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 REPLY BRIEF OF APPELLANTS

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REPLY ARGUMENT

I. THE CURRENT CONTROVERSY IS NOT MOOT SO LONG AS THE ORDINANCE REMAINS PART OF THE ST. LOUIS COUNTY CODE AND APPELLANTS ARE ENTITLED TO A JUDGMENT THAT THE ORDINANCE IS VOID.

Respondents argue this case is moot because Missouri Revised Statute § 443.454 "superseded" the Ordinance, making further relief unnecessary. (Substitute Brief of Respondents ("Resp. Brief") at pp. 12-15.) The Court should reject this contention because it relies upon misrepresentations and misinterpretations of Missouri law. For the reasons expressed in the Substitute Brief of Appellants ("Appellants' Brief"), as well as the reasons that follow, this case is not moot.

According to Respondents, a judgment declaring the Ordinance void—as opposed to a ruling that this case is moot—is inappropriate because a "void ordinance is one for which there was no authority at the time of enactment," so "[r]ather than being void, the ordinance has been superseded to the extent the power to enact it was derived from Section 18(b), and the County has affirmed that it lacks authority under Section 18(b) to continue enforcement of the Mediation Program."[1] (*Id.* at p. 14.) This is an incorrect

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[1] Contrary to Respondents' claim—made without citation to the Legal File or Appellants' brief—Appellants do not contend that the enactment of § 443.454, standing alone, makes the Mediation Program void. (Resp. Brief. at p. 14.) Appellants' argument is the

statement of the law insofar as it insinuates an ordinance is only void if no authorizing authority existed when the ordinance was enacted.

Missouri courts have long held that an ordinance may become void if it conflicts with a subsequently enacted statute. *See, e.g., Morrow v. City of Kansas City*, 788 S.W.2d 278, 281 (Mo. banc 1990) ("The powers granted a municipality must be exercised in a manner not contrary to the public policy of the state and any provisions in conflict with prior or subsequent statute statutes must yield."); *State ex rel. Volker v. Carey*, 136 S.W.2d 324, 325 (1940) ("The rule follows: When the ordinances or charter provisions are or become in conflict with prior or subsequent state statutes, such ordinances or charter provisions are or become, void, and must yield to the higher law."); *XO Missouri, Inc. v. City of Maryland Heights*, 362 F.3d 1023, 1026-1027 (8th Cir. 2004) ("While it is true that the City passed the Ordinance before the state enacted Senate Bill 369 . . . [i]t does not matter that the City passed the Ordinance first. The City, as a political subdivision of the state, cannot exceed the authority granted by the state and must accept the state's election to limit that authority.")

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opposite. They contend that until a judgment declaring the Ordinance void is entered, Appellants remain subject to the possible enforcement of the Ordinance, as well as other legal ramifications like clouds on title and lawsuits. (*See, e.g.*, App. Brief at p. 22.) The uncertainty created by the Ordinance's continued inclusion in the County Code is precisely why this case is not moot.

Respondents' discussion of *Levinson v. City of Kansas City*, 43 S.W.3d 312 (Mo. Ct. App. 2001), is misleading. *Levinson* is cited for the proposition that a "void ordinance is one for which there is no authority at the time of enactment." (Resp. Brief at p. 14.) Appellants do not contest that an ordinance enacted without authority is void. But Appellants do contest the inference that Respondents ask the Court to draw, *i.e.*, that only ordinances passed without "authority at the time of enactment" are void. As the foregoing paragraph illustrates, that is not the law.

Similarly unpersuasive is Respondents' reliance on *C.C. Dillon Company v. City of Eureka*, 12 S.W.3d 322, 325 (Mo. banc 2000), which is cited for the principle that "where an enactment supersedes the statute on which the litigants rely to define their rights, the appeal no longer represents an actual controversy . . . ." (Resp. Brief at pp. 14-15.) There, plaintiff challenged a version of a statute that was expressly repealed the following year by a new statute. *C.C. Dillon*, 12 S.W.3d at 324. The court held plaintiff's challenge to the prior, repealed statute was moot. *Id.* Appellants do not contest that a claim based on an expressly repealed statute is moot. (*See* App. Brief at p. 21 n. 4.) But that is not the situation here. The Ordinance was not expressly repealed by § 443.454. It remains part of the St. Louis County Code. Consequently, Appellants' claims were not rendered moot by § 443.454's enactment.

Respondents contend Appellants' reliance on *Bratton v. Mitchell*, 979 S.W.2d 232 (Mo. Ct. App. 1998), is misplaced because "it is not informal County statements which have rendered this Section 18(b) challenge moot but rather the enactment of the superseding statute." (Resp. Brief at p. 15.) For the reasons stated in Appellants' Brief,

Bratton is on all fours with the present case. Most relevant here, it was an "informal County statement" that the Court of Appeals relied upon to declare this case moot. In a letter brief filed with the Court of Appeals after § 443.454's enactment, the County Counselor stated "[t]he County has abandoned its enforcement efforts and will not resume them in light of the General Assembly's unfortunate decision to affirmatively withdraw this opportunity from Missouri's residents." (App. Brief Appx. at p. A61.) The Court of Appeals concluded that "[b]ased on the County's concession, we find it unnecessary to consider this controversy." *Id.*

The *Bratton* memo, like the County's letter brief, was written after an intervening action changed the lawsuit's landscape. There, an intervening opinion by the Supreme Court of Missouri changed the interpretation of the parole statute, whereas here, the enactment of § 443.454 rendered the Ordinance void. *Bratton*, 979 S.W.2d at 235. There, the memo could not, standing alone, grant plaintiff the relief she sought because "[a]s long as a contrary judgment remains of record, Bratton's exposure to being declared to have one prior remand is still a viable, ripe issue, allowing appellate action." *Id.* at p. 236. Here, the County's concession, on its own, leaves Respondents exposed to the possibility that the Ordinance will be resurrected and enforced against them. So, like the *Bratton* court, this Court should hold that Respondents are "entitled to have the judgment

changed to show [their] status the same as agreed to in the [letter brief]." *Id.* Respondents are entitled to a judgment that the Ordinance is void.[2]

II. THE ORDINANCE IMPOSES TAXES ON LENDERS AND VIOLATES THE HANCOCK AMENDMENT.

Respondents contend the Ordinance does not improperly tax Lenders[3] for two reasons: (1) because the Mediation Program is ostensibly a "new responsibility with attendant costs," not a "tax payable to the government indirectly through a third party," and (2) because a third party, not the County, collects the Mediation Program revenues. (Resp. Brief at pp. 18-19.) These contentions cannot withstand close scrutiny. For the reasons stated in Appellants' Brief, as well as the arguments below, the Ordinance violates Missouri's Hancock Amendment.

To be clear, the fees imposed by the Ordinance bear no relationship to any services rendered and Respondents' Brief makes no real attempt to argue otherwise. (*Id.* at pp. 18-21.) A charge with no connection to a service "has all of the essential characteristics of a levy, i.e., an act that creates an obligation to pay that is not contingent

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[2] Respondents do not meaningfully address the arguments raised in Points I(C)-(G) of Appellants' Brief, stating only that Appellants' "arguments as to alleged conflicts with other State statutes have become moot in light of the General Assembly's specific declaration of policy in Section 443.454 RSMo." (Resp. Brief at p. 15.)

[3] Unless otherwise indicated, capitalized terms have the same meaning given to them in Appellants' Brief and/or the Ordinance.

upon any later use of the political subdivision's service." *Zweig v. Metrop. St. Louis Sewer Dist.*, 412 S.W.3d 223, 237 (Mo. banc 2013). *See also Bldg. Owners & Managers Ass'n of Greater Kansas City v. City of Kansas City, Missouri*, 231 S.W.3d 208, 213 (Mo. Ct. App. 2007) ("In order for a government charge to appear to be a user fee . . . the charge imposed must bear a direct relationship to the level of services a 'fee payer' actually receives from the political subdivision." (emphasis in original)). As this Court noted just last year:

> Under *Keller*, therefore, charges imposed by a political subdivision are separated into two species: (1) "taxes," which include "licenses and fees" and other levied charges; and (2) "user fees," which are charged for an individual's use of the political subdivision's service . . . However, a tax by any other name remains a tax. It cannot be transformed into a user fee by adept packaging, any more than a zoologist can transform a horse into a zebra with a bucket of paint.

Id. at 226-227.

When Lenders send the "Notice of Right to Request Mediation" to Homeowners and the Mediation Coordinator, it must "be accompanied by payment to the Mediation Coordinator of a fee of $100.00." (L.F. 93.) This fee must be paid regardless of whether the homeowner mediates. *Id.* This fee is nonrefundable. *Id.* And this fee is required before a Lender receives a Certificate of Compliance, which is necessary to record the

deed. *Id.* There is simply no connection between the $100 fee and any service—the fee is a tax.[4] *Zweig*, 412 S.W.3d at 237; *Bldg. Owners*, 231 S.W.3d at 213.

Similarly flawed is the $350 fee charged for the mediation itself. (L.F. 94.) Although this fee is charged only if a Homeowner agrees to mediate, the Lender pays the same amount regardless of whether the mediation actually occurs, the complexity of the issues presented and/or how long the mediation lasts. *Id.* This fee is also non-refundable, even if the Homeowner ultimately fails to participate, unless the parties submit their own settlement at least one business day before the mediation. (*Id.* at 96.) So, again, the fee charged bears no relationship to the actual services provided and "has all of the essential characteristics of a levy." *Zweig*, 412 S.W.3d at 237. Respondents' contention that "the fee is two-tiered so that the actual amount paid corresponds to and is dependent upon the amount of services being provided," is demonstrably false. (Resp. Brief at p. 21.)

Respondents attempt to circumvent this well-settled law by asserting that "[p]ayments to third-party vendors do not become a part of the government's funds and therefore are not governmental revenues subject to the Hancock Amendment." (*Id.* at p.

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[4] The record is silent regarding how excess Mediation Program fees will be spent or how the Program would be funded if the fees do not cover expenses. Other than stating the Mediation Coordinator and mediators will be "compensated solely by the fees established by this Chapter," there is no other reference to how Program fees will be utilized. (L.F. 36.) Such ambiguities call into question whether and to what extent the Mediation Program's operations would remain allegedly unconnected to the County's coffers.

19.) Relying on *Grace v. St. Louis County*, 348 S.W.3d 120 (Mo. Ct. App. 2011), Respondents contend that if the County outsources a service—be it trash collecting or foreclosure mediations—and does not collect the revenues, then the Hancock Amendment is not implicated. (Resp. Brief at pp. 19-20). This position ignores both the law and the facts of this case.[5]

The simple fact that Respondents hired a contractor to perform foreclosure mediations, without more, does not insulate them from a Hancock Amendment challenge. In *Loving v. City of St. Joseph*, 753 S.W.2d 49, 50 (Mo. Ct. App. 1988), plaintiffs sought a declaratory judgment that charges to use municipal facilities violated the Hancock

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[5] Respondents also cite to *Zahner v. City of Perryville*, 813 S.W.2d 855 (Mo. banc 1991), in support of this argument. But *Zahner* is of minimal precedential value. In that case, plaintiff was charged an assessment for road improvements and paid that assessment directly to the contractor performing the work. *Id.* at 857. Arguing the assessment was actually a tax, plaintiff asserted that "owners paid assessments into the general fund in the sense that the payments allowed the City to expend money from its general fund for purposes other than street improvement." *Id.* at 859. It was that argument which the Court held was "purely speculative." *Id.* *Zahner* would be analogous if Appellants argued that the County will generate general revenue through higher property taxes and/or using fewer resources to deal with problem properties. Such an argument, under *Zahner*, would be speculative. But Appellants do not make that argument here, so *Zahner* offers little guidance.

Amendment. There, the City had contracted with a non-profit corporation to "handle the daily operation of the complex, collect the fees, and maintain accurate records. Any fees above the cost incurred by the Foundation were to be divided equally with the City." *Id.*

The court noted that "the Foundation was nothing more than the agent or instrumentality through which the City charged fees for the privilege of playing tennis at the complex." *Id.* The City's argument that "the Foundation collected the fees" was summarily rejected:

> [J]ustice would be blind if it failed to detect the real purpose of the effort by the city to clothe a public function with the mantle of private responsibility. The petition alleges that the purpose here was to evade the constitutional bar to collect fees. Such attempts at deception are as old as recorded history . . . The Constitution would be impotent if such a transparent effort could succeed in defeating a constitutional provision.

Id. at 51. Accordingly, the court held that if the city could not collect the fee itself, "it cannot do so through an agent," and remanded the case. *Id.*

Respondents attempt a similar gambit here, trying to clothe the County's involvement in the Mediation Program with the mantle of private responsibility, *i.e.*, the Mediation Coordinator's collection of "fees." However, the Mediation Program and Coordinator are not arms-length third-party vendors—they are the County's agent. Respondents essentially admit this in their brief, arguing that the Mediation Program is not an improper delegation of judicial authority because "an agency may perform adjudicative functions without violating the Constitution so long as the agency's decision

is subject to 'direct review by the courts.'" (Resp. Brief at p. 25 (*quoting Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. banc 1993).) Respondents cannot have it both ways—they cannot claim the Mediation Program is equivalent to a third party vendor for purposes of avoiding the Hancock Amendment, but then shield the Program from other constitutional obligations by characterizing it as a government agency.

A cursory review of the Ordinance shows that the County is not merely a passive observer of the Mediation Program—it is intimately involved with its operation. For example, the County Counselor must approve several of the forms used in the Program, including the Certificate of Compliance, the form used by Homeowners to request mediation, the financial statement form submitted by Homeowners prior to mediation and a Request for Mortgage Assistance form, also submitted by Homeowners. (L.F. 92-94.) The County is empowered to gather "[a]ggregate data to monitor and/or evaluate the implementation of the program . . . ." (L.F. 97.) The County Assessor is implicated because a Lender who fails to present a Certificate of Compliance when recording a deed is subject to a fine. *Id.* The relevant County Council Meeting Minutes reflect the Assessor's involvement, stating "the Assessor's Office will be responsible for implementation and . . . 'stands ready to assist the County in implementation as necessary.'" (L.F. 107.) And, of course, the County Counselor prosecutes violations and the fines paid by offenders flow into the County's coffers.

This case is, therefore, a far cry from *Grace*. Unlike the waste haulers there, who were "private entities unconnected to the County and . . . selected through a competitive bidding process," 348 S.W.3d at 126, the Mediation Program is being created from

scratch by the Ordinance and the Mediation Coordinator in charge is appointed by the County Executive. (L.F. 34-35 &92.) Moreover, unlike the waste haulers in *Grace*, who provided services without any operational involvement from the County, the Mediation Program relies upon the direct participation of the County Counselor and Assessor, as well as their staffs. Lastly, unlike the fees charged in *Grace*, which were "determined by the level of service actually provided," 348 S.W.3d at 125, the fees imposed by the Mediation Program bear no relationship to any provided services. (L.F. 93.)

Thus, the facts presented are more akin to *Loving* than *Grace*. The Mediation Program and Coordinator are the County's agents. Respondents could not have directly collected the Mediation Program fees—unrelated as they are to any service—absent compliance with the Hancock Amendment. Hoping to skirt that burden, the Mediation Coordinator is tasked with collecting the Program fees. But if Respondents "may not collect the fee [themselves, they] cannot do so through an agent." *Loving*, 753 S.W.2d at 51. Accordingly, the Ordinance violates the Hancock Amendment.[6]

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[6] Respondents do not meaningfully address the arguments raised in Points II(B)-(C) of Appellants' Brief, stating only that "[t]he first three grounds asserted by Bankers in Point II . . . are all based upon the assumption that County's Mediation Program levies a tax upon those Lenders who wish to file foreclosure deeds without being subject to penalty . . . None of the fees imposed upon Lenders are paid, either directly or indirectly, to County. Because of that fact, the fees cannot correctly be characterized as taxes." (Resp. Brief at pp. 17 & 18.)

III. THE ORDINANCE ILLEGALLY DELEGATES JUDICIAL AUTHORITY TO THE MEDIATION COORDINATOR.

Respondents' argument that the Mediation Coordinator is not improperly empowered with judicial authority is based on a selective reading of the Ordinance and a fundamental misunderstanding of a party's right to judicial review. Respondents assert that the Mediation Program is constitutional because it operates as a government agency, and the County Counselor's ability to prosecute a Lender provides judicial review of the Coordinator's decisions. (Resp. Brief at pp. 23-25.) As noted in Section II, *supra*, Respondents' characterization of the Mediation Program as an agency is internally inconsistent with their argument that the Program is an arms-length contractor. Respondents want to have their cake and eat it, too. They want the Program to be independent when that helps Respondents avoid Hancock Amendment compliance, but then declare the Program is a government agency when that empowers the Coordinator to make adjudicative decisions. In any event, by the County's own admission, the Mediation Program and Mediation Coordinator are part of the County government.

As a threshold issue, the expertise that typically justifies an agency's limited adjudicative power is wholly missing here. Appellants do not deny that the "complexity of modern government demands the delegation of some administrative and decisional authority to executive agencies because of their particular expertise." *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 74 (Mo. banc 1982). However, "[a]gency adjudicative power extends only to the ascertainment of facts and the application of

existing law thereto in order to resolve issues within the given area of agency expertise." *Id.* at 75 (emphasis added). Here, there is no indication that the Mediation Coordinator or mediators themselves possess any expertise in the area of residential foreclosures. The Ordinance does not require preexisting knowledge on the topic, nor does it mandate training of any kind. Thus, neither the Coordinator nor the mediators possess the same expertise as agency employees. More to the point, this lack of specialized knowledge means there is no area of expertise in which they are empowered to ascertain facts and apply law.

Yet there is no doubt that the Ordinance authorizes the Mediation Coordinator to make, at a minimum, quasi-judicial decisions. Arguing otherwise, Respondents ignore key provisions of the Ordinance, including the Mediation Coordinator's power to decide whether "extraordinary circumstances" justify a continuance and/or whether the Lender made a "good faith effort" to mediate. (L.F. 95, 96 & 97.) The latter determination is especially important because it precedes the issuance of a Certificate of Compliance, which is, in turn, a prerequisite to recording a foreclosure deed without penalty. *Id.*

Respondents' contention that "[n]on-issuance of a Certificate of Compliance amounts only to an assertion of probable cause as to one element of the offense at issue," ignores the real-world implications of the Coordinator's decision. (Resp. Brief at p. 24.) Without the Certificate, a Lender cannot record its foreclosure deed without penalty and cannot take any further action on the property given the cloud on its title. The Mediation Coordinator is, therefore, empowered with discretionary authority to make decisions that directly affect a Lender's rights—all without any indicia of expertise.

Equally troubling is that Lenders cannot seek judicial review of the Mediation Coordinator's decision. Respondents allege that the Program's decision-making scheme is constitutionally sound if "final judgment [is] within the purview of the judiciary." (*Id.* at p. 25.) This is an incomplete statement of the law. Rather, "an agency may perform adjudicative functions without violating the Constitution so long as the agency's decision is subject to 'direct review by the court.'" *Asbury*, 846 S.W.2d at 200 (emphasis added). This Court has interpreted "direct review" to mean "immediately reviewable by the circuit court without an intervening level of review." *Id.* at 201.

Respondents contend the availability of prosecution satisfies the judicial review requirement. (Resp. Brief at pp. 24-25.) The flaw in Respondents' argument is that review relies upon whether the County Counselor decides "prosecution will even be initiated," and is not immediately available to the aggrieved Lender. (*Id.* at p. 24.) The only references to judicial action contained in the Ordinance refer to prosecution, *i.e.*, the right to use "documents and discussions" from the mediation "to prosecute a violation of Section 727.700," and a provision that "it shall be a complete defense to prosecution hereunder that the Lender has in fact complied with the [Ordinance's] requirements." (L.F. 97.) This leaves the Lender at the County Counselor's mercy—unable to seek judicial review of the Mediation Coordinator's findings and unable record a foreclosure deed without fear of penalty—until a decision regarding prosecution is made.

Moreover, the Ordinance provides no explanation for what happens if the Mediation Coordinator denies that a Lender participated in good faith and refuses to issue a Certificate of Compliance, but the County Counselor declines to prosecute. Does the

County Counselor's determination reverse the Coordinator's finding?[7] Can the County Counselor issue the Certificate or is the matter sent back to the Coordinator? Is the Lender free to record its deed of foreclosure without penalty? May the Lender seek judicial review of the Mediation Coordinator's findings once the County Counselor declines to prosecute? None of these questions are answered by the Ordinance. As this Court explained in *Asbury*, "[t]he rights of [the parties] are too significant to be subjected to this type of back-and-forth administrative battling and delay. Both [parties] need to know their relative status." 846 S.W.2d at 202. Here, the combination of quasi-judicial power, lack of expertise and absence of meaningful judicial review compels the conclusion that the Ordinance improperly delegates judicial authority to the Mediation Coordinator.

IV. THE ORDINANCE IS NOT A PROPER EXERCISE OF THE COUNTY'S POLICE POWER.

To briefly reiterate, the Ordinance is not a valid exercise of Respondents' police power under § 18(c) of the Missouri Constitution because: (1) authority granted pursuant to § 18(c) cannot "invade 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

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[7] Such an operation would strengthen the arguments made in Section II, *supra*, that the Mediation Coordinator is an agent of the County because the Mediation Coordinator would be subject to the County Counselor's authority and control.

S.W.2d 749, 754 (Mo. banc 1975), and (2) the Ordinance is not designed to address needs "peculiar" to the County, *Chesterfield Fire Prot. v. St. Louis County*, 645 S.W.2d 367, 371 (Mo. banc 1962). (*See also* App. Brief at pp. 15-18 & 42-44.) Respondents' brief fails to present evidence to the contrary, relying instead upon blatant misstatements of the law. For the reasons provided in Appellants' Brief, as well as this Reply, the Ordinance is not a valid exercise of charter county policy power.

> Respondents' brief states the following, reproduced here verbatim:
>
> As Bankers themselves acknowledge, Mo. Const. Art. VI § 18(c) grants charter counties the power to exercise legislative authority over services and functions of a municipality or political subdivision . . . ," and this grant of power allows for the exercise of police power such as public health, police and traffic "in order to meet the 'peculiar' needs of the county." *Bankers Brief p. 42*. This grant of power is "not subject to, but take[s] precedence over, the [General Assembly's] legislative power." *State ex rel. Shepley v. Gamble*, 280 S.W.2d 656, 660 (Mo. banc 1955). *See also St. Louis County v. City of Manchester*, 360 S.W.2d 638, 641 (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 . . . .")

(Resp. Brief at p. 29.) This paragraph completely misstates the Court's comments in *Shepley*. A closer inspection of that case reveals that it actually support Appellants' position.

Shepley dealt with a proposed amendment to the County's charter which transferred the powers of the sheriff and constables to a newly-created St. Louis County police department. 280 S.W.2d at 658. Respondents cherry pick one line from the Court's analysis and, more importantly, add the words "General Assembly" in a manner that drastically alters the Court's true intent. When the Court's full comments are reviewed, it becomes clear that *Shepley* expressly rejected the principle for which Respondents cite the case:

> Moreover, charter counties . . . are empowered to exercise legislative power pertaining to public health, police and traffic, building construction, and planning and zoning in such areas. Section 18(c), supra. . . . A county under the special charter provisions of our constitution is possessed to a limited extent of a dual nature and functions in a dual capacity. It must perform state functions over the entire county and 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.

Id. at p. 660 (emphasis added). Stated succinctly, the *Shepley* Court explained that constitutional grants of power—including the requirement that counties "must perform state functions over the entire county"—take precedence over a county's "legislative power," *i.e.*, its police powers under § 18(c). *Id.* *Shepley* absolutely did not hold that a county's police powers take precedence over the "[General Assembly's] legislative

power," and to suggest otherwise is a flagrant misrepresentation of that case. (Resp. Brief at p. 29.)[8]

Respondents also take significant liberties in their discussion of cases from other jurisdictions. For example, Respondents claim that *Easthampton Savings Bank v. City of Springfield*, 874 F.Supp.2d 25 (D. Mass. 2012), upheld a pre-foreclosure mediation program "[n]otwithstanding that [no state statute specifically authorized the program], and notwithstanding the court's acknowledgment that the process might 'extend the time

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[8] Respondents' reliance on *City of Manchester* is also misplaced. There, the dispute centered on whether the City of Manchester was required to abide by County zoning ordinances when selecting a location for a sewage treatment plant. *City of Manchester*, 360 S.W.2d at 639-640. The Court explained that the "planning and zoning powers which are vested in charter counties directly by the Constitution are of similar character and in some respects such constitutional powers take precedence over the legislative grants. *Id.* at 640 (emphasis added). Here, the Ordinance does not implicate a county police power, like zoning, that is directly referenced in the Constitution. Moreover, the *City of Manchester* Court did not ultimately address "whether the county or the city occupies a superior position in the governmental hierarchy because the county ordinances and the statutes may be harmonized and permitted to stand." *Id.* at 642 (internal quotations and citations omitted). That case, therefore, does not support the proposition that the County's police powers take precedence over other constitutional provisions or state laws.

line' for foreclosures as set forth in state statutes . . . ." (Resp. Brief at p. 30.) This is a blatant misstatement of the court's opinion, which actually provides:

> Plaintiffs suggested during the hearing on these motions that the Mediation Ordinance may extend the time line set forth for the foreclosure process by Chapter 244, but the ordinance specifically states that the mediation shall in no way constitute an extension of the foreclosure process, nor an extension of the right to cure period.

Easthampton, 874 F.Supp.2d at 30 (emphasis added) (internal quotations omitted). The court did not, therefore, endorse a mediation scheme that "might extend the time line" for foreclosures, as Respondents suggest.

Further, Respondents' analysis of *Duetsche Bank National Trust Company v. City of Providence*, P.C. No. 10-1240 (Super. Ct. R.I. 2010), is misleading because it fails to meaningfully acknowledge the court's invalidation of ordinances forbidding deeds from being recorded without a certificate of compliance.[9] The court struck these ordinances

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[9] Respondents' discussion of this point is limited to a footnote which reads, in its entirety, "[t]he *Deutsche* court did strike a provision which prohibited the recording of deeds for property as to which no mediation had occurred, but no such provision exists in County's mediation program." (Resp. Brief at p. 31.) In yet another example of an all too familiar pattern, this statement is thoroughly misleading. The ordinances struck down in *Deutsche* provided that "[n]o deed offered by a lender/mortgagor to be filed with the recorder of deeds shall be accepted and/or recorded in the land evidence records of the

for two reasons. First, after examining the legislature's regulation of recording systems, the *Duetsche Bank* court concluded that "[w]ith such an expansive and comprehensive framework . . . the General Assembly intended to occupy the entire field of regulation with respect to the recording of instruments." *Id.* at 3. Consequently, the court held that the "Ordinances are invalid to the extent that they disrupt the state's overall scheme of regulating the transfer of real estate and specifically the recording of instruments." *Id.* at p. 2 (internal quotations omitted).

Second, the court rejected the recording provisions because they violated the Home Rule Amendment to Rhode Island's Constitution. *Id.* at p. 3. Under the constitution, "[e]very city and town shall have the power at any time to adopt a charter, amend its charter, [and] enact and amend local laws . . . not inconsistent with this Constitution and laws enacted by the general assembly . . . ." *Id.* (*quoting* R.I. Const. Art. XIII, § 2). However, as in Missouri, Rhode Island "municipalities may not legislate on matters of statewide concern, and the power of home rule is subordinate to the General Assembly's unconditional power to legislate in the same areas." *Id.* (internal quotations omitted). Turning to the ordinances at issue, the court concluded:

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city if it is determined that the lender/mortgagor has failed <u>in any respect</u> with the requirements and provisions of this article." *Duetsche Bank* at p. 1 (emphasis added). In short, failure to satisfy any of the mediation requirements prevented a foreclosure deed from being recorded. The *Duetsch* ordinances are substantively identical to the Ordinance in this respect.

> [T]he City's enactment impermissibly deals with a statewide matter. To begin, uniform statewide regulation over the recording of instruments is both necessary and desirable. . . . Because the land evidence records are so heavily relied upon and govern such important expectations between parties, this Court finds it critically important that recording laws are uniform throughout the state. . . .
>
> [T]he General Assembly has provided a uniform and detailed framework regulating the recording of instruments. If each city and town were permitted to implement its own nuances, a comprehensive approach would be impossible. . . . Allowing towns and municipalities to enact their own recording laws would create conflicting and idiosyncratic obligations that might confuse individuals who seek to adhere to the accepted requirements. . . . Thus, this Court finds that the laws governing the recording of instruments are of statewide concern. As such, it was impermissible for the City to force a party to meet new requirements before a foreclosure deed can be recorded . . . Such an enactment is a violation of the Home Rule Amendment.

Id. at pp. 3-4. Thus, a more thorough examination of the *Deutsche Bank* decision shows that it supports many of Appellants' arguments and persuasively articulates why public policy requires uniformity in this arena.

Despite Respondents' ill-founded arguments to the contrary, the County's police power must yield to general legislation involving statewide public policy. The

misleading arguments and misstated quotations in Respondents' brief cannot overcome this settled issue of law. The Ordinance is a bridge too far and exceeds Respondents' constitutional police powers.

V. APPELLANTS' BRIEF ADDRESSES THE REMAINDER OF RESPONDENTS' ARGUMENTS.

Appellants' Brief already addresses the remaining contentions asserted by Respondents, so those arguments are not repeated here. For the reasons stated in Appellants' Brief, the Court should reverse the Circuit Court's summary judgment in favor of Respondents and enter summary judgment in Appellants' favor on any or all of those grounds.

CONCLUSION

Until the Ordinance is removed from the County Code this case is not moot, and Appellants are entitled to a judgment that the Ordinance is void and unenforceable. Yet even without the enactment of § 443.454, the Circuit Court's summary judgment for Respondents should be reversed because the Ordinance is unconstitutional. The Ordinance oversteps the County's authority by invading the arena of general legislation governing statewide public policy. The Ordinance violates the Hancock Amendment by collecting taxes—albeit through the transparent use of an agent reliant upon County officers and authority—that are wholly unrelated to any service. The Ordinance impermissibly delegates judicial authority to a Mediation Coordinator with no expertise and then denies aggrieved Lenders any meaningful judicial review. The Ordinance

unlawfully maneuvers money and resources for the benefit of some individuals at the expense of others. And the Ordinance improperly interferes with Lenders' established contract rights and the powers granted by existing Missouri statutes to enforce those rights.

Respondents contend that the analysis of constitutional infirmities provided in Appellants' Brief and Reply is "a hodgepodge of grounds for reversal . . . ." (Resp. Brief at p. 16.) However, the simple truth is that the Ordinance is so constitutionally deficient that a discussion of the amendments and laws being violated generates a considerable list of problems. Respondents may wish that Appellants had not been so thorough, but a serious issue of public policy warrants a serious and comprehensive response. For the reasons stated in Appellants' Brief and this Reply, this Circuit Court's summary judgment in favor of Respondents should be reversed and summary judgment should be entered in Appellants' favor.

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 6,255 words, exclusive of the sections exempted by Rule 84.06(b), 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 25th day of April, 2014, a true and correct copy of the foregoing Reply Brief was served on the following party of record by eService through the Court's e-Filing System:

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