



**In the Missouri Court of Appeals  
Eastern District  
DIVISION FIVE**

MIKE WEBBER, PAUL MARQUIS, and )	)	No. ED94271
CATHY ARMBRUSTER, )	)	
	)	
Appellants, )	)	
	)	Appeal from the Circuit Court of
vs. )	)	St. Louis County
	)	
ST. LOUIS COUNTY, IESI MO )	)	
CORPORATION, VEOLIA ES SOLID )	)	Honorable Robert S. Cohen
WASTE MIDWEST, LLC, and ALLIED )	)	
SERVICES, LLC, )	)	
	)	
Respondents. )	)	FILED: November 16, 2010

***Introduction***

Plaintiffs, Mike Webber, Paul Marquis, and Cathy Armbruster appeal the judgment of the trial court dismissing their Amended Petition against Defendants, St. Louis County and IESI MO Corporation, Veolia ES Solid Waste Midwest, LLC, and Allied Services, LLC (the Haulers).<sup>1</sup> In their Amended Petition, Plaintiffs challenged the validity of the County’s Ordinance Nos. 23,023, 23,221, and 23,795 (the Ordinances). We affirm in part and reverse and remand in part.

***Background***

In December 2006, the County Council enacted Ordinance No. 23,023, adding Sections 607.1300-1310 to the County’s Revised Ordinances and allowing the County to enter into the trash collection business in unincorporated St. Louis County. Specifically, Ordinance No.

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<sup>1</sup> We note that the record contains two different spellings of Webber. Because the notice of appeal spells Webber with two “b”s, we use this spelling.

23,023, authorized the County Executive to establish “collection areas” in unincorporated St. Louis County “for the collection and transfer of waste and recovered materials” and to award contracts to individuals with the most “responsible” bids to provide exclusive trash collection services in one or more of the collection areas.<sup>2</sup> In May 2007, the County enacted Ordinance No. 23,221, which maintained the provisions added by Ordinance No. 23,023.

In November 2008, the County enacted Ordinance No. 23,795, amending Section 607.1310 to add additional conditions for the trash haulers the County selected and prohibiting any trash hauler not selected from providing trash collection services to a household within a designated collection area.<sup>3</sup> Ordinance No. 23,795 also amended Section 607.960, which provides a maximum \$1000 fine and maximum one-year incarceration for any person convicted of violating a provision of Ch. 607 of the County’s Revised Ordinances.<sup>4</sup>

Pursuant to the Ordinances, the County established eight collection areas in unincorporated St. Louis County and awarded contracts to the Haulers to service the collection areas. Subsequently, the Haulers began providing trash collection services in unincorporated St. Louis County and Plaintiffs contracted with and paid the Haulers for their services.

Plaintiffs filed their initial petition on September 11, 2009 and filed their Amended Petition on December 10, 2009. In the first count of their Amended Petition, Plaintiffs sought a

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<sup>2</sup> We note that Plaintiffs use the term “trash districts” in their Amended Petition and brief and Defendants use the terms “service areas” and “trash collection areas.” We, however, utilize the term “collection areas” because it is the term used in Section 607.1300 of the County’s Revised Ordinances, which Plaintiffs attached to their Amended Petition.

<sup>3</sup> The additional conditions included a temporary opt-out provision for vacant households, mandatory discounts for senior citizens, accommodations for disabled customers, mandatory refunds for unused pre-paid services, mandatory customer service with minimum hours of service from 8:00a.m.-5:00p.m., Monday through Friday, and review by St. Louis County of the trash hauler’s performance.

<sup>4</sup> Section 607.960 further provides that any person convicted of violating Section 607.1310.3 shall be subject only to a fine of not more than \$50.

declaration that the Ordinances were void *ab initio* on two independent theories.<sup>5</sup> First, Plaintiffs contended that the Ordinances were void because the County failed to comply with the election provision of Article II, Section 2.180.24 of the County’s Charter (Art. II, § 2.180.24) (Count 1(a)). Art. II, § 2.180.24 authorizes the County Council to “[p]rovide for the creation of districts in unincorporated areas of the county within which may be provided . . . garbage and refuse collection and disposal . . . as the voters therein by a majority may approve, the same to be paid for from funds raised by special assessment, general taxation or service charge . . . .”<sup>6</sup> Plaintiffs alleged that the County violated Art. II, § 2.180.24 by failing to hold an election prior to enacting the Ordinances and establishing the collection areas in unincorporated St. Louis County.

Second, Plaintiffs contended that the Ordinances were void because the County failed to comply with the notice provision of Mo. Rev. Stat. § 260.247 (Cum. Supp. 2007) (Count 1(b)).<sup>7</sup> Section 260.247 provides that before “[a]ny city or political subdivision” intending to expand “solid waste collection services into an area where the collection of solid waste is presently being

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<sup>5</sup> More specifically, in their first count, Plaintiffs asked the trial court to declare void the Ordinances, “including §607.1300 and §607.1310 of the St. Louis County Code” as well as the “trash district contracts . . . and any obligation the Plaintiffs had or have to pay defendants for trash services . . . .”

<sup>6</sup> Art. II, § 2.180.24 provides that the County Council shall have, by ordinance, the power to: Provide for the creation of districts in the unincorporated areas of the county within which may be provided police protection, fire protection, public water supply, streets, sidewalks, street lighting, sewers, sewage disposal facilities, garbage and refuse collection and disposal, and such kindred facilities as the voters therein by a majority of those voting thereon may approve, the same to be paid for from funds raised by special assessment, general taxation or service charge, or any combination thereof within such districts; and, when authorized by law, provide for the consolidation of such functions with those now performed in existing districts;

<sup>7</sup> We note that we, and not Plaintiffs, designate Plaintiffs’ two theories for declaratory relief as “Count 1(a)” and “Count 1(b)” so as to not confuse which theory we are referring to throughout this opinion. We further note that Mo. Sup. Ct. Rule 55.11 requires that a party state separate claims in separate counts “whenever a separation facilitates the clear presentation of the matters set forth.”

provided” shall provide the current trash haulers notice of its intent to provide such services by “certified mail” and shall not commence waste collection services in the area for “at least two years from the effective date of the notice.”<sup>8</sup> Plaintiffs alleged that the County violated Section 260.247 by failing to provide the trash haulers previously servicing unincorporated St. Louis County the required two-year notice by certified mail.

In their remaining three counts, Plaintiffs sought reimbursement for all of the monies Plaintiffs paid to the Haulers for their trash collection services. Plaintiffs brought their claims under the theories of money had and received (Count 2), the Merchandising Practices Act (Count 3), and unjust enrichment (Count 4).<sup>9</sup>

In response to Plaintiffs’ Amended Petition, Defendants filed a motion to dismiss. With respect to all counts in the Amended Petition, Defendants argued that the claims were barred by the doctrines of laches and mootness. With respect to Count 1(a), Defendants claimed Plaintiffs failed to state a claim for a declaratory judgment because Art. II, § 2.180.24 only applies to the creation of “taxing districts” and no voter approval was required to enact the Ordinances. With respect to Count 1(b), Defendants contended that Plaintiffs lacked standing to enforce Section 260.247’s notice provision, which is intended to protect trash haulers. With respect to Counts 2

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<sup>8</sup> Section 260.247 provides:

1. Any city or political subdivision which annexes an area or enters into or expands solid waste collection services into an area where the collection of solid waste is presently being provided by one or more private entities, for commercial or residential services, shall notify the private entity or entities of its intent to provide solid waste collection services in the area by certified mail.

2. A city or political subdivision shall not commence solid waste collection in such area for . . . at least two years from the effective date of the notice that the city or political subdivision intends to enter into the business of solid waste collection or to expand existing solid waste collection services into the area, unless the city or political subdivision contracts with the private entity or entities to continue such services for that period.

<sup>9</sup> Plaintiffs conceded during oral argument that Counts 2, 3, and 4 are directed against the Haulers only, and not the County.

and 4, Defendants contended that Plaintiffs failed to plead sufficient facts establishing the elements of money had and received and unjust enrichment. Finally, with respect to Count 3, Defendants asserted that Plaintiffs failed to allege a violation of the Merchandising Practices Act and, in any event, their claim was barred by the voluntary payment doctrine.

After a hearing on Defendants' motion to dismiss, the trial court entered judgment dismissing Plaintiffs' Amended Petition. The trial court did not specify the grounds for dismissal in its judgment. This appeal followed.

### *Standard of Review*

We review a trial court's grant of a motion to dismiss *de novo*. Huch v. Charter Commc'ns, Inc., 290 S.W.3d 721, 724 (Mo. banc 2009). We treat all allegations in the petition as true, grant all reasonable inferences therefrom, and construe the allegations favorably to the plaintiff. Breeden v. Hueser, 273 S.W.3d 1, 6 (Mo.App.W.D. 2008). "[T]he petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." Reynolds v. Diamond Foods & Poultry, Inc., 79 S.W.3d 907, 909 (Mo. banc 2002). In addition to reviewing the petition, we also review any attached exhibits, which are considered to be part of the petition for all purposes. Suburban Bus. Prods., Inc. v. T.E. Schmitt Co., 796 S.W.2d 77, 78 (Mo.App.E.D. 1990); see also Mo. Sup. Ct. Rule 55.12.

Where, as here, the trial court does not specify its reasons for dismissing a petition, we presume the trial court based its judgment on one of the reasons stated in the motion to dismiss. Shores v. Express Lending Servs., Inc., 998 S.W.2d 122, 125 (Mo.App.E.D. 1999). We will affirm the judgment of dismissal if it is supported by any of the grounds raised in the motion to dismiss, regardless of whether the trial court actually relied on that ground. Id.

## *Discussion*

Raising eight points, Plaintiffs contend that the trial court erred in dismissing their Amended Petition because none of the various grounds set forth in Defendants' motion to dismiss supports the trial court's judgment of dismissal. To facilitate analysis, we address these points out of order, first considering those that relate to the trial court's dismissal of all of the counts in the Amended Petition, and then resolving the remaining points that pertain to the dismissal of each individual count.

### **A. All Counts: Laches**

In their fourth point, Plaintiffs contend that the trial court erred in dismissing their Amended Petition because the doctrine of laches is not a proper basis for dismissal. Specifically, Plaintiffs assert that laches is an affirmative defense and dismissal is inappropriate because the elements of laches are not clearly established on the face of the Amended Petition without exception. Defendants contend that laches is a proper basis for dismissal because Plaintiffs unreasonably delayed bringing their action by filing their original petition after the County "fully implemented" its trash collection program.

As Plaintiffs correctly assert, laches is an affirmative defense. Associated Elec. Co-op., Inc. v. City of Springfield, 793 S.W.2d 517, 520 (Mo.App.S.D. 1990); Mo. Sup. Ct. Rule 55.08. Where an affirmative defense is asserted in a motion to dismiss, a trial court may dismiss the petition only if the petition clearly establishes "on its face and without exception" that the defense applies and the claim is barred. Sheehan v. Sheehan, 901 S.W.2d 57, 59 (Mo. banc 1995) (quoting Int'l Plastics Dev., Inc. v. Monsanto Co., 433 S.W.2d 291, 294 (Mo. banc 1968)); see also Ver Standig v. St. Louis Union Trust Co., 98 S.W.2d 588, 591 (Mo. 1936).

The doctrine of laches bars a party's claim where the party has knowledge of the facts giving rise to his or her rights and delays assertion of the rights for an excessive amount of time causing legal detriment to the opposing party. Ewing v. Ewing, 901 S.W.2d 330, 334 (Mo.App.W.D. 1995). "[M]ere delay does not of itself constitute laches, the delay must be unreasonable and unexplained and must be shown to have caused disadvantage and prejudice to the defendant." Id. (quoting Higgins v. McElwee, 680 S.W.2d 335, 341 (Mo.App.E.D. 1984)).

Here, the requisite elements for laches are not established without exception on the face of Plaintiffs' Amended Petition. The facts alleged in the Amended Petition reveal only that Plaintiffs filed their original petition within three years after the County enacted Ordinance No. 23,023, which first authorized the County's entrance into the trash collection business, and approximately one year after the County contracted with the Haulers and commenced its trash collection program. Besides the mere delay between the County's challenged actions and Plaintiffs' initial petition, there are no facts in the Amended Petition demonstrating that the Plaintiffs' delay was either unreasonable or that Defendants were sufficiently disadvantaged and prejudiced. Accordingly, there is no basis in the record for dismissal of Plaintiffs' Amended Petition on the grounds of laches. Point granted.

#### **B. All Counts: Mootness**

In their fifth point, Plaintiffs contend that the trial court erred in dismissing their Amended Petition because the doctrine of mootness is not a proper basis for dismissal. Specifically, Plaintiffs assert that their claims are not moot because the trial court had the authority to declare the Ordinances void and order the reimbursement of the monies Plaintiffs paid to the Haulers. Conversely, Defendants contend that Plaintiffs' claims are moot because the full implementation of the County's trash collection program has occurred and, thus, the "granting of effectual relief by this Court is now impossible." Defendants also argue that

Plaintiffs' claims are moot because the Haulers, by relying in good faith on the Ordinances and investing the County's trash collection program, have obtained a "vested interest" in the Ordinances.

"A cause of action is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy." State ex rel. Mo. Parks Ass'n v. Mo. Dept. of Nat. Res., 316 S.W.3d 375, 384 (Mo.App.W.D. 2010) (quotation omitted). Likewise, a case becomes moot and should be dismissed "[w]hen an event occurs that makes a court's decision unnecessary or makes granting effectual relief by the court impossible[.]" State ex rel. Reed v. Reardon, 41 S.W.3d 470, 473 (Mo. banc 2001) (quotation omitted).

Here, there is an existing controversy between Plaintiffs and Defendants over the validity of the Ordinances. Moreover, if Plaintiffs proved their claims that the Ordinances are void, the trial court has the authority to grant the relief requested, despite the fact that the County has already commenced its trash collection program. See, e.g., Bldg. Owners & Managers Ass'n of Greater Kansas City v. City of Kansas City, 231 S.W.3d 208, 211 (Mo.App.W.D. 2007). Because there is an existing controversy and effectual relief is possible, Plaintiffs' claims are not moot.

In support of its argument that the full implementation of the County's trash collection program renders effectual relief impossible, Defendants rely on several cases where the parties' claims were moot because they sought to enjoin events that had already occurred. Defendants' reliance on these cases is misplaced. For example, Defendants contend that the facts in this case are analogous to those in State ex rel. Acoff v. City of Univ. City, 180 S.W.3d 83 (Mo.App.E.D. 2005). In Acoff, a group of firefighters "sought to prevent the City from proceeding with a promotional examination for the position of battalion chief." Id. at 85. Prior to the appeal, the

City held its examination and selected a new battalion chief. Id. The court held that “[b]ecause the examination and selection have already occurred, we cannot grant any effectual relief. Accordingly, we dismiss this appeal as moot.” Id. In contrast to Acoff, Plaintiffs here are not seeking an injunction to prevent an event that has already occurred. Rather, they seek a declaration regarding the validity of the Ordinances authorizing the County’s *ongoing* trash collection program as well as reimbursement for monies paid to the Haulers under the Ordinances. The controversy in this case continues to exist and, as discussed above, effectual relief is not impossible because the trial court has the authority to grant the relief requested.<sup>10</sup>

Finally, Defendants contend that “a third party’s reliance in good faith upon an ordinance in making a substantial investment can moot a challenge to an ordinance, because the third party will obtain a vested interest in the ordinance.” More specifically, Defendants assert that the “Haulers relied in good faith upon the County’s enactment of the ordinances and Program to invest in additional equipment and other costs to implement the Program.” The only authority Defendants cite in support of their contention, however, fails to address the doctrine of mootness, and rather applies the rule that construction of a structure in reliance on existing zoning laws can

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<sup>10</sup> Defendants also cite several other cases where, like in Acoff, the petitioner’s claim was moot because it sought to prevent an event that had already occurred. See Jackson County Bd. of Election Comm’rs ex rel. Brown v. City of Lee’s Summit, 277 S.W.3d 740, 744 (Mo.App.W.D. 2008) (holding that a Board of Election Commissioners’ declaratory action to determine whether it was required to place an ordinance on a ballot became moot after the Board placed the ordinance on the ballot, an election was held, and the ordinance passed); Miller-Morrison v. City of Aurora, 1 S.W.3d 623, 625 (Mo.App.S.D. 1999) (holding that claim for injunction to prevent defendants from paying attorneys’ fees was moot because the City had already paid the attorneys’ fees in full and, consequently, “[t]here [was] nothing to enjoin.”); Eicholz v. Davis, 289 S.W.2d 433, 435 (Mo.App.1956) (holding that claim for injunction to prevent partition sale was moot when partition sale had already occurred); One Thousand Friends of Iowa v. Mineta, 364 F.3d 890, 893-94 (8th Cir. 2004) (holding that claims to enjoin construction of roadway project and declaration that Federal Highway Administration arbitrarily and capriciously approved the project were moot because the project had been completed and neither an injunction nor a declaration would result in “any true relief.”). These cases are likewise unpersuasive because here Plaintiffs are not attempting to enjoin a past event, but rather seek a declaration of the validity of the Ordinances and the County’s *ongoing* trash collection program.

be completed notwithstanding a subsequent zoning change. See, e.g., State ex rel. Great Lakes Pipe Line Co. v. Hendrickson, 393 S.W.2d 481, 484 (Mo.1965); May Dept. Stores Co. v. County of St. Louis, 607 S.W.2d 857, 869 n.4 (Mo.App.E.D. 1980).

Given the foregoing, we find that Plaintiffs' claims are not moot and, therefore, the doctrine of mootness is not a proper basis for the dismissal of Plaintiffs' Amended Petition. Point granted.

**C. Count 1(a): The Election Provision of Art. II, § 2.180.24**

In their first point, Plaintiffs assert that the trial court erred in dismissing Count 1(a) of their Amended Petition because they pled sufficient facts to establish that the County violated Art. II, § 2.180.24 when it established “trash districts” in unincorporated St. Louis County without an election.<sup>11</sup> Defendants respond that the trial court properly dismissed Count 1(a) because the County’s authority to contract for “waste collection services” is not dependent upon the election provision of Art. II, § 2.180.24, which only applies to the creation of “permanent taxing districts.” Additionally, Defendants argue that authority to enact its “garbage collection program” is found in Art. II, § 2.180.11, .22, and .23, none of which requires elections prior to implementation of a trash collection “program.”<sup>12</sup> With respect to both Plaintiffs’ contention

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<sup>11</sup> We note that in their third point, Plaintiffs contend generally that they have standing to “challenge the legality of the void County Ordinance[s].” Defendants concede that Plaintiffs have standing to challenge the County’s alleged failure to comply with the election provision of Art. II, § 2.180.24. As discussed more fully below, Defendants dispute Plaintiffs’ standing only with respect to Plaintiffs’ claim regarding the County’s alleged failure to comply with the notice provision of Section 260.247. We agree that Plaintiffs have standing to challenge the alleged violation of Art. II, § 2.180.24 because, at the very least, Plaintiffs, as residents of unincorporated St. Louis County, have a legally cognizable interest in the County’s compliance with the election provision of Art. II, § 2.180.24 and have a threatened or actual injury from the County’s alleged failure to hold an election if, in fact, one was required. See Wahl v. Braun, 980 S.W.2d 322, 325 (Mo.App.E.D. 1998).

<sup>12</sup> Art. II, § 2.180 of the County Charter provides in relevant part:

[T]he council shall have, by ordinance, the power to: . . .

and Defendants' counter-arguments, it is clear that both parties seek from this court an analysis of the applicability of the various County Charter sections to the facts pled in the Amended Petition.

We first consider whether it is appropriate when reviewing a judgment of dismissal for failure to state a claim for this court to decide the applicability of the various County Charter sections to the facts pled in the Amended Petition. To determine which County Charter sections govern the manner in which the County may implement its trash collection program, we would need to construe the County Charter sections and analyze whether Art. II, § 2.180.24, as a matter of law, required an election prior to the County's enactment of the Ordinances. In reviewing a judgment of dismissal for failure to state a claim for declaratory relief, it is not a function of this court "to construe the statutes in question or to determine on the merits whether plaintiff is entitled to the declaratory relief he seeks in accordance with the theory he states." State ex rel. Am. Eagle Waste Indus. v. St. Louis County, 272 S.W.3d 336, 340 (Mo.App.E.D. 2008) (quoting City of Creve Coeur v. Creve Coeur Fire Pro. Dist., 355 S.W.2d 857, 859-60 (Mo.1962)). Accordingly, at this stage of the litigation, we decline to construe the language of the County Charter sections and determine the merits of Plaintiffs' claim. See id. at 340-41.

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11. Collect and dispose of sewage, offal, ashes, garbage and refuse, or license and regulate such collection and disposal, and impose a charge for such service; . . .

22. Furnish or provide within the part of the county outside incorporated cities any service or function of any municipality or political subdivision, except school districts;

23. Exercise legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county outside incorporated cities, and on such other subjects as may be authorized by the constitution or by law;

On appeal from a judgment of dismissal for failure to state a claim for declaratory relief, the narrow issue for our review is whether Plaintiffs alleged sufficient facts to state a claim for a declaratory judgment. See, e.g., id. at 340. To sufficiently state a claim for a declaratory judgment, the petition need only allege facts that invoke substantive legal principles which, if proved, entitle the petitioner to declaratory relief. Id. (citing Creve Coeur Fire Prot. Dist., 355 S.W.2d at 859). “In testing the sufficiency of a petition purporting to state a claim for declaratory relief the question is not whether the petition shows that plaintiff is entitled to the declaratory relief he seeks in accordance with the theory he states, rather, it is whether under the averments of his petition he is entitled to a declaration of rights at all.” Creve Coeur Fire Prot. Dist., 355 S.W.2d at 860.

Guided by the aforementioned principles, we find that Plaintiffs stated a claim for a declaratory judgment. First, Plaintiffs’ claim sufficiently invokes the substantive legal principle that the County’s charter is “its fundamental, organic law” and “acts beyond the powers granted or necessarily implied therefrom are void.” Schmoll v. Hous. Auth. of St. Louis County, 321 S.W.2d 494, 498 (Mo.1959) (quoting State ex rel. Town of Olivette v. Am. Tel. & Tel. Co., 280 S.W.2d 134, 137-38 (Mo.App.1955)). Second, Plaintiffs’ allegation that the County violated Art. II, § 2.180.24 when enacting the Ordinances without an election, if proved, would entitle Plaintiffs to a declaration that the Ordinances are void. Given these allegations, while we express no opinion as to whether Plaintiffs are entitled to the declaratory relief they seek, we find that they have stated a claim for a declaratory judgment sufficient to survive Defendants’ motion to dismiss.

Because Plaintiffs stated a claim for a declaratory judgment, the trial court erred in dismissing Count 1(a) of Plaintiffs’ Amended Petition. Point granted.

**D. Count 1(b): Written Notice Provision of Section 260.247**

In their second point, Plaintiffs contend that the trial court erred in dismissing Count 1(b) of their Amended Petition because they alleged sufficient facts to establish that the County violated Section 260.247 by failing to provide the previous trash haulers written notice two years before commencing its trash collection program. Defendants argue, as an initial matter, that Plaintiffs lack standing to challenge the County's alleged failure to comply with the notice provisions of Section 260.247.<sup>13</sup>

Because a party without standing may not seek a declaratory judgment, we address the issue of Plaintiffs' standing first. See Kinder v. Holden, 92 S.W.3d 793, 802 (Mo.App.W.D. 2002). If a party is without standing to bring a particular action, a court shall dismiss the claim because the court lacks the authority to decide the merits of the action. Farmer v. Kinder, 89 S.W.3d 447, 451 (Mo. banc 2002). Standing inquires into whether the party seeking relief has a right to do so and requires that the party have "a legally cognizable interest in the subject matter and that he has a threatened or actual injury." White v. White, 293 S.W.3d 1, 8 (Mo.App.W.D. 2009) (quoting E. Mo. Laborers Dist. Council v. St. Louis County, 781 S.W.2d 43, 46 (Mo. banc 1989)). "To have proper standing, the party seeking relief must show two things: that he is sufficiently affected by the action he is challenging to justify consideration by the court of the validity of his action, and that the action violates the rights of the particular party who is attacking it and not of some third party." Wahl, 980 S.W.2d at 325.

Plaintiffs contend that they have standing by virtue of their status as taxpayers in unincorporated St. Louis County. More specifically, Plaintiffs assert in their reply brief that "[i]t is undisputed that the taxes paid by the three Plaintiffs have been and will be spent on St. Louis County's illegal and void trash district ordinances and program."

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<sup>13</sup> As noted in footnote 11 above, Plaintiffs address standing generally in point three.

Missouri courts have long recognized the right of a taxpayer to bring an action on behalf of him or herself or others similarly situated to enjoin the illegal expenditure of public funds. See E. Mo. Laborers Dist. Council, 781 S.W.2d at 46; Newmeyer v. Mo. & M.R. Co., 52 Mo. 81 (1873). “However, the mere filing of a lawsuit does not automatically confer standing on a taxpayer.” E. Mo. Laborers Dist. Council, 781 S.W.2d at 46. To demonstrate standing, absent fraud or compelling circumstances, a taxpayer must show “a direct expenditure of funds generated through taxation, or an increased levy in taxes, or a pecuniary loss attributable to the challenged transaction of a municipality.” Id. at 47.

As Plaintiffs acknowledge, to establish standing taxpayers “must show that their taxes went or will go to public funds that have been or will be expended *due to the challenged action.*” Duvall v. Coordinating Bd. for Higher Educ., 873 S.W.2d 856, 858 (Mo.App.W.D. 1994) (quoting O’Reilly v. City of Hazelwood, 850 S.W.2d 96, 98 (Mo. banc 1993)) (emphasis added). In Count 1(b) of their Amended Petition, the “challenged action” is the County’s alleged failure to provide the previous trash haulers notice. Importantly, Plaintiffs did not allege any facts in their Amended Petition demonstrating that the failure to provide notice to the previous trash haulers resulted in an expenditure of tax dollars, increase in taxes, or pecuniary loss, as required to establish taxpayer standing.<sup>14</sup> See, e.g., John T. Finley, Inc. v. Mo. Health Facilities Review Comm., 904 S.W.2d 1, 3 (Mo.App.W.D. 1995).<sup>15</sup>

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<sup>14</sup> Although in certain paragraphs of the Amended Petition, Plaintiffs refer to loss of monies, the source of the loss is attributed to the “illegal and void trash district ordinances” rather than the failure to comply with Section 260.247.

<sup>15</sup> We note that Defendants also argue that Plaintiffs lack standing to enforce Section 260.247 because Plaintiffs are not trash haulers and, thus, are not within the “zone of interest” created by Section 260.247. See State ex rel. Christian Health Care Of Springfield, Inc. v. Mo. Dept. Of Health & Senior Servs., 229 S.W.3d 270, 277-78 (Mo.App.W.D. 2007) (holding that a party has standing to challenge an administrative agency’s decision under a particular statute if “the purpose and policy rooted in the values set out in the legislation in question places the party in the ‘zone of interest’ that the legislation seeks to protect, such that the party should have standing to enforce the statute.”); see also Legal Commc’ns. Corp. v. St. Louis County Printing & Pub.

Plaintiffs also lack standing as individuals to challenge the County’s alleged violation of Section 260.247 because they failed to allege facts demonstrating that the County’s purported failure to provide the previous trash haulers written notice either adversely affected Plaintiffs or violated their rights. As this court has previously observed, the “fundamental purpose of [S]ection 260.247 is to provide an entity engaged in waste collecting sufficient notice to make necessary business adjustments prior to having its services terminated in a given area.” Am. Eagle Waste Indus., 272 S.W.3d at 342-43 (quoting Christian Disposal, Inc. v. Village of Eolia, 895 S.W.2d 632, 634 (Mo.App.E.D. 1995)) (emphasis added). Plaintiffs are not “entities engaged in waste collecting”, and therefore lack standing as individuals to challenge the County’s alleged violation of Section 260.247.

Based on the foregoing, we find that Plaintiffs lack standing in their capacity either as taxpayers or as individuals to challenge the County’s alleged failure to comply with Section 260.247 requiring notice to the previous trash haulers. Accordingly, we decline to reach Plaintiffs’ second point.<sup>16</sup>

#### **E. Counts 2 & 4: Money Had and Received & Unjust Enrichment**

In their sixth point, Plaintiffs contend that the trial court erred in dismissing Counts 2 and 4 of their Amended Petition because they properly pled that the Haulers “had been unjustly enriched and had received money that in equity and good conscience should be returned to Plaintiffs and their neighbors.” In response, the Haulers contend that Plaintiffs failed to state a claim for money had and received and unjust enrichment because Plaintiffs acknowledged in

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Co., Inc., 24 S.W.3d 744, 747 (Mo.App.E.D. 2000). We agree with Plaintiffs that “zone of interest” is not an element of taxpayer standing. See E. Mo. Laborers Dist. Council, 781 S.W.2d.at 47 (setting forth the standard for taxpayer standing).

<sup>16</sup> Consistent with footnote 11, as well as our analysis above, we grant Plaintiffs’ point three in part and deny it in part.

their Amended Petition that they paid only for the trash collection services they received from the Haulers.

“An action for money had and received lies where a defendant has received or obtained money or its equivalent from or for the plaintiff under circumstances that in equity and in good conscience call for him to pay it to plaintiff.” Haugland v. Parsons, 863 S.W.2d 609, 611 (Mo.App. E.D. 1992) (quoting Ryan v. Tinker, 744 S.W.2d 502, 504 (Mo.App.S.D. 1988)). Similarly, “[a]n unjust enrichment has occurred where a benefit was conferred upon a person in circumstances in which retention of the benefit, without paying its reasonable value, would be unjust.” S & J, Inc. v. McLoud & Co., L.L.C., 108 S.W.3d 765, 768 (Mo.App.S.D. 2003).

Claims of money had and received and unjust enrichment both require a plaintiff to demonstrate that the defendant’s retention of the benefit received is unjust. See S & J, Inc., 108 S.W.3d at 768; Haugland, 863 S.W.2d at 611. “In determining whether it would be unjust for the defendant to retain the benefit, courts consider whether any wrongful conduct by the defendant contributed to the plaintiff’s disadvantage.” S & J, Inc., 108 S.W.3d at 768. A plaintiff attempting to show that the defendant’s retention of the benefit is unjust must show more than a defendant’s “mere receipt of benefits” or “passive acquiescence.” Id.

Here, Plaintiffs failed to allege in their Amended Petition facts from which a jury could find that the Haulers’ retention of Plaintiffs’ payments is unjust. According to Plaintiffs’ Amended Petition, the Haulers received payments only for the trash collection services provided. Plaintiffs do not allege that their payments exceeded the reasonable value of the services provided by the Haulers. Cf. Webcon Group, Inc. v. S.M. Props., L.P., 1 S.W.3d 538, 542 (Mo.App.E.D. 1999) (“Unjust enrichment occurs when a person retains the benefit and enjoys the benefit conferred upon him without paying its reasonable value.”).

More importantly, Plaintiffs do not allege sufficient facts demonstrating that the Haulers engaged in wrongful conduct in connection with receiving Plaintiffs' payment for the trash collection services. In their Amended Petition, Plaintiffs stated generally that Defendants "conspired" to "have Defendant St. Louis County continue to enact, enforce and require obedience to the illegal and void ab initio ordinances." Plaintiffs, however, allege no facts showing more than the Haulers' mere receipt of Plaintiffs' payments and passive acquiescence to the County's enactment and enforcement of the Ordinances. These facts are insufficient to permit a jury to conclude that the Haulers' receipt of Plaintiffs' payments was unjust. See, e.g., S & J, Inc., 108 S.W.3d at 768-69. Point denied.

### **B. Count 3: Merchandising Practices Act**

In their seventh point, Plaintiffs contend that the trial court erred in dismissing Count 3 of their Amended Petition because they alleged sufficient facts to state a claim under the Merchandising Practices Act, Mo. Rev. Stat. § 407.010 *et seq.* (2000) (the Act). Specifically, Plaintiffs claim that they sufficiently alleged that the County engaged in "unfair practices" under the Act by: (1) representing to the public that the Ordinances are legal and that no election was required prior to establishing collection areas for trash collection in unincorporated St. Louis County;<sup>17</sup> and (2) using the threat of imprisonment and fines to require Plaintiffs to contract with and pay the Haulers for their services.

The Act is designed to protect consumers. Huch, 290 S.W.3d at 724. To promote that purpose, the Act prohibits false, fraudulent, deceptive, or unfair merchandising practices "in connection with the sale or advertisement of any merchandise in trade or commerce." Id.

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<sup>17</sup> Plaintiffs attached to their Amended Petition a St. Louis County publication of Frequently Asked Questions, which addressed the question of "Why Wasn't This [the Ordinances] Voted On?" The County answered: "Ordinance changes to the waste code do not require a vote of the people. However, a body of elected officials – the Saint Louis County Council – did vote unanimously in December of 2006 to enact the new provisions."

(quoting Mo. Rev. Stat. § 407.020.1 (2000)). The Act defines “trade” and “commerce”, in part, as “the advertising, offering for sale, sale, or distribution, or any combination thereof, of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situated.” Mo. Rev. Stat. § 407.010(7) (2000).

Here, Plaintiffs fail to allege a proper claim under the Act. As an initial matter, while Defendants argue that the County, as a political subdivision, is not a proper defendant under the Act, Plaintiffs conceded during oral argument that the County is not a party to Count 3. Despite Plaintiffs’ concession, in their Amended Petition, Plaintiffs allege “unfair and deceptive trade practices” committed only by the County. More to the point, the Amended Petition contains no factual allegations that the Haulers engaged in the “unfair practices” that form the basis for the Plaintiffs’ claim under the Act. In addition, even if the Amended Petition could be construed to allege that the Haulers made statements regarding the legality of the collection areas and used fines and penal sanctions to enforce the Ordinances, this conduct does not appear to constitute unfair practices in connection with the sale or advertisement of merchandise in trade or commerce as contemplated by the Act. Cf. Schuchmann v. Air Servs. Heating & Air Conditioning, Inc., 199 S.W.3d 228, 233 (Mo.App.S.D. 2006) (vendor of heating and air conditioning units violated the Act by selling to the plaintiff a unit with a “lifetime warranty” and subsequently refusing to honor the lifetime warranty); State ex rel. Nixon v. Estes, 108 S.W.3d 795, 796-97 (Mo.App.W.D. 2003) (owner of corporation selling vending machines violated the Act by falsely representing to potential customers that the demand for vending machines would yield “tens of thousands of dollars” in “net profit” per year); Clement v. St. Charles Nissan, Inc., 103 S.W.3d 898, 900 (Mo.App.E.D. 2003) (leaseholder of vehicle sufficiently stated a violation of the Act by alleging that sales representative told her that she would not be penalized for early termination of a 5-year car lease, and, later, when attempting to terminate the lease early, the

representative told her she would incur a “substantial penalty”). In the absence of any supportive case law, we decline to expand the reach of the Act to encompass the discussion and/or enforcement of an Ordinance. Point denied.<sup>18</sup>

### *Conclusion*

We affirm the trial court’s dismissal of Plaintiffs’ Amended Petition in part and reverse and remand with respect to the trial court’s dismissal of the portion of Plaintiffs’ Count 1 seeking a declaration that the Ordinances are void for violating the election provision of Art. II, § 2.180.24.

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Patricia L. Cohen, Judge

Gary M. Gaertner, Jr., P.J., and  
Mary K. Hoff, J., concur.

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<sup>18</sup> In light of our resolution of point seven, we need not reach Plaintiffs’ eighth point where they contend that their claim under the Act is not barred by the voluntary payment doctrine. We do, however, note that Defendants do not dispute this point. See Huch, 290 S.W.3d at 727 (“In light of the legislative purpose of the Merchandising Practices Act, the voluntary payment doctrine is not available as a defense to a violation of the act.”).