

C. The Fees Collected Pursuant to the Ordinance Circumvents the Appropriation Power of the County Council Under the County Charter.

Article II, § 2.180 of the Charter outlines powers vested in the County Council and includes the power to "[a]ppropriate money for the payment of debts and expenses for any public purpose . . . ." (L.F. 198.) As discussed above, payments mandated by the Ordinance are paid directly to the Mediation Coordinator. (L.F. 86.) The scheme outlined in the Mediation Program circumvents the appropriation power of the County Council contained in the County Charter. Because the Ordinance violates the County Charter, it must be declared void. *See Schmoll*, 321 S.W.2d at 498.

VI. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANTS DEMONSTRATED A RIGHT TO JUDGMENT AS A MATTER OF LAW IN THAT THE ORDINANCE CONFLICTS WITH PROVISIONS OF THE MISSOURI CONSTITUTION, MISSOURI STATUTES OF GENERAL STATEWIDE APPLICABILITY, AND THE COUNTY'S OWN CHARTER.

"[T]he denial of a motion for summary judgment may be reviewed when its merits are completely intertwined with a grant of summary judgment to the opposing party." *State v. Nationwide Life Ins. Co.*, 340 S.W.3d 161, 179 (Mo. Ct. App. 2011). The Court "may direct in this posture, if proper, the judgment that the court should have entered." *Id.* at 179-80 (*quoting Transatlantic Ltd. v. Salva*, 71 S.W.3d 670, 676 (Mo. Ct. App. 2002)). Where "a question of law is almost certain to arise on retrial and has been fully briefed by the parties, the issue will be addressed as a matter of judicial efficiency and economy." *James v. Paul*, 49 S.W.3d 678, 682 (Mo. Ct. App. 2011). The trial court denied Appellants' motion for summary judgment and granted the County's motion for summary judgment based upon the same legal analysis. (L.F. 242-252.)

For the reasons set forth in Points Relied On I-V, *supra*, which are herein incorporated by reference, the Court should reverse the judgment of the trial court denying Appellants' motion for summary judgment and direct the trial court to enter judgment granting same.

CONCLUSION

For the foregoing reasons, Appellants Missouri Bankers Association, Inc. and Jonesburg State Bank respectfully request this Court to reverse the decision of the trial court granting St. Louis County's motion for summary judgment and direct the trial court to enter judgment against St. Louis County and for the Appellants on Appellants' motion for summary judgment as set forth herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Missouri Supreme Court Rule 84.06(c), this brief (1) contains the information required by Missouri Rule of Civil Procedure 55.03; (2) complies with the limitations in Missouri Rule of Civil Procedure 84.06(b) and contains 14,739 words, exclusive of the sections exempted by Rule 84.06(b) and Local Rule 360, determined using the word count program in Microsoft Office Word 2007; and (3) the Microsoft Office Word 2007 version e-mailed to the parties of records has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 17th day of March, 2014, a true and correct copy of the foregoing Substitute Brief and the Appendix were served on the following party of record by eService through the Court's e-Filing System and by e-mail to:

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