

IN THE SUPREME COURT OF MISSOURI

REJ, INC.,)	
Plaintiff/Appellant,)	
)	
v.)	No. SC85711
)	
CITY OF SIKESTON,)	
Defendant/Respondent,)	
)	
And)	
)	
GREERS GROVE DEVELOPMENT,)	
L.P.)	
Intervenor.)	

**Appeal from the Circuit Court of Scott County
The Honorable Steve Mitchell, Associate Circuit Judge**

SUBSTITUTE BRIEF OF APPELLANT REJ, INC.

I. JAMES E. MELLO

#37734

**Thomas B. Weaver #29176
Jeffery T. McPherson #42825
ARMSTRONG TEASDALE LLP
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
314-621-5070
314-621-5065 FAX**

**ATTORNEYS FOR APPELLANT
REJ, INC.**

TABLE OF CONTENTS

Table of Authorities	2
Jurisdictional Statement	4
Statement of Facts	5
Points Relied On.....	12
Argument	14
Conclusion.....	32
Certificate of Service.....	33
Certificate of Compliance.....	34

TABLE OF AUTHORITIES

<i>Bank of Washington v. McAuliffe</i> , 676 S.W.2d 483 (Mo. banc 1984).....	20
<i>Boyer v. City of Potosi</i> , 38 S.W.3d 430 (Mo. App. 2000)	16, 17, 20, 23
<i>Bratton v. Mitchell</i> , 979 S.W.2d 232 (Mo. App. 2001).....	20
<i>Dietrich v. Pulitzer Pub. Co.</i> , 422 S.W.2d 330 (Mo. 1968).....	27
<i>Hagely v. Board of Educ.</i> , 841 S.W.2d 663 (Mo. banc 1992).....	18
<i>Knapp v. Junior College Dist. of St. Louis County</i> , 879 S.W.2d 588 (Mo. App. 1994).....	16, 22, 23
<i>Koller v. Ranger Ins. Co.</i> , 569 S.W.2d 372 (Mo. App. 1978).....	27, 28
<i>Manzer v. Sanchez</i> , 985 S.W.2d 936 (Mo. App. 1999)	28, 29
<i>Memco, Inc. v. Chronister</i> , 27 S.W.3d 871 (Mo. App. 2000)	30
<i>Missouri Coalition for the Env’t v. Joint Comm. on Admin. Rules</i> , 943 S.W.2d 125 (Mo. banc 1997)	20
<i>Nat’l Treasury Employees Union v. Cornelius</i> , 617 F.Supp. 365 (D.C. D.C. 1985).....	22, 24
<i>Nazeri v. Missouri Valley College</i> , 860 S.W.2d 303 (Mo. banc 1993)	17
<i>Pulitzer Pub. Co. v. Missouri State Employees Retirement Sys.</i> , 927 S.W.2d 477 (Mo. App. 1996).....	18
<i>Rosenfeld v. Thoele</i> , 28 S.W3d 446 (Mo. App. 2000).....	20
<i>Schwartz v. Lawson</i> , 797 S.W.2d 828 (Mo. App. 1990)	28
<i>Shelton v. St. Anthony’s Medical Ctr.</i> , 781 S.W.2d 48 (Mo. banc 1989).....	18

<i>Ste. Genevieve School Dist. R II v. Bd. of Aldermen,</i>	
66 S.W.3d 6 (Mo. banc 2002).....	16
<i>State ex rel. Missouri Highway and Transp. Comm’n v. McDonald’s Corp.,</i>	
872 S.W.2d 108 (Mo. App. 1994).....	31
<i>Tipton v. Barton,</i> 747 S.W.2d 325 (Mo. App. 1988)	24
<i>Western Cas. & Sur. Co. v. Kansas City Bank & Trust Co.,</i>	
743 S.W.2d 578 (Mo. App. 1988).....	27, 28, 31
§ 77.080 RSMo	19
§ 610.010 RSMo.....	21
§ 610.011 RSMo	22
§ 610.020 RSMo	17, 21
§ 610.027 RSMo	18, 21, 29
Rule 55.33.....	27, 28
Rule 67.06.....	27

JURISDICTIONAL STATEMENT

Plaintiff REJ, Inc., appeals from a judgment entered by the Circuit Court of Scott County dismissing REJ's petition against Defendant City of Sikeston and denying REJ's motion for leave to file its first amended petition. The trial court entered its judgment on September 5, 2002. L.F. 118. On October 3, 2002, REJ filed a timely motion for new trial. L.F. 127. On October 17, 2003, the trial court denied the motion. L.F. 133. On October 25, 2002, REJ filed a timely notice of appeal to the Missouri Court of Appeals, Southern District. L.F. 134.

On October 29, 2003, the court of appeals filed an opinion affirming the trial court's judgment. On November 13, 2003, REJ filed a timely motion for rehearing and a timely application for transfer in the court of appeals. On November 20, 2003, the court of appeals denied the motion for rehearing and application for transfer.

On December 5, 2003, REJ filed a timely application for transfer in this Court. This Court granted REJ's application for transfer on December 23, 2003.

STATEMENT OF FACTS

This appeal arises from the trial court’s dismissal of Plaintiff REJ, Inc.’s action against the defendant City of Sikeston, in which REJ sought relief for the City’s unlawful enactment of ordinances that purportedly rezoned property (“the Property”) located in the City. REJ, a Missouri corporation, pays taxes in the City and owns interests in land adjacent to the Property. L.F. 6. Greers Grove Development, LP, which intervened in this action, owns a tract of land on the west side of U.S. Highway 61, a portion of which is located directly across the highway from the REJ’s tract. L.F. 42. The following facts, alleged in REJ’s petition, formed the basis of REJ’s claims for relief.¹

The Property is a twelve-acre tract of land adjacent to North Main Street in Sikeston. L.F. 6, 15; Appendix at A1. The Property is completely surrounded by land that, for many years, has been zoned for agricultural and residential uses and developed into homes and churches. L.F. 6. Before July of 2001, when the City attempted to rezone the Property, the Property was zoned as “Agricultural Open Space.” L.F. 7.

In June of 2001, Josh Bill, the City’s former mayor, submitted to the City’s Planning and Zoning Commission a proposal that the City rezone the Property from “Agricultural Open Space” to “C-3 (Highway Commercial).” L.F. 7, 9. C-3 Zoning is

¹ For the Court’s convenience, copies of REJ’s Petition, REJ’s proposed First Amended Petition, the trial court’s judgment, and the court of appeals’ slip opinion are included in the appendix to this brief.

designed for the conduct of commercial enterprises catering to the traveling public, personal and business services, and general retail trade. L.F. 7. The proposed commercial rezoning of the Property was purportedly to accommodate a public health clinic that would occupy only 2.79 acres of the twelve acres that comprise the Property. L.F. 7. Mr. Bill had a pecuniary interest in rezoning the Property. L.F. 9.

Mr. Bill had ended his mayoral term in April of 2001, two months before he submitted his rezoning proposal. L.F. 9. Prior to April of 2001, the City received, at a cost of \$70,000, a Comprehensive Plan for Community Development and Preservation (“the Comprehensive Plan”). L.F. 8. As mayor, acting alone or with other city officials, Mr. Bill withheld the Comprehensive Plan from the Planning and Zoning Commission to prevent the Commission from adopting the plan and considering its impact on Mr. Bill’s proposed rezoning. L.F. 8. Rezoning the Property to a commercial classification is inconsistent with the Comprehensive Plan. L.F. 8, 9.

On June 14, 2001, the Planning and Zoning Commission voted against rezoning the Property to “C-3 (Highway Commercial)” or to another zoning classification that permitted commercial uses, “C-1 (Neighborhood Shopping District).” L.F. 7. In making its decision, the Planning and Zoning Commission was presented with a petition signed by more than 300 Sikeston residents from the affected area opposing the proposed rezoning of the Property to any commercial designation. L.F. 7.

On July 9, 2001, the Sikeston City Council held a public meeting on a proposed Ordinance 5405. L.F. 8. The purpose of Ordinance 5405 was to overrule the Planning and Zoning Commission’s decision not to rezone the Property to a commercial

designation. L.F. 8. In making its decision, the City Council was presented with, but ignored, a petition protesting rezoning signed by the owners of land adjacent to or near the Property, including the First Church of the Nazarene, Trinity Baptist Church, REJ, Inc., and Calvary Temple. L.F. 8, 24-25. The City Council also was presented with, but ignored, the petition from 300 Sikeston residents from the affected area protesting the proposed rezoning. L.F. 8, 16-21.

As read at the City Council meeting of July 9, Ordinance 5405 would have changed the Property's zoning to "C-3 (Highway Commercial)." L.F. 8, 29; Appendix at A3, A24. The minutes of that meeting reflect that the City Council voted in favor of approving the proposed Bill Number 5405. L.F. 8, 34; Appendix at A29.

However, Ordinance 5405 as approved by the City Council and later enacted was different from the Ordinance 5405 as read at the meeting. The meeting minutes recite that, rather than purporting to rezone the Property to "C-3 (Highway Commercial)," the City Council voted and "ordained that [the Property] is hereby zoned 'C-1' Neighborhood Commercial." L.F. 34; Appendix at A29. The City Council members then approved and signed Bill Number 5405 which, as approved, became Ordinance 5405. L.F. 37; Appendix at A32. As approved and signed, however, Ordinance 5405 differed from what the City Council voted to approve: the version of Ordinance 5405 that was signed "ordained that [the Property] is hereby zoned 'C-1' Highway Commercial." L.F. 37. The City has no zoning districts designated "C-1 Neighborhood Commercial" (as mentioned in the ordinance) or "C-1 Highway Commercial" (as mentioned in the minutes). L.F. 9. The City's zoning options include "C-1

(Neighborhood Shopping District)” and “C-3 (Highway Commercial).” L.F. 9. The minutes of the July 9 City Council meeting indicate that no vote was taken to amend the proposed Ordinance 5405 as it was read at the public meeting. L.F. 8.

On August 3, 2001, the City attempted to enact another version of Ordinance 5405. L.F. 9, 38; Appendix at A33. This time, Ordinance 5405, which recited that it was discussed and approved as of July 9, purported to rezone the Property to “‘C-1’ Neighborhood Commercial,” a zoning category that did not exist in the City. L.F. 39; Appendix at A34. Before enacting this second version of Ordinance 5405, the City gave no notice of any proposed amendment to Ordinance 5405, and did not hold a public hearing or vote on such an amendment. L.F. at 9.

On August 13, 2001, REJ filed its three-count petition against the City. L.F. 6; Appendix at A1. In the first nineteen paragraphs of its petition, REJ alleged the facts set forth above. L.F. 6-9. Those alleged facts were incorporated into each of the three counts of the petition. L.F. 9, 11, 13. In Count I, REJ alleged that section 610.020 RSMo, Missouri’s Sunshine Law, created specific requirements for public notice and minutes of public proceedings, and that “the City of Sikeston violated the Sunshine Law” in “at least” four enumerated respects when it enacted Ordinance 5405. L.F. 10. REJ further alleged in Count I that the City’s conduct violated section 77.080 RSMo, which sets forth requirements for the City’s passage of ordinances. L.F. 10-11. REJ alleged that “the various versions of Ordinance 5405” were void because they were not validly enacted. L.F. 11. REJ prayed for a declaratory judgment that the ordinance was void and unenforceable, an injunction preventing the ordinance from being enforced, costs and

attorneys fees, “and such other and further relief” as the court deemed just. L.F. 11.

In Count II, REJ alleged that the rezoning of the Property violated REJ’s rights to substantive and procedural due process under the Missouri and United States Constitutions. L.F. 11-12. In Count III, REJ alleged that the rezoning of the Property violated section 89.060 RSMo, which required the City to give all adjoining landowners notice of the City’s intent to rezone. L.F. 13-14. In Counts II and III, REJ prayed for a declaratory judgment, injunction, costs, and such other relief as the court deemed just. L.F. 13. REJ did not seek attorneys fees in Counts II and III. L.F. 13, 14.

On August 5, 2002, the City enacted Ordinance 5491, by which it repealed Ordinance 5405. L.F. 47-48. Three days later, on August 8, 2002, the City filed a motion to dismiss REJ’s petition, arguing that “the issues have now become moot” by the passage of Ordinance 5491. L.F. 44-45. REJ filed a memorandum in opposition to the motion. L.F. 53. REJ argued in its memorandum that the City’s repeal of Ordinance 5405 did “nothing to remedy the statutory violations and the deprivation of property rights” that REJ had suffered. L.F. 56. REJ further argued that “dismissing the case as moot simply because Ordinance 5405 has been repealed would deprive [REJ] of statutory remedies to which it is entitled under Missouri law.” L.F. 56.

REJ also filed a motion for leave to file its first amended petition, and tendered its amended petition with its motion. L.F. 78, 80; Appendix at A35. REJ sought to allege additional facts and information obtained during discovery which were unknown to REJ at the time it filed its original petition. L.F. 78. Those additional facts included a description of the City’s unlawful enactment of a second ordinance, Ordinance 5406, on

July 9, 2001. L.F. 84, 92. Ordinance 5406 provided for the subdivision of 2.79 acres of the Property, and was dependent on the validity of Ordinance 5405. L.F. 84, 92. After the City passed Ordinance 5406, at least one parcel of the 2.79 acres was sold. L.F. 84.

REJ alleged that, although the City had repealed Ordinance 5405, the City had made no finding that Ordinance 5405 was void ab initio, and the City had not repealed Ordinance 5406. L.F. 84. As in its original petition, REJ again alleged in Count I that the City violated the Sunshine Law and section 77.080 in enacting Ordinance 5406. L.F. 64-66. REJ prayed for a judgment declaring Ordinances 5405 and 5406 void ab initio and unenforceable; an injunction; costs and attorneys fees; civil fines pursuant to the Sunshine Law; and such other relief as the court deemed proper. L.F. 86-87. In Counts II and III, REJ again alleged that the rezoning of the Property violated REJ's rights to substantive and procedural due process, and violated section 89.060 RSMo. L.F. 89-90.

The City opposed REJ's motion for leave to amend its petition, arguing that REJ's original petition was "a suit in equity seeking declaratory and injunctive relief," and that Count I of REJ's amended petition "would convert Count I of the lawsuit into a statutory action for remedies provided by the so-called Sunshine, or Open Meetings, Law contained in chapter 610 of the Revised Statutes of Missouri." L.F. 112. The City claimed that REJ's "new cause of action" under the Sunshine Law was "barred by the statute of limitations." L.F. 112.

On September 5, 2002, the trial court entered its judgment dismissing REJ's petition as "moot as a result of the repeal of City of Sikeston Ordinance No. 5405." L.F. 118-120; Appendix at A51-A53. In its judgment, the trial court also denied REJ's motion

for leave to file its first amended petition. L.F. 120; Appendix at A53. REJ timely appealed the judgment to the Missouri Court of Appeals, Southern District. L.F. 134.

The court of appeals affirmed the judgment, stating in its opinion that REJ's original petition "could reasonably be read as indicating [REJ's] intent to invoke remedies other than those provided by the Sunshine Law." Appendix at A62. The court further concluded that, although REJ's first amended petition "clearly sought relief" under the Sunshine Law, that petition was time-barred because the trial court "could reasonably have concluded that [REJ's] original petition did not invoke Sunshine Law remedies." Appendix at A65. This Court subsequently granted transfer of this appeal.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DISMISSING REJ'S PETITION BECAUSE REJ'S CLAIMS WERE NOT MOOT, IN THAT REJ'S PETITION PRAYED FOR A VARIETY OF REMEDIES FOR THE CITY'S SUNSHINE LAW VIOLATIONS ARISING FROM ILLEGAL ACTS IN CONNECTION WITH THE PASSAGE OF ORDINANCE 5405, INCLUDING A DECLARATION THAT THE ORDINANCE WAS VOID AND UNENFORCEABLE, AN INJUNCTION PREVENTING ITS ENFORCEMENT, AND COSTS AND ATTORNEYS FEES, AND REJ'S REQUEST FOR THOSE REMEDIES CONSTITUTED A CONTINUING JUSTICIABLE CONTROVERSY.

Shelton v. St. Anthony's Medical Ctr, 781 S.W.2d 48 (Mo. banc 1989)

Bank of Washington v. McAuliffe, 676 S.W.2d 483 (Mo. banc 1984)

Boyer v. City of Potosi, 38 S.W.3d 430 (Mo. App. 2000)

Knapp v. Junior College Dist. of St. Louis County, 879 S.W.2d 588 (Mo. App. 1994)

§ 610.010 RSMo.

§ 610.027 RSMo.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF’S MOTION FOR LEAVE TO FILE A FIRST AMENDED PETITION BECAUSE JUSTICE REQUIRED THE COURT TO GRANT REJ LEAVE TO AMEND ITS PLEADINGS, IN THAT REJ’S FIRST AMENDED PETITION ASSERTED THE SAME CAUSES OF ACTION ALLEGED IN ITS ORIGINAL PETITION, AND REJ FURTHER SUPPORTED ITS CLAIMS BY ALLEGING NEW FACTS AND INFORMATION LEARNED DURING DISCOVERY.

Western Cas. & Sur. Co. v. Kansas City Bank & Trust Co.,

743 S.W.2d 578 (Mo. App. 1988)

State ex rel. Missouri Highway & Transp. Comm’n v. McDonald’s Corp.,

872 S.W.2d 108 (Mo. App. 1994)

Schwartz v. Lawson, 797 S.W.2d 828 (Mo. App. 1990)

Manzer v. Sanchez, 985 S.W.2d 936 (Mo. App. 1999)

Rule 55.33(a)

Rule 67.06

ARGUMENT

The Missouri Sunshine law exists to protect the people of this state from exactly the kind of secret backroom dealing displayed by the City of Sikeston in this case. The City passed an illegal ordinance that differed from the proposed ordinance that the required public notice led taxpayers to believe was at issue. After passing an ordinance that rezoned a piece of property to a zoning classification that did not even exist, the City tried to cover its tracks by illegally amending the ordinance to rezone the property to *another* classification that did not exist, without the required public notice of the proposed amendment and without the required public notice of the illegal meeting where the illegal vote occurred. Then the City committed more Sunshine Law violations by illegally passing a third version of the ordinance, again without the required public notice of the proposed amendment and without the required public notice of the illegal meeting where the illegal vote occurred. The City's undisputed conduct, amply demonstrated by copies of public records, could not be a clearer violation of the Sunshine Law.

The City attempted to avoid its liability by repealing the third ordinance, claiming that this action mooted the plaintiff's claims for relief under the Sunshine Law. Contrary to the settled law of this state, the circuit court agreed with the City and dismissed this case. The circuit court also refused REJ leave to file a first amended petition raising additional violations unearthed during the discovery process.

The circuit court's judgment must be reversed. The explicit purpose of the Sunshine Law is to make Missouri government open to the people. The people are entitled to open government, which is why the Sunshine law sets forth requirements for

open meetings and public notice of proposed meetings and proposed enactments. The City's blatant violations of these requirements cannot be mooted merely by undoing the illegal ordinance -- it was not just the ordinance itself that violated the law, but also the City's many and repeated violations of the public's right to access to the political process. A thief does not escape criminal liability simply by returning the stolen goods. By the same token, the City cannot escape its obvious liability for numerous Sunshine Law violations by repealing the illegal ordinance.

Similarly, this Court's rules require the circuit court to grant leave to amend when justice requires. In this case, the circuit court abused its discretion by refusing the plaintiff leave to file a first amended petition to include facts obtained during discovery that showed that the City willfully violated the Sunshine Law, rendering it liable for civil fines. In this case of significant public importance, arising from a local government's efforts to hide its illegal activities, justice requires that the plaintiff be permitted to bring all of the relevant facts before the court to vindicate the public interest.

I. THE TRIAL COURT ERRED IN DISMISSING REJ’S PETITION BECAUSE REJ’S CLAIMS WERE NOT MOOT, IN THAT REJ’S PETITION PRAYED FOR A VARIETY OF REMEDIES FOR THE CITY’S SUNSHINE LAW VIOLATIONS ARISING FROM ILLEGAL ACTS IN CONNECTION WITH THE PASSAGE OF ORDINANCE 5405, INCLUDING A DECLARATION THAT THE ORDINANCE WAS VOID AND UNENFORCEABLE, AN INJUNCTION PREVENTING ITS ENFORCEMENT, AND COSTS AND ATTORNEYS FEES, AND REJ’S REQUEST FOR THOSE REMEDIES CONSTITUTED A CONTINUING JUSTICIABLE CONTROVERSY.

The trial court erred in dismissing REJ’s action against the City. The facts set forth in REJ’s petition, which are deemed to be true in considering a motion to dismiss, showed that the City violated the Sunshine Law and that REJ was entitled to the relief requested. The City did not insulate itself from liability to REJ under the Sunshine Law by repealing an ordinance that it had enacted illegally. The Court should reverse the trial court’s judgment and remand this matter for a full and fair consideration of REJ’s claims.

A. Standard of Review.

“When reviewing the dismissal of a petition for failure to state a claim, appellate courts treat the facts contained in the petition as true and construe them liberally in favor of the plaintiffs.” *Ste. Genevieve School Dist. R II v. Bd. of Aldermen*, 66 S.W.3d 6, 11 (Mo. banc 2002); *Boyer v. City of Potosi*, 38 S.W.3d 430, 435 (Mo. App. 2000). A petition may be dismissed for failure to state a claim only if it appears that the plaintiff could not prove any set of facts that would entitle it to relief. *Knapp v. Junior College*

Dist. of St. Louis County, 879 S.W.2d 588, 589 (Mo. App. 1994). This Court “will reverse the trial court’s dismissal of a plaintiff’s action for failure to state a claim if, after viewing the pleading in its broadest intendment, the allegations invoke principles of substantive law which may entitle a plaintiff to relief.” *Boyer*, 38 S.W.3d at 435; *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993).

B. REJ’s original petition stated a claim for relief under the Sunshine Law.

In determining that it was proper to dismiss REJ’s petition as moot, the trial court apparently accepted the City’s argument that the petition did not allege a claim under the Sunshine Law and that REJ first asserted the City’s Sunshine Law violations in its proposed first amended petition. L.F. 119-20. The court of appeals likewise accepted this argument, concluding that REJ’s original petition “could reasonably be read as indicating Plaintiff’s intent to invoke remedies other than those provided by the Sunshine Law.” Appendix at A62. Even a cursory review of REJ’s petition, however, shows that the trial court and the court of appeals erred in accepting the City’s groundless argument.

REJ explicitly alleged in Count I of its original petition that “Section 610.020 of the Missouri Revised Statutes (the Sunshine Law) creates specific requirements for public notice and minutes to be kept of public meetings,” and that “the City of Sikeston violated the Sunshine Law in at least” four enumerated respects. L.F. 10. REJ alleged that the City violated the Sunshine Law by failing to give “notice of any meeting for the purpose of amending” Ordinance 5405; failing to keep “minutes of any meeting for the purpose of amending” the ordinance; failing to keep a “record of any votes taken for the purpose of amending” the ordinance; and failing to keep a “record of any votes taken for

the purpose of passing” the ordinance. L.F. 10. REJ’s prayer for relief in Count I included a request for costs and attorneys fees, relief that the trial court is authorized to award to a party that successfully establishes a city’s Sunshine Law violations. § 610.027.3, RSMo; L.F. 11.

In determining whether to dismiss a petition, the court should allow the pleading its broadest intendment, assume that all facts stated in the petition are true, and construe those averments liberally and favorably to the plaintiff. *Hagely v. Bd. of Educ.*, 841 S.W.2d 663, 665 (Mo. banc 1992). “If the facts pleaded and the reasonable inferences to be drawn therefrom, looked at most favorably from the plaintiff’s standpoint, show any ground upon which relief may be granted, the plaintiff has the right to proceed.” *Shelton v. St. Anthony’s Medical Ctr.*, 781 S.W.2d 48, 49 (Mo. banc 1989); *Pulitzer Pub. Co. v. Missouri State Employees’ Retirement Sys.*, 927 S.W.2d 477, 479 (Mo. App. 1996). Both the trial court and the court of appeals failed to follow this settled law when they concluded that REJ failed to allege a Sunshine Law claim in its petition. Indeed, the Southern District’s opinion declared a new standard for the dismissal of a petition. The appellate court affirmed the dismissal of REJ’s petition based on a construction of the petition that was plainly unfavorable to the plaintiff, but one that the court deemed was “reasonable,” despite the petition’s explicit invocation of relief under the Sunshine Law.

The court of appeals stated in its opinion that it was “reasonable” for the trial court to conclude that REJ did not assert a Sunshine Law claim in its original petition because REJ’s “requests for a declaratory judgment and injunction were not grounded *exclusively* on allegations of Sunshine Law violations.” Appendix at A61 (emphasis added). The

court of appeals noted that REJ had enumerated fewer violations of the Sunshine Law than violations of section 77.080 in Count I, and from that fact concluded that the REJ did not assert a Sunshine Law claim because “the *majority* of [REJ’s] Count I allegations charged violations of section 77.080.” Appendix at A61 (emphasis in original). The court of appeals concluded that REJ did not assert a Sunshine Law claim because in Counts II and III, REJ “sought invalidation of Ordinance 5405 for a variety of reasons wholly unrelated to Sunshine Law violations.” Appendix at A61-A62. Thus, according to the court of appeals’ opinion, REJ’s original petition, which explicitly alleged the City’s Sunshine Law violations and explicitly sought relief under the Sunshine Law, might have been construed to assert a claim for relief under the Sunshine Law only if (1) REJ enumerated more violations of the Sunshine Law than violations of section 77.080 in Count I, and (2) REJ alleged a claim for relief under the Sunshine Law in every count of its petition. This conclusion makes no sense. No prior Missouri opinion holds that a plaintiff fails to assert a claim under the Sunshine Law if its petition alleges additional reasons why the defendant’s conduct is unlawful and seeks relief in addition to the relief sought under the Sunshine Law. No prior Missouri opinion supports the Southern District’s suggestion that a petition may properly be dismissed based on a tortured construction of the petition that is favorable to the *defendant*.

The facts set forth in REJ’s petition showed that the City violated the Sunshine Law. The inferences reasonably drawn from those facts showed that the City violated the Sunshine Law. REJ explicitly alleged that the City violated the Sunshine Law in four enumerated respects and requested relief authorized under the Sunshine Law. A

reasonable inference drawn from these allegations – in fact, the *only* reasonable inference – is that REJ asserted a cause of action under the Sunshine Law in its original petition.

C. REJ’s claims are not moot.

The trial court’s dismissal of REJ’s petition was grounded in its erroneous determination that the City’s repeal of Ordinance 5405 mooted REJ’s claims. “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.” *Bank of Washington v. McAuliffe*, 676 S.W.2d 483, 487 (Mo. banc 1984); *see also Bratton v. Mitchell*, 979 S.W.2d 232, 235 (Mo. App. 2001) (“Mootness indicates that a controversy existed, which was properly before the court for resolution, but was extinguished by the occurrence of some event, rendering the controversy academic”). A case is not moot if the plaintiff’s requests for relief “constitute a continuing valid justiciable controversy.” *Boyer*, 38 S.W.3d at 433; *see also Missouri Coalition for the Env’t v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 135 (Mo. banc 1997) (“Although a subsequent statutory amendment may moot a case when an amendment removes the question at issue so that any judgment would not have any practical effect upon any then existing controversy, . . . a case is not mooted when the controversy continues regardless of the amendment”); *Rosenfeld v. Thoele*, 28 S.W.3d 446, 451 (Mo. App. 2000) (a case is rendered moot when “an event has occurred which makes the court’s decision unnecessary or makes it impossible for the court to grant the effectual relief”).

There are several reasons why the City’s repeal of Ordinance 5405 did not make

the court's decision unnecessary, or render it impossible for the court to grant REJ effectual relief, or cause the controversy to become "academic." First, the repeal of Ordinance 5405 did not remedy the City's statutory violations or the damage to REJ that resulted from those statutory violations. In its petition, REJ sought declaratory relief, injunctive relief, attorneys fees and costs for the City's violation of the Sunshine Law, section 610.010 RSMo *et seq.* In its amended petition, REJ sought additional injunctive relief and civil fines. These requests for relief were supported by REJ's allegations showing that the City acted illegally and that the City's conduct resulted in a deprivation of REJ's constitutional rights.

Section 610.027.3 provides that a public governmental body "shall be subject to a civil fine in the amount of not more than five hundred dollars and the court may order the payment by such body . . . of all costs and reasonable attorney fees to any party" who successfully shows that the governmental body violated sections 610.010 to 610.026 of the Sunshine Law. REJ explicitly alleged that section 610.020 "creates specific requirements for public notice and minutes to be kept of public proceedings," and that the City violated that statute's provisions by failing to give notice of meetings related to the ordinance, failing to keep minutes of such meetings, and failing to keep a record of votes. L.F. 10, 85. Upon REJ's proof of these allegations, REJ would have been entitled to its costs, attorneys fees, and fines, regardless of the City's subsequent repeal of Ordinance 5405. No provision of the Sunshine Law suggests that a city may vitiate its liability under section 610.027 by repealing an illegally enacted ordinance.

Second, subsequent events such as the enactment of Ordinance 5406 and the sale

of at least one parcel of the corresponding subdivision were premised on the validity and enforceability of Ordinance 5405. Those subsequent events have operated to deprive REJ of property rights, which the City's repeal of the ordinance has failed to remedy.

Third, permitting the City to "moot" the consequences of its plainly illegal conduct by repealing the ordinance would subvert the Sunshine Law's public policy "that meetings, records, votes, actions and deliberations of public governmental bodies be open to the public unless otherwise provided by law." § 610.011 RSMo. By its plain terms, the Sunshine Law must be construed to protect the public, not to protect public bodies that operate illegally: "Sections 610.010 to 610.028 shall be liberally construed and their exceptions strictly construed to promote this public policy." *Id.* By providing that costs, attorney fees, and fines will be awarded to litigants who successfully prove Sunshine Law violations, the legislature manifested its belief that such penalties promote the statute's public policy by not only punishing entities that violate the Sunshine Law, but also by deterring them from repeating their illegal conduct. *See Nat'l Treasury Employees Union v. Cornelius*, 617 F. Supp. 365, 371 (D.C. D.C. 1985) ("It would significantly erode the usefulness of the [Administrative Procedure Act] if agencies were permitted unilaterally to repeal regulations dealing with the substantive rights of individuals under federal statutes, by declaring that the earlier regulations were just a mistake").

Knapp v. Junior College District of St. Louis, supra, demonstrates that the trial court erred in accepting the City's groundless argument that its repeal of Ordinance 5405 mooted REJ's claims. In *Knapp*, a junior college student alleged that she was harassed by other students and college personnel because of her views on a "highly controversial"

issue. *Knapp*, 879 S.W.2d at 590. The student was suspended after she contacted the local media to complain about her treatment by the college. *Id.* The student sued the college seeking, *inter alia*, money damages, attorney fees, and an order expunging her college record of all evidence concerning the suspension. *Id.* at 594. The college argued that the student's claims were moot because she had filed her petition after her suspension expired. *Id.* at 594. The court of appeals held that the college's argument was "without merit"; the student's request for damages, fees and an expunged record constituted "a continuing valid justiciable controversy" and therefore was not moot. *Id.*

Similarly, in *Boyer v. City of Potosi*, *supra*, the former mayor of Potosi, Boyer, filed suit against the city seeking administrative review of his impeachment. *Boyer*, 38 S.W.3d at 432. The trial court dismissed Boyer's petition, and he appealed. *Id.* at 433. During the pendency of his appeal, Boyer lost the election for mayor. *Id.* The city moved to dismiss Boyer's appeal, arguing that the appeal was moot because Boyer's term had expired, he had lost the mayoral election, and it was impossible for him to be returned to office. *Id.* The court of appeals denied the city's motion, holding that "Boyer's requests for relief constituted a continuing valid justiciable controversy," and that "Boyer had a continuing interest in having the impeachment declared invalid, whether or not he could be reinstated in office." *Id.*

As in *Boyer* and *Knapp*, REJ's prayer for relief constitutes a continuing valid justiciable controversy. The City's repeal of Ordinance 5405 did not remedy its statutory violations or the deprivation of property rights that REJ sustained as a result of those violations. REJ has requested a variety of relief, including attorney fees, costs, and

declaratory and injunctive relief. The City's repeal of Ordinance 5405 does not moot REJ's entitlement to those remedies. *See Nat'l Treasury, supra; see also Tipton v. Barton*, 747 S.W.2d 325, 332 (Mo. App. 1988) (plaintiffs were entitled to attorneys fees where evidence showed that defendants – the mayor, city coordinator, and board of aldermen of the City of Wentzville – failed to make available to plaintiffs public records, and failed to comply with the procedural requirements for closing public records set forth in §§ 610.020 and 610.025).

Allowing the City in this case to sidestep liability for its Sunshine Law violations simply by repealing the contested ordinance would be akin to presenting every public governmental body in the state with a “get out of jail free” card. If the trial court's dismissal is upheld, every governmental entity that is covered by the Sunshine Law will be able to freely enact an ordinance through procedures that violate the statute, and simply repeal the ordinance if the violation prompts a lawsuit. Such a result would be directly contrary to the expressed public policy of the Sunshine Law.

REJ's requests for costs, fees, and declaratory and injunctive relief, and such further relief as the court deemed proper, constituted a continuing controversy that survived the City's repeal of Ordinance 5405. REJ's action is not moot. The trial court's judgment dismissing REJ's petition should be reversed.

D. REJ has alleged facts that entitle it to a judgment declaring Ordinances 5405 and 5406 void and unenforceable.

As REJ alleged in its proposed first amended petition, on July 9, 2001, immediately after it enacted Ordinance 5405, the City enacted Ordinance 5406. L.F. 64.

Ordinance 5406 provided for the subdivision of 2.79 acres of the Property. Ordinance 5406 was predicated on the rezoning of the Property purportedly effected through Ordinance 5405, and on the validity and enforceability of Ordinance 5405.

After the City enacted Ordinance 5406, at least one parcel of the land subdivided through that ordinance was sold to a commercial entity. L.F. 64. The sale of that parcel of land has been detrimental to the quiet enjoyment of REJ's property. L.F. 64. The land sale was based upon the assumption that Ordinance 5405, as originally enacted, was valid and enforceable. L.F. 64. In the absence of a finding that Ordinance 5405 is void ab initio, that land sale will be allowed to stand.

When the City repealed Ordinance 5405, it made no finding that Ordinance 5405 was void ab initio and unenforceable. The City did not acknowledge that the enactment of Ordinance 5405 violated the Sunshine Law. The City has taken no action to repeal Ordinance 5406, even though the ordinance on which it was based has been repealed. Thus, despite the repeal of Ordinance 5405, REJ continues to suffer a deprivation of its property rights as a result of the initial passage of that ordinance.

In its original petition and first amended petition, REJ alleged facts showing that Ordinance 5405 was enacted illegally and was consequently void ab initio. In its amended petition, REJ alleged that Ordinance 5406 was void ab initio because it was not validly enacted. L.F. 66. REJ sought a declaratory judgment that both Ordinance 5405 and 5406 were void ab initio. L.F. 66. For the reasons discussed in this point and in Point II, REJ's allegations in its petition and its first amended petition were timely and stated claims for declaratory and injunctive relief and relief under the Sunshine Law.

Like its requests for Sunshine Law remedies, REJ's request for a declaratory judgment that Ordinances 5405 and Ordinance 5406 are void ab initio were not mooted by the City's repeal of Ordinance 5405.

The trial court erred in determining that REJ's original petition was rendered moot, and for the reasons discussed in Point II, the court abused its discretion in denying REJ leave to file its amended petition. The court's judgment should be reversed.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE A FIRST AMENDED PETITION BECAUSE JUSTICE REQUIRED THE COURT TO GRANT REJ LEAVE TO AMEND ITS PLEADINGS, IN THAT REJ'S FIRST AMENDED PETITION ASSERTED THE SAME CAUSES OF ACTION ALLEGED IN ITS ORIGINAL PETITION, AND REJ FURTHER SUPPORTED ITS CLAIMS BY ALLEGING NEW FACTS AND INFORMATION LEARNED DURING DISCOVERY.

The trial court abused its discretion in denying REJ's motion for leave to file its first amended petition. The court's judgment was contrary to the Rules of Civil Procedure and to Missouri law governing the trial court's discretion to grant or deny leave to amend. The judgment should be reversed.

A. Standard of Review.

In accordance with the letter as well as the spirit of Rules 67.06 and 55.33, the general policy in this state has long been that, when a first pleading is ruled to be insufficient in a trial court, the party is afforded a reasonable time to file an amended pleading if desired. *Dietrich v. Pulitzer Pub. Co.*, 422 S.W.2d 330 (Mo. 1968); *Koller v. Ranger Ins. Co.*, 569 S.W.2d 372 (Mo. App. 1978); *Western Cas. & Sur. Co. v. Kansas City Bank & Trust Co.*, 743 S.W.2d 578, 581 (Mo. App. 1988). While a party does not have an absolute right to file even a first amended petition, a trial court's discretion is limited by Rule 67.06, which provides, "On sustaining a motion to dismiss a claim, counterclaim or cross-claim the court shall freely grant leave to amend and shall specify the time within which the amendment shall be made or amended pleading filed."

Similarly, Rule 55.33 provides that leave to amend a petition “shall be freely given when justice requires.”

The whole spirit of this Court’s rules of practice is freely to permit amendments to pleadings when justice so requires. *Koller*, 569 S.W.2d at 373. In reviewing the decision to deny leave to amend, this Court is concerned with whether justice is furthered or subverted by the trial court's decision. *Manzer v. Sanchez*, 985 S.W.2d 936, 939 (Mo. App. 1999). Missouri law generally frowns on summary adjudication based on a plaintiff’s initial pleading: “Our decisions, indeed, accord to summary judgment, a motion to dismiss, and a motion for judgment on the pleadings a functional equivalence. They allow a final adjudication on the pleadings alone when from the face they present no material issue of fact and the moving party is entitled to judgment as a matter of law. . . . In such case, however, as the motion to dismiss and the judgment on the pleading practices favor, leave to amend should precede a summary adjudication.” *Schwartz v. Lawson*, 797 S.W.2d 828, 833 (Mo. App. 1990). Under such circumstances, the trial court abuses its discretion in denying leave to amend. *See id*; *Western Cas. & Sur. Co.*, 743 S.W.2d at 582.

B. The trial court abused its discretion in denying leave to amend.

Factors the court should consider in determining whether to allow an amendment are: (1) hardship to the moving party if leave is denied; (2) the reasons for the moving party’s failure to include the new matter in the earlier pleading; and (3) injustice resulting to the party opposing the motion should it be granted. *Western Cas. & Sur. Co.*, 743 S.W.2d at 582. “Other considerations are the timeliness of the application, the record of

the case as to plaintiff's prior attempts to state a claim for relief, and whether the plaintiff by amendment could cure the inadequacy of its petition." *Id.* Consideration of these factors here demonstrates that the trial court should have exercised its discretion in favor of granting leave to amend.

The trial court unquestionably was aware that denying leave to amend would cause hardship to REJ. The court's decision deprived REJ of an opportunity to prove its claims and ended the possibility that REJ would obtain relief for the City's Sunshine Law violations and the deprivation of REJ's property rights. REJ suffered a severe hardship in that its original petition was dismissed with prejudice so that REJ is prohibited from ever bringing the action. *Manzer*, 985 S.W.2d at 939. Moreover, in the context of this case, the public as a whole suffered because the City was to escape the consequences of its violations of the Sunshine Law.

In its first amended petition, REJ sought to allege additional, newly-discovered facts to support its original claims. L.F. 64-69. REJ alleged facts showing the City's illegal enactment of Ordinance 5406, which was dependent on the validity of Ordinance 5405; the subsequent sale of at least one parcel of land subdivided by Ordinance 5406; and the fact that the sale of that parcel of land was predicated on the land being zoned for commercial use. L.F. 64-67. REJ sought additional relief under the same causes of action, including a declaratory judgment that both ordinances 5405 and 5406 were void ab initio, and civil fines pursuant to section 610.027.3 of the Sunshine Law. L.F. 67-68. The reason that REJ failed to include in its original petition facts that were newly alleged in its first amended petition was that REJ was unaware of those facts when it filed this

action. It learned those facts during discovery. Under these circumstances, the trial court should have granted REJ leave to amend its petition. *See Memco, Inc. v. Chronister*, 27 S.W.3d 871, 877 (Mo. App. 2000) (allowing leave to amend where, due to the secretive nature of defendant's acts, plaintiff was unaware of certain facts when it filed its original petition).

The City would have suffered no hardship if the motion for leave had been granted. In its memorandum in opposition to motion for leave to amend, the City made the conclusory statement that the amendment of REJ's petition would have "an adverse effect on planning and development of property within the city." L.F. 115. However, the City offered no facts to support this contention, and made no attempt to explain how planning and development would be impeded if the City and its officials were required to comply with the Sunshine Law. To allow the City to evade liability for Sunshine Law violations solely because of an alleged (but factually groundless) impact on planning and development would be fundamentally unjust.

Furthermore, there are no issues relating to the timeliness of REJ's motion for leave to amend. The City never contended that REJ's motion for leave was untimely; it claimed only that REJ's Sunshine Law claims were time-barred because they were first raised in the amended petition – a claim that was, as noted in Point I, groundless. L.F. 112. REJ filed its motion for leave shortly after taking the depositions of City officials, which was how REJ learned of the additional facts that were newly alleged in its amended petition. L.F. 129. Its amended petition was timely.

Finally, as discussed above, the record of the case as to REJ's prior pleadings

showed that REJ, since the inception of this lawsuit, stated a claim for relief under the Sunshine Law. REJ's original petition was only "inadequate" to the extent that it did not contain facts regarding the City's illegal conduct that REJ learned through discovery. Allowing REJ to amend its petition would cure that inadequacy. A primary purpose of discovery is to allow parties to gather evidentiary facts and to provide the parties with all necessary materials necessary to support their claims. *See State ex rel. Missouri Highway & Transp. Comm'n v. McDonald's Corp.*, 872 S.W.2d 108, 113 (Mo. App. 1994). Given that the rules of civil procedure provide that pleadings may be amended to add parties and claims and may be amended to conform to the evidence at trial, the rules clearly contemplate that litigants can and should amend their pleadings to allege facts learned during discovery. In fact, "the reason for allowing amendments to be made is to enable matters to be presented that were overlooked or were unknown to the party at the time he filed his original pleading." *Western Cas. & Sur.*, 743 S.W.2d at 581.

As with its decision to dismiss REJ's petition, the trial court apparently accepted the City's argument that REJ's cause of action was moot because REJ first asserted a Sunshine Law claim in its amended petition, and that the claim was time-barred because no Sunshine Law claim was alleged in REJ's original petition. L.F. 119-120. The court of appeals likewise concluded that REJ's Sunshine Law claim in its amended petition was time-barred because the trial court "could reasonably have concluded that Plaintiff's original petition did not invoke Sunshine Law remedies." Appendix at A64-A65.

However, as shown in Point I, the applicable standard of review required the trial court and the court of appeals to accept REJ's allegations as true and construe those allegations

liberally and favorably to REJ. The trial court and the court of appeals clearly did not comply with this standard when they determined that the City's construction of REJ's petition and amended petition was "reasonable," and that REJ's petition could be dismissed and leave to file an amended petition could be denied based on a purportedly "reasonable" construction of those pleadings that was favorable to the defendant.

The factors that the trial court should have considered in determining whether to grant or deny leave to amend a petition weighed in favor of granting REJ's motion for leave to file its amended petition. The claims alleged in REJ's amended petition were not time-barred. The trial court abused its discretion in denying REJ's motion for leave to file its amended petition, and its judgment should be reversed.

CONCLUSION

For the reasons discussed in this brief, the trial court's judgment dismissing REJ's petition and denying REJ leave to file its first amended petition should be reversed.

Respectfully submitted,

ARMSTRONG TEASDALE LLP

BY: _____
James E. Mello, #37734
Thomas B. Weaver, #29176
Jeffery T. McPherson, #42825
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
(314) 621-5070
(314) 612-2297 (facsimile)

ATTORNEYS FOR APPELLANT REJ,
INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Substitute Brief of Appellant and the appendix to the substitute brief, and a disk containing the brief were delivered via overnight mail on this 2nd day of February, 2004, to each of the following counsel of record:

Mr. James R. Robison
Attorney for Defendant
ROBISON & ROBISON
521 Greer Street, P.O. Box 921
Sikeston, Missouri 63801

Mr. John Oliver
Attorney for Intervenor
OLIVER, OLIVER & WALTZ, PC
400 Broadway, P.O. Box 559
Cape Girardeau, Missouri 63702-0559

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Substitute Brief of Appellant includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,738, excluding the cover page, signature block, and certificates of service and compliance.

IN THE SUPREME COURT OF MISSOURI

REJ, INC.,)	
Plaintiff/Appellant,)	
)	
v.)	No. SC85711
)	
CITY OF SIKESTON,)	
Defendant/Respondent,)	
)	
And)	
)	
GREERS GROVE DEVELOPMENT,)	
L.P.)	
Intervenor.)	

**Appeal from the Circuit Court of Scott County
The Honorable Steve Mitchell, Associate Circuit Judge**

**APPENDIX TO
SUBSTITUTE BRIEF OF APPELLANT REJ, INC.**

II. JAMES E. MELLO

#37734

**Thomas B. Weaver #29176
Jeffery T. McPherson #42825
ARMSTRONG TEASDALE LLP
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
314-621-5070
314-621-5065 FAX**

**ATTORNEYS FOR APPELLANT
REJ, INC.**