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STATEMENT OF FACTS

For purposes of this brief, the plaintiff-appellant, REJ, Inc., will be referred to as REJ. The defendant-respondent, City of Sikeston, will be referred to as the City. The intervenor-respondent, Greers Grove Development, L.P., will be referred to as Greers Grove. The Record on Appeal consists of a transcript, Legal File and a Supplemental Legal File. References to the Legal File will be (LF __) and reference to the Supplemental Legal File will be (Supp.LF___).

REJ filed this lawsuit in the Circuit Court of Scott County on August 14, 2001. The trial judge recused himself and the case was assigned to Judge Stephen Mitchell in Stoddard County. (LF 1) By stipulation of the parties all proceedings in the trial court were held in the courtroom of Judge Mitchell in Stoddard County. (LF 2)

REJ's three count petition attacks the validity of the City's Ordinance Number 5405.(LF 11-14).

The intervenor, Greers Grove, owned a tract of land adjacent to and directly west of U.S. Highway 61 in the north part of the City. REJ owns land which lies east of U.S. Highway 61 in the vicinity of the Greers Grove property. Greers Grove applied to the City's planning and zoning commission for a hearing on whether its property should be re-zoned to allow for commercial use. REJ appeared before the commission to oppose Greer Grove's request. The planning and zoning commission filed a report

to the City Council in which it did not recommend approval of Greer Groves request. A public hearing was held by the council, attended by Richard Montgomery and his sister, Elizabeth Wilson, representatives of REJ, who continued to oppose the zoning change. (LF 7, 8, 33, 34)(TR 6). The city council rejected the recommendation of the planning and zoning commission and enacted Ordinance Number 5405, by which commercial zoning was granted for the Greers Grove property on July 9, 2001. (LF 34)

REJ then filed this case. In Count I of its petition, REJ seeks a declaratory judgment holding that Ordinance Number 5405 is "void and unenforceable." REJ also requested an "injunction preventing Ordinance Number 5405 from being enforced". REJ further requested in Count I that it be awarded costs and attorney fees and such other relief as the court deems just and proper. Counts II and III seek the same relief as Count I, with the exception that there is no express request for attorney fees in those counts. (LF 11-14) In paragraph 21 of Count I REJ asserted that the Sunshine Law (Section 610.020 RSMo.) creates "specific requirements for public notice and minutes to be kept of public proceedings." It was then alleged in paragraph 21 that the City violated the Sunshine Law by giving no notice of any meeting for the purpose of amending Exhibits D, G, and F to the plaintiff's petition; that the City kept no minutes for the purpose of amending Exhibit D, F and G; that it kept no records of any votes taken for the purpose of amending Exhibits D, F, and G; and that it kept no record of any votes taken for the purpose of passing Exhibit F or G. (LF 10, 11) REJ also attached to its petition, Exhibit E, a seven page set of minutes for the Special Meeting of the City

Council on July 9, 2001. Page 5 of those minutes recites the adoption of Ordinance Number 5405. It is further recited on page 5 that Councilmen Boyer, Harris, Marshall, Mitchell, and Pullen voted for the passage of Ordinance Number 5405. (LF 30, 36) No negative votes are cited.

Exhibit A to the Petition is a plat showing the boundaries of the Greers Grove property. Exhibit B is a Petition in opposition to the Greers Grove Rezoning Request with the signatures of a number of individuals. (LF 8, 16-21); Exhibit C is a petition in opposition to the proposed zoning change signed by a trustee for the First Church of the Nazarene, and by the pastor of the Trinity Baptist Church. (LF 8, 24-25).

One of the City's Interrogatories to REJ inquired as to claims by REJ that the Sunshine Law had been violated. REJ objected to this interrogatory (No. 11) on the ground that "it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence."(Supp. LF 20). No record was made of the hearing on the objections. The record does contain a proposed order which counsel for REJ submitted relative to the disposition of its objections to interrogatories. Counsel for the City challenged the accuracy of the draft of the proposed order by a letter to Corrine Darvish, one of the attorneys for REJ. (Supp. LF 10,11) The order was never revised to correct the objectionable portions, there was no response by Ms. Darvish to the letter, and no formal order on the objections was ever entered by the court.

On August 5, 2002, the City enacted Ordinance Number 5491, by which it expressly repealed Ordinance Number 5405. (LF 46-48) The City then moved for the

dismissal of the lawsuit on the ground that it had become moot by the repeal of the ordinance. (LF 47-49).

REJ was granted until August 26, 2002 to file a response in opposition to the City's motion and the City was granted until September 2, 2002 to respond. (LF 4-5). When REJ filed its response, it also filed a separate motion asking leave to file an amended petition. (LF4) By the amendments REJ sought to add a request for remedies provided for violations of the Sunshine Law. One of the proposed changes would have added sub-paragraph (d) to paragraph 21 of the petition. Sub-paragraph (d) is a request that the court impose civil fines upon each of the City Council Members and "relevant city officials pursuant to Sec. 610.027.3 RSMo". (LF 86-87) FN 1

Sub-paragraph (e) to paragraph 21 of the proposed amendment asks that the court enjoin the City Council Members and City Officials from violating the Sunshine Law. Sub-paragraph (f) to paragraph 21 of the amended petition asks for such further relief as the court deems just and proper. One other change which would result from the proposed amendment was that the original petition seeks only a declaratory judgment and injunction relative to City Ordinance Number 5405. By the proposed amendment REJ also asks the court to

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FN1. None of the City Council Members, nor any other city officials have ever been

joined as defendants in this case.

declare City Ordinance Number 5406 to be void and unenforceable. In the prayer for relief under Count I of the proposed amended petition REJ asks that the court declare both Ordinance Number 5405 and Ordinance Number 5406 to be "void ab initio and unenforceable". (LF 084, 086) A copy of Ordinance Number 5406 is attached to the proposed First Amended Petition as Exhibit H. (LF 92) Ordinance Number 5406 was also enacted at the July 9, 2001 council meeting. It deals solely with the subdivision of a portion of the Greers Grove's property. (LF 92) By a contract dated April 26, 2001, with an addendum dated July 16, 2001, Greers Grove had agreed to sell 2.6 acres from its property to the Scott County Health Department, a governmental body. (Supp LF 28,29). The Scott County Health Department tract is within the portion of the property affected by Ordinance Number 5406. (LF 061, 064, 084, 092, Supp.LF 76) REJ asserts in paragraph 8 of its petition that the use of the property by the County Health Department is inconsistent with the surrounding residential, church, and agricultural uses being made of property in the area. (LF 7)

On April 22, 2002, Joel Montgomery, one of the residents in the tract owned by REJ, allegedly acting as a taxpaying citizen of Scott County and as an owner of land near the "Highway 61 Project" construction site, filed cause number 02CV745001 in the

Circuit Court of Scott County against the Scott County Health Department and its individual trustees. That case is a suit for a declaratory judgment and an injunction to block construction of the Health Department Building on the tract acquired from Greers Grove. (Supp LF 23, 28). The Montgomery case was assigned to Judge Randy Schuller from Wayne County. (Supp. L.F. 25)

In the Montgomery lawsuit the plaintiff alleged the existence of the pending case of *REJ, Inc v. the City of Sikeston*, in which it is asserted that the property purchased by the health department is improperly zoned, and that Ordinance Number 5405 is "*void for a multitude of reasons as set forth*". (Supp LF 31).

The Scott County Health Department and its Trustees responded to the Montgomery lawsuit with a motion to dismiss for a number of reasons, including an allegation that the County Health Department is a political subdivision of the State, which is not subject to the zoning laws of the City of Sikeston. (Supp LF 48). On October 8, 2002, Judge Schuller, at the request of Montgomery, issued a Temporary Restraining Order against the construction of a building on the health department property. (Supp L.F. 25) At a hearing on the health department's motion to dissolve the restraining order held on October 8, 2002, Judge Schuller made a docket entry reciting that, unless restrained by an appropriate appellate writ, he would dismiss the Montgomery petition and dissolve the temporary restraining order on October 18, 2002. Montgomery applied to the Court of Appeals, Southern District, for such a writ. That court entered a stop order precluding Judge Schuller from dismissing the

Montgomery case until the parties had filed their response to the application. On November 4, 2002, the Court of Appeals dissolved its stop order and denied the Montgomery request for a writ. (Supp LF 27) Judge Schuller proceeded to dismiss the case and to dissolve his Temporary Restraining Order. Montgomery then filed a Notice of Appeal in his case (Scott County Cause Number 02CV745001) on December 12, 2002. (Supp. L.F.27)

On September 5, 2002, Judge Mitchell sustained the City's motion to dismiss the REJ petition on the ground of mootness, and further overruled REJ's Motion for Leave to file its First Amended Petition. (LF 118) On October 16, 2002, REJ's Motion for a New Trial was overruled. (LR 5, 134) The court took judicial notice of the file in the Montgomery lawsuit while ruling on REJ's Motion for a New Trial. (LF 133) A Notice of Appeal was filed by REJ on October 22, 2002. (L.F. 5, 134)

The Court of Appeals issued its decision affirming the trial court on October 29, 2003. After timely motions asking the Court of Appeals to order a re-hearing and for its order to transfer were overruled, REJ filed its Motion to Transfer with this Court. The written record in the Montgomery case is a part of the record in this case in the form of a Supplemental Legal File. Missouri Case Net indicates that the appeal in the Montgomery case against the Scott County Health Department and its Trustees was voluntarily dismissed on May 9, 2003.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN DISMISSING THE PLAINTIFF'S PETITION FOR A DECLARATORY JUDGMENT AND INJUNCTION. EACH OF THE THREE COUNTS OF PLAINTIFF'S PETITION WERE CLAIMS FOR A DECLARATION THAT SIKESTON ORDINANCE NO. 5405 WAS VOID AND UNENFORCEABLE AND FOR AN INJUNCTION AGAINST ITS ENFORCEMENT. ORDINANCE NO. 5405 HAS BEEN REPEALED IN ITS ENTIRETY AND THE TRIAL COURT, THEREFORE, PROPERLY SUSTAINED THE CITY'S MOTION TO DISMISS ON THE GROUND THAT THE CLAIM HAD BECOME MOOT.

Armstrong v. Adair County, **990 S.W.2d 62, 64 (Mo. App. 1999)**

Automobile Club of Missouri v. The City of St. Louis, **334 S.W.2d 335, 336 (Mo. 1960)**

Colombo v. Buford, **935 S.W.2d 690, 695 (Mo. App. WD 1997)**

State, ex rel, Helujon, Ltd v. Jefferson County, **964 S.W.2d 531, 537 (Mo. App. ED**

1998)

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING REJ'S MOTION FOR LEAVE TO FILE A FIRST AMENDED PETITION

A.

THE PURPOSE OF THE FIRST AMENDED PETITION WAS TO CHANGE THE PLAINTIFF'S CAUSE OF ACTION FROM A CLAIM FOR A DECLARATORY JUDGMENT AND INJUNCTION TO ONE FOR THE ENFORCEMENT OF THE REMEDIAL PROVISIONS OF THE SUNSHINE LAW. AT THE TIME REJ ATTEMPTED TO AMEND ITS PETITION TO SEEK REMEDIES UNDER THE SUNSHINE LAW, THAT REMEDY WAS ALREADY BARRED BY THE STATUTE OF LIMITATIONS. THE TRIAL COURT WAS, THEREFORE, WITHOUT JURISDICTION TO ALLOW THE AMENDMENT.

***Colombo v. Buford*, 935 S.W.2d 690, 695 (Mo. App. WD 1997)**

***Goe v. City of Mexico*, 64 S.W.3d 836, 840 (Mo. App. ED 2001)**

***Hertzog v. City of Greenwood*, 944 S.W.2d 588 (Mo. App. WD 1997)**

***Laux v. Motor Carrier's Council of St. Louis, Inc.*, 499 S.W.2d 805, 807 (Mo. 1973)**

Section 610.027.4 RSMo

V.A.M.S. Section 610.027.1

V.A.M.R. Rule 55.33(a)

B.

EVEN IF THE TRIAL COURT STILL HAD JURISDICTION TO ALLOW AN AMENDED PETITION TO SEEK REMEDIES UNDER THE SUNSHINE LAW, IT WAS NOT OBLIGATED TO ALLOW THE AMENDMENT BECAUSE ONCE RESPONSIVE PLEADINGS HAVE BEEN FILED, WHETHER TO ALLOW AN AMENDMENT IS WITHIN THE DISCRETION OF THE TRIAL COURT. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DENY THE MOTION.

***Curnutt v. Scott Melvin Transport, Inc.*, 903 S.W.2d 184, 193 (Mo. App. W.D. 1995).**

***Downey v. Mitchell*, 835 S.W.2d 554, 556 (Mo. App. E.D. 1996)**

***Hudson v. Riverport Performance Arts Center*, 37 S.W.3d 261, (Mo. App. E.D. 2000)**

***Kroger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 413 (Mo. App. W.D. 2000)**

Section 610.027.3 RSMo.

Rule 55.33(a)

C.

EVEN IF THE COURT SHOULD FIND THAT THE TRIAL COURT IS NOT BARRED BY THE STATUTE OF LIMITATIONS FROM GRANTING LEAVE FOR THE FILING OF PLAINTIFF'S FIRST AMENDED PETITION; AND, IF THE COURT FURTHER FINDS THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION, THIS CASE CAN BE REMANDED ONLY FOR THE LIMITED PURPOSE OF A TRIAL ON THE ISSUE OF WHETHER THE CITY OF SIKESTON ACTED IN VIOLATION OF THE SUNSHINE LAW AND, IF SO, THE AMOUNT OF CIVIL FINE WHICH SHOULD BE IMPOSED AGAINST THE CITY, NOT TO EXCEED $500.00; AND WHETHER THERE IS ANY BASIS FOR AN AWARD OF ATTORNEY FEES AGAINST THE CITY. THE CITY COUNCIL MEMBERS AND OTHER CITY OFFICIALS ARE NOT PARTIES AND THE COURT HAS NO JURISDICTION TO IMPOSE A FINE OR ATTORNEY FEES AGAINST ANY OF THEM INDIVIDUALLY. THE COUNCIL MEMBERS AND OTHER CITY OFFICIALS CAN NO LONGER BE ADDED AS DEFENDANTS BY AMENDMENT IN A SUNSHINE LAW CLAIM BECAUSE THE STATUTE OF LIMITATIONS HAS EXPIRED.

***Ellison v. Valley View Dairy, Inc.*, 905 S.W.2d 93, 97-98 (Mo. App. SD 1995)**

***Grooms v. Grange Mutual Casualty Co.*, 32 S.W.3d 618, 621 (Mo. App. ED 2000)**

***Shroyer v. McCarthy*, 769 S.W.2d 156, 159-160 (Mo. App. WD 1989)**

***Tyson v. Dixon*, 859 S.W.2d 758, 763 (Mo. App. WD 1993)**

Section 610.027.3 RSMo.

ARGUMENT

I

I. THE TRIAL COURT DID NOT ERR IN DISMISSING THE PLAINTIFF'S PETITION FOR A DECLARATORY JUDGMENT AND INJUNCTION. EACH OF THE THREE COUNTS OF PLAINTIFF'S PETITION WERE CLAIMS FOR A DECLARATION THAT SIKESTON ORDINANCE NO. 5405 WAS VOID AND UNENFORCEABLE AND FOR AN INJUNCTION AGAINST ITS ENFORCEMENT. ORDINANCE NO. 5405 HAS BEEN REPEALED IN ITS ENTIRETY AND THE TRIAL COURT, THEREFORE, PROPERLY SUSTAINED THE CITY'S MOTION TO DISMISS ON THE GROUND THAT THE CLAIM HAD BECOME MOOT.

The trial court did not err in dismissing REJ's Petition for Declaratory and Injunctive Relief. The declaratory judgment sought by REJ was to establish the invalidity of Sikeston City Ordinance Number 5405. The purpose of the injunctive relief sought by REJ was to enjoin the City from enforcing Ordinance Number 5405.

A. Standard of Review

The City disagrees with REJ's concept of the standard of review, which it says would require the court to treat the facts contained in the petition as true and to construe them in the light most favorable to REJ. (Page 16, Appellant's Substitute Brief).

We believe that a motion to dismiss submits on the merits the issues on which REJ has the burden of persuasion so that the standard of review is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976); and that under that standard the evidence and reasonable inferences must be viewed in the light most favorable to the judgment with all contrary evidence to be disregarded. *Colombo v. Buford*, 935 S.W.2d 690, 694 (Mo. App. WD 1997).

B. The trial court properly dismissed the Petition after the City repealed Ordinance Number 5405.

REJ sought the appropriate and, perhaps, its exclusive remedy, with its request for declaratory and injunctive relief. It has been held that under Missouri law, challenges to zoning, rezoning and refusal to rezone must be either by an action for declaratory judgment or for an injunction. *State, ex rel Helujon, Ltd v. Jefferson County,* 964 S.W.2d 531, 537 (Mo. App. ED 1998).

After the lawsuit was filed, the City, on August 5, 2002, enacted Ordinance Number 5491, by which it expressly repealed Ordinance Number 5405 (LF 47) At that point, there was no longer any reason for a declaratory judgment as to the validity of the repealed ordinance nor any reason for an injunction against its enforcement. The trial court, therefore, properly sustained the City's motion to dismiss on the basis of the mootness doctrine.

Generally, courts do not decide moot cases. *Kinsky v. Steiger,* 109 S.W.3d 194,

195 (Mo. App. 2003). Mootness relates to the justiciability of a case. *Id* at 195. A question is justiciable only where a judgment would declare a fixed right and accomplish a useful purpose. *Local Union 1287 v. Kansas City Area Transp. Auth,* 848 S.W.2d 462, 463 (Mo. banc 1993) When an event occurs that makes a court's decision unnecessary or makes granting effectual relief impossible, the case is moot and generally should be dismissed. *Armstrong v. Adair County,* 990 S.W.2d 62, 64 (Mo. App. 1999). *River Fleets, Inc. v. Creech and Missouri Department of Revenue*, 36 S.W.3d 809, 813 (Mo. App. 2001)contains a thorough discussion by this court of the concept of when a cause of action becomes moot.

The repeal of a statute or ordinance which is at the basis of a lawsuit presents a classic situation for the application of the mootness doctrine. A question as to the validity of an ordinance is moot when the ordinance has been repealed. *Automobile Club of Missouri v. The City of St. Louis,* 334 S.W.2d 335, 336 (Mo 1960). In *St. Louis County v. Village of Peerless Park*, 726 S.W.2d 405, 409 (Mo. App. ED 1987), it was held that when an amendment changes a statute on which litigants rely to define their rights in such a way that an appeal in effect presents only a hypothetical question, the Court of Appeals may dismiss the appeal as moot.

See also *Petition of Carroll*, 828 S.W.2d 382, 384 (Mo. App. SD 1992) where the court said that "when an enactment supersedes the statute that litigants rely on to define their rights, the appeal no longer presents an actual controversy and the case will

be dismissed as moot". A federal court applied this rule in *Mickey v. Kansas City,* 43 F Supp 739, 742 (U.S. District Court WD Mo. 1942) where the litigation centered around Section 409, Chapter 7, Article 6 of the Revised Ordinance of Kansas City, where the court said:

> **This ordinance was in full force and effect at the time plaintiffs filed their complaint, on June 21, 1941, <u>but it was repealed by the Council of Kansas City on September 8, 1941</u>(underlined for emphasis)....It is unnecessary, therefore, to give further consideration to questions arising on that ordinance for the reason that it is no longer the law. A discussion thereof would be purely moot and academic.**

***Robinson v. City of Raytown,* 606 S.W.2d 460 (Mo. App. WD 1980) is a case which is extremely similar to the case now before the court. There, as here, the planning and zoning commission had rejected a rezoning proposal, which the City Council proceeded to approve. The relief sought by the plaintiffs in *Raytown* is identical to the relief sought by REJ, *i.e.,* a declaratory judgment that the zoning ordinance was invalid and unenforceable; and an injunction against its enforcement. *Id.* 463. In reversing a trial court's judgment for the plaintiff, the Court of Appeals said that all issues tendered by the appellant on appeal became moot when counsel for Raytown admitted during oral argument that Raytown's Ordinance was void and unenforceable because it did not receive a favorable vote of three-fourths of all the members of the Board of Aldermen.**

See also *Carruthers v. Beal*, 556 S.W.2d 807, 809 (Mo. App. SD 1978) where the court held that for the purpose of determining the moot character of a case, a court may even notice facts and consider matters outside the record.

If a statement by counsel during appellate argument is a sufficient basis for the establishment of an event which renders an ordinance moot, then certainly the trial court in this case, when presented with the fact that Ordinance Number 5405 had been expressly repealed, had a sufficient basis for dismissing REJ's petition under the mootness doctrine.

REJ argues that the mootness doctrine is inapplicable because there was no language in the repealing ordinance which declared that Ordinance Number 5405 was *void ab initio.*

Thus far, REJ has cited no law which would require the use of the phrase *void ab initio* to successfully repeal an ordinance. It is clear that municipalities have a right to repeal an ordinance. The style of ordinances and procedure for their enactment in third class cities is spelled out in Section 77.080 RSMo. The power to repeal an ordinance is incidental to the power to enact one. *City of St. Louis v. Cavanagh,* 207 S.W.2d 449, 454-55 (Mo. 1947). The repeal of a law means its complete abrogation by the enactment of a subsequent law. *C.C. Dillon Company v. City of Eureka,* 12 S.W.3d 322, 325 (Mo. banc. 2000). A city council has general authority to rezone property from one classification to another and, in order to legally exercise that power, it is not necessary

that it strictly and rigorously comply with *every* directory provision of the statutes. *Miller v. Kansas City*, 358 S.W.2d 100, 106 (Mo. App. WD 1962).

None of these cases suggest that an ordinance has not been successfully repealed until there is an express recital that it is *void ab initio.*

REJ cited two cases in support of its contention that this case did not become moot when the City repealed Ordinance Number 5405. They are: *Knapp v Junior College District of St. Louis,* 879 S.W.2d 588, (Mo. App. ED 1994) and *Boyer v City of Potosi*, 38 S.W.3d 430 (Mo App ED 2000). Both of them can be distinguished on their facts.

In *Boyer*, the court refused to dismiss the case as moot, because it included a prayer for back wages which left an unresolved issue. The issue which became moot was whether the mayor of Potosi, Missouri, who had been removed from office, was entitled to reinstatement. That question was rendered moot when the mayor failed to win re-election while the case was pending. In *Knapp*, a college student filed suit for a number of remedies in connection with her suspension by the college. The college argued that the case became moot when the suspension expired before the case was finally decided. The court declined to apply the mootness doctrine to dismiss additional remedies sought by the student, including expungement of her college records of any reference to the suspension. The existence of those records resulted in a *continuing controversy* which had not become moot. In both of those cases, the issues which were

held to give rise to a continuing controversy were properly pleaded before the attempts to have the cases declared moot.

To accept the argument of REJ that a legal proceeding and judgment of a court is required to render an ordinance invalid would establish a public policy that would preclude any legislative body from correcting defects in its own proceedings. It would mean that, even when a legislative body is willing to recognize that one of its enactments is defective, its constituents would simply have to live with the consequences of the defect until someone invested the time and money to pursue the matter to its bitter end through the courts. Assuming that this case is scheduled for argument sometime in the summer of 2004, which seems likely in view of the briefing schedule, and if REJ's argument is accepted, then a final resolution of the validity of Ordinance Number 5405 will have consumed nearly two years and many, many billable hours. Even then, we will only be back to the point where the City Council put us when it repealed Ordinance Number 5405. We would submit that there is no better example of the reason for the development of the doctrine of mootness.

Although there has been only one possible outcome for the issues raised by REJ's attempt to obtain a declaratory judgment as to the validity of Ordinance Number 5405 and the companion issue of whether to enjoin its enforcement, the parties have been forced to waste both public and private resources to accomplish a wholly hypothetical task.

The trial court correctly applied the doctrine of mootness and it was properly

affirmed by the Court of Appeals. There is no reason for this court to rule any differently.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING REJ'S MOTION FOR LEAVE TO FILE A FIRST AMENDED PETITION

A.

THE PURPOSE OF THE FIRST AMENDED PETITION WAS TO CHANGE THE

PLAINTIFF'S CAUSE OF ACTION FROM A CLAIM FOR A DECLARATORY JUDGMENT AND INJUNCTION TO ONE FOR THE ENFORCEMENT OF THE REMEDIAL PROVISIONS OF THE SUNSHINE LAW. AT THE TIME REJ ATTEMPTED TO AMEND ITS PETITION TO SEEK REMEDIES UNDER THE SUNSHINE LAW, THAT REMEDY WAS ALREADY BARRED BY THE STATUTE OF LIMITATIONS. THE TRIAL COURT WAS, THEREFORE, WITHOUT JURISDICTION TO ALLOW THE AMENDMENT.

The trial court did not err in denying REJ's Motion for Leave to File a First Amended Petition. When the City filed its Motion to Dismiss after it repealed Ordinance Number 5405, REJ requested and obtained time to file a response to the City's Motion. (LF 3) On August 26, 2002 when REJ filed its response to the Motion to Dismiss, it also filed a Motion for Leave to Amend its Petition accompanied by a proposed First Amended Petition. (LF 4).

In the First Amended Petition and in all of the proceedings in the appellate courts, REJ has attempted to avoid the fatal consequences of having allowed a statute of limitation to lapse by arguing that its original petition pleaded a cause of action for the statutory remedies provided by the Sunshine Law. (Section 610.027.4 RSMo)

The City disagrees. First of all, the right to amend a pleading as a matter of right ceases to exist when the opposing party has filed responsive pleadings. V.A.M.R. 55.33(a).

While leave to amend a pleading is to be freely given when justice so requires,

a party does not have an absolute right to amend his or her pleading. The denial of a motion for leave to amend is presumed correct and the burden is on the proponent of the motion to show that the trial court clearly and palpably abused its discretion. Judicial discretion is abused when a trial court's ruling is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. ***Neenan Company v. Cox*****, 955 S.W.2d 595, 598 (Mo. App. WD 1997).**

When REJ filed its petition for declaratory and injunctive relief, it elected the two standard remedies available to it to sustain its attack on Ordinance Number 5405. Challenges to zoning, rezoning and refusal to rezone in Missouri must be either by an action for declaratory judgment or for an injunction. ***State ex rel Helujon Ltd v. Jefferson County,*** **964 S.W.2d 531, 537 (Mo. App ED 1998). Remedies under the Sunshine Law are in addition to those provided by any other provision of law. V.A.M.S., Sec. 610.027.1**

Just as the Sunshine Law provides its own set of remedies, it also contains its own statute of limitation, which has recently been amended to extend a six month limitation period to one year. (Section 610.027.4) The one year statute was in effect at all times relevant to this case.

"Leave to amend a petition contemplates an amendment which will cure defects in a petition without changing the essential elements of the cause of action originally attempted to be plead. Alleging a new cause of action which is subject to the bar of a statute of limitations cannot be considered a mere amendment and is not authorized."

***Laux v. Motor Carrier's Council of St Louis, Inc.*, 499 S.W.2d 805, 807 (Mo 1973). The rule governing relation back of amendments to pleadings does not authorize an amendment which states an entirely new claim. *Caldwell v. Lester E. Cox Medical Centers - South, Inc.*, 943 S.W.2d 5, 8 (Mo. App. SD 1997).**

Here the original lawsuit challenged the validity of an ordinance which was enacted at a special meeting of the City Council on July 9, 2001. (LF 6-14) REJ first attempted to amend its petition to state a claim for remedies under the Sunshine Law on August 27, 2002 (LF 78) which is well beyond the one year limitation period.

REJ argued in the Court of Appeals that the limitation period can be extended based on when the violation of the Sunshine Law became ascertainable. The language in Section 610.027.4 RSMo which refers to when a violation is "ascertainable" may not be used to extend the period of limitation in this case. In *Colombo v. Buford,* 935 S.W.2d 690, 695 (Mo. App WD 1997), a case of first impression with regard to the interpretation of Section 610.027.4 RSMo, the Court of Appeals held that:

> **The violation of the Sunshine Law and the damage caused thereby are one in the same...a closed meeting of a public governmental body excluding the oversight and input of the public. <u>In other words</u> when the violation is ascertainable, so is the damage.**

Ordinance Number 5405 was enacted by the City at a special meeting of its council on July 9, 2001. (LF 8, 30-36) It is undisputed that REJ, through its representatives, actively opposed the enactment of the Ordinance. (LF 7, 8, 33, 34) (TR

6). Clearly, if the enactment of the Ordinance was in violation of the Sunshine Law, which we dispute, the fact of its enactment was ascertainable to REJ on July 9, 2001 at the earliest; and on August 13, 2001 when REJ filed its Petition for Declaratory and Injunctive Relief, at the latest. (LF 6) The attempt to amend REJ's pleadings on August 26, 2002 was more than one year beyond either of those dates. See also, *Armstrong v. Adair County*, 990 S.W.2d 64, 68 (Mo App WD 1999) where the appellants sought to rely on the "ascertainability" issue to avoid the statute of limitations in a Sunshine Law case.

REJ cannot legitimately argue to the court that it was not aware of the proceedings of the City Council when it enacted Ordinance Number 5405 until it tried to amend its petition, in view of the fact that it attached copies of the minutes of the July 9, 2001 special meeting of the City Council as an exhibit to its petition, which was filed on August 13, 2001. It is also difficult to understand how REJ can in good faith allege that there was no council meeting and no record of the votes taken on the adoption of Ordinance Number 5405 in light of the fact that REJ attached Exhibit E to its petition when it was filed on August 13, 2001. That exhibit is a copy of the minutes of a special meeting of the City Council held on July 9, 2001. It sets forth the ordinance on page 5 of the minutes, and also recites Councilmen Boyer, Harris, Marshall, Mitchell, all voted aye on the issue. There were no negative votes. (LF 30-36).

There is no tolerance in the application of the limitation period in a case seeking remedies under the Sunshine Law. In *Colombo v. Buford*, supra, which was decided

while six months was still the limitation period, the alleged violation occurred on August 22, 1994. The six month period, therefore, lapsed no later than February 22, 1995. The lawsuit was filed one day later, on February 23, 1995, and was, therefore, barred by limitations. *Colombo* L.C. 695.

REJ seeks to avoid the consequences of having failed to act within the limitations period by an assertion that this has always been a suit for remedies under the Sunshine Law; and, that its First Amended Petition would merely be supplemental to the cause of action which it originally pleaded. Although REJ now argues that the essence of its original pleading was a violation of the Sunshine Law, a pleading must be judged by what it alleges or fails to allege, not by what counsel says was intended. *King v. Guy*, 297 S.W.2d 617, 624 (Mo. App. SD 1956). In determining what cause of action has been pleaded, a court must examine the facts pleaded along with the relief sought to determine that question. *Goe v. City of Mexico*, 64 S.W.3d 836, 840 (Mo. App. ED 2001).

Since the purpose of pleadings is to inform the parties and the court of the claim made and the issues to be passed upon, they should not be drawn so as to mislead. *State ex rel Harvey v. Wells*, 955 S.W.2d 546, 547 (Mo. banc 1997). Neither should a party be allowed to plead in such a manner as to conceal one cause of action within another. *Grover v. Cleveland*, 299 S.W.2d 239, 242 (Mo. App. 1957).

Here we not only have no request for relief in the original petition for remedies under the Sunshine Law, but we also have a set of objections to interrogatories in which

REJ takes the position that an inquiry into Sunshine Law issues is overly-broad, unduly burdensome and not calculated to lead to the discovery of admissible evidence. (Supp LF 20)

The REJ petition entitled its pleading as a Petition for Declaratory Judgment and an Injunction and that is the relief which it sought. Those are the standard remedies available under Missouri law to challenge zoning changes. *State ex rel Helujon Ltd v. Jefferson City,* supra. It is correct that courts are to judge a pleading by its subject matter and not by its caption. *Worley v. Worley,* 19 S.W.3d 127, 129 (Mo. banc 2000). The pleading can, however, be judged by what it alleges and what relief is sought. "Generally speaking, the same rules which govern the interpretation and construction of other writings are applicable to pleadings. So, the language is to be given its plain and ordinary meaning and such interpretation as *fairly* appears to have been intended by the pleader." In the application of that rule, the courts may consider not only the facts pleaded but also the relief sought. *J.H. King v. S.D. Guy,* 297 S.W.2d 617 (Mo. App. SD 1956). The *King* case was decided by the Court of Appeals specifically in the context of analyzing a petition to determine what cause of action the pleader had stated. In that context, the court said that:

> **Pleadings are not to be used to conceal issues or to ambush the adverse party, and the court should not be charged with assuming that the pleader intended to conceal one cause of action within another. *Id* 624.**

When the REJ petition is analyzed in its entirety, it becomes apparent that the Sunshine Law is referred to only as one of a multitude of asserted reasons for finding Ordinance Number 5405 invalid and enjoining its enforcement. The pleading does not suggest that REJ is seeking the specific remedies provided in Chapter 610 RSMo for violations of the Sunshine Law. Moreover, Ordinance Number 5406 is not alluded to in any way in the REJ petition. The validity of ordinance Number 5406 was injected into this case for the very first time when REJ attempted to amend its petition. At that time, REJ was already confronted with the imminent dismissal of its properly pleaded causes of action for declaratory and injunctive relief, neither of which were dependent upon a violation of the Sunshine Law.

For an example of a petition which was held to have properly pleaded a cause of action for remedies provided by the Sunshine Law, see *Hertzog v. City of Greenwood*, 944 S.W.2d 588 (Mo. App. WD 1997). In that case, a mayor was contending that he had been improperly removed from office as the result of actions taken at non-public meetings. In Count I of his petition, the mayor specifically requested the imposition of fines on individual defendants who were members of the Greenwood Board of Aldermen.

The mayor specifically pleaded that he was bringing his action for remedies pursuant to the Sunshine Law and also pleaded specific violations of the law by the various individual defendants. In the prayer to the mayor's petition, he asked for the relief provided for in the Sunshine Law.

REJ's petition does not come close to claiming that it is seeking the remedies

provided by the Sunshine Law; and, it attempted to do far more than clarify or supplement a cause of action already well pleaded when it attempted to amend.

Since REJ is asserting that the court must accept as true every allegation in its pleadings, and it has placed special emphasis on some of those allegations which we believe it will never be able to prove, it is necessary to respond to certain of the allegations which, if taken as true, still have no legal effect on the validity of a zoning ordinance.

For example, REJ alleges that the City Council ignored petitions from persons opposing Ordinance No. 5405; that the City overruled its Planning and Zoning Commission when it enacted the ordinance; and that former mayor Josh Bill, during his tenure as mayor, did something to prevent the approval of the draft of a document entitled "Comprehensive Plan For Community and Preservation." (LF 8). None of these allegations have any legal effect on the authority of a city to enact an ordinance for the purpose of rezoning property. In *City of Monett v Buchanan*, 411 SW2d 108, 113 (Mo. 1967) this court addressed the question of whether a City Council is bound to follow recommendations from its Planning and Zoning Commission in zoning matters. The court noted that: "Ultimately the appellant's complaint is that the City Council did not adopt the recommendations the zoning commission finally made." *Id*. L.C. 113. The court held that the City Council, as the legislative branch of municipal government, was entrusted with the sole power to enact a rezoning ordinance; and that, <u>the council was not bound to adopt the proposals or recommendations submitted by the zoning</u>

commission. *Id*. 114. **The court in the *City of Monett* case said:**

> **The classification of areas under the statutes is a legislative function, and the city legislative body has the right and duty to determine the use classification to be given any particular area, and it is not the prerogative of the courts to substitute their opinions for those of the city unless manifestly or demonstrably arbitrary and unreasonable. *Id*. 114.**

If Ordinance Number 5405 had not been repealed, then REJ may have had the right to litigate the issue of whether the City had acted arbitrarily or unreasonably in adopting the ordinance. Because the ordinance has been repealed, for reasons already stated, there is no right to even litigate that issue, which became moot when the ordinance was repealed.

REJ's allegation that the former Mayor somehow kept the Planning and Zoning Commission from enacting a comprehensive plan falls into the same category. This same issue was raised in the companion lawsuit of *Joel Montgomery v Scott County,* which has now been voluntarily dismissed in the Court of Appeals. See the "Conflict of Interest" allegations in paragraphs 10-13 of the Montgomery petition. (Supp L.F. 30) As a general rule, the courts will not inquire into the interests or motives of the members of a municipal body in exercising their legislative functions. *Strandberg v. Kansas City,* 415 S.W.2d 737, 742 (Mo, banc 1967).

Moreover, the "Comprehensive Plan for Community Development and

Preservation" was in no way essential to the City's consideration of Ordinance Number 5405. In an article at page 26, Journal of the Missouri Bar, January-February, 2002, entitled *Municipal Land Planning Law in Missouri—Further Observations and Analysis,* by Stephen A. Kling, Jr, the author observed at pages 20-30 that:

> **While the land plan does not operate as legally controlling zoning law, it should constitute a guide for suitable projected land uses in the municipality, and it should be given deference as re-zoning requests are considered..... Judicial decisions to date in this state have not fully analyzed the importance of the land plan in zoning disputes.**

At footnote 22 at the bottom of page 30 of his article Mr. Kling states that: "The land plan has been acknowledged as a factor but there is scant analysis. (citing *Chiavola v Village of Oakwood,* 886 S.W.2d 74,78 [Mo. App. WD 1994] and *J.R. Green Properties v. Bridgeton,* 825 S.W.2d 684 [Mo. App. ED 1992]).

One case in which the role and nature of a comprehensive plan is discussed is *City of St. Charles v DeVault Management,* 959 S.W.2d 815 (Mo. App. ED 1997). In that case, the court notes that a review of Chapters 89 and 99 RSMo. indicates that there is no statutory definition of a "comprehensive plan;" and that it need not be a single document. A comprehensive plan may be validly enacted in the zoning ordinance and does not need to exist in a separate document. *State ex rel Westside Development Co. Inc, v. Weatherby Lake,* 935 S.W.2d 634, (Mo App W.D. 1996). In *Treme v St. Louis,* 609

S.W.2d 706, (Mo App ED 1980) the court refused to presume that the "General Plan for St. Louis County" is the development plan contemplated by the County Charter. There is, likewise, no basis for presuming that the document which REJ accuses Mr. Bill of having kept from the Planning and Zoning Commission is a comprehensive plan, in the context of the zoning statutes, nor that it was essential to consideration of re-zoning issues in Sikeston, Missouri in July of 2001.

REJ asserts in its brief that it has suffered a property loss by virtue of the enactment of Ordinance Number 5405. The allegation of economic loss is irrelevant to the proper application of the City's legislative functions. The fact that economic loss will be sustained if a zoning ordinance is upheld is not controlling; nor does the fact that the neighboring land or adjoining land is less restrictively zoned establish that a zoning ordinance is arbitrary or unreasonably discriminatory. *Chiavola v Village of Oakwood,* 886 S.W.2d 74, 77 (Mo App W.D. 1994) .

The City council also had no obligation to refuse to rezone, based on the request made in the petitions submitted in opposition to re-zoning, for the reason that it is the legislative function of the City Council, not that of petitioning opponents to act upon ordinances. The interests of neighboring homeowners do not constitute the public interest as a whole regarding the validity of a zoning ordinance. *Lennette Realty v. Investment Co of Chesterfield,* 33 S.W.3d 399 (Mo. App. ED 2000).

We submit, therefore, that the court was without jurisdiction to allow the filing of the First Amended Petition.

Insofar as the First Amended Petition realleges the claims for declaratory and injunctive relief, those claims are also subject to the mootness doctrine. To the extent that the First Amended Petition seeks to plead a cause of action for remedies under the Sunshine Law, those claims are barred by the statute of limitations. The trial court, therefore, properly denied the motion for leave to amend.

B.

EVEN IF THE TRIAL COURT STILL HAD JURISDICTION TO ALLOW AN AMENDED PETITION TO SEEK REMEDIES UNDER THE SUNSHINE LAW, IT WAS NOT OBLIGATED TO ALLOW THE AMENDMENT BECAUSE ONCE RESPONSIVE PLEADINGS HAVE BEEN FILED, WHETHER TO ALLOW AN AMENDMENT IS WITHIN THE DISCRETION OF THE TRIAL COURT. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DENY THE MOTION.

If this court should find that the statute of limitations (Section 610.027.4, RSMo.) did not deprive the trial court of jurisdiction to grant the Motion for Leave to File a First Amended Petition, the issue then becomes whether the trial court abused its discretion in denying the motion. There is no automatic right to file an amended petition once responsive pleadings have been filed, except by consent of the opposing parties. Rule 55.33(a). The responsive pleadings of the City were filed on September 10, 2001. (LF 1, 40). After that date, the plaintiff had to first obtain leave of court to file

an amended petition. *Curnutt v. Scott Melvin Transport, Inc.*, 903 S.W.2d 184, 193 (Mo. App. W.D. 1995).

A trial court has broad discretion in granting or denying leave to amend, and its decision will not be overturned in the absence of a clear and palpable abuse of that discretion. *Downey v. Mitchell*, 835 S.W.2d 554, 556 (Mo. App. E.D. 1996). An order by a trial court refusing to allow an amendment is reviewed only for an abuse of discretion. *Sheehan v. Northwestern Mutual Life Ins. Co.*, 44 S.W.3d 389, 394 (Mo. App. E.D. 2000) A court of appeals will reverse a trial court's ruling on a Motion for Leave to Amend only when it is clearly erroneous. *Kroger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 413 (Mo. App. W.D. 2000). In order to evaluate whether leave to amend should have been granted, factors for consideration include (1) the reasons for the moving party's failure to include the matter in the original proceedings; (2) whether there is any prejudice to the non-moving party; and (3) whether there will be a hardship to the party requesting amendment if the request is denied. *TransWorld Airlines, Inc. v. Associated Aviation Underwriters*, 58 S.W.3d 606, 624 (Mo. App. E.D. 2001). Some cases mention "timeliness of the attempt to amend" as an additional factor. For example, see *Manzer v. Sanchez*, 985 S.W.2d 936, 939 (Mo. App. E.D. 1999), *Curnutt v. Scott Melvin Transport, Inc.*, 903 S.W.2d 184, 193 (Mo. App. W.D. 1995). The timeliness issue has been decided against a party seeking to amend when the motion for leave to amend was filed in response to a dispositive motion. *Hudson v. Riverport Performance Arts Centre*,

37 S.W.3d 261, 266 (Mo. App. ED 2000) where the Court of Appeals affirmed an order denying leave to amend; and said:

> **...the court found the appellants had ample time to plead such a claim and did so on the eve of a summary judgment hearing only to avoid the dispositive motions.**

In our case, counsel argued at the hearing on its motion for new trial that it learned during depositions that Ordinance No. 5405 was approved in violation of law, and that Ordinance No. 5406 was also approved in violation of law. It was further argued that counsel for plaintiff did not, in good faith, have a basis for discerning the actions and conduct of the City Council prior to the depositions. (Tr. 16, 17) Counsel did not articulate any new facts learned at the depositions with reference to alleged violations of the Sunshine Law. (Tr. 17) Counsel referred to May 16 (2002) as the date for the depositions. (Tr. 13) We believe that date to be correct, with the exception that the depositions were not completed in a single day. The depositions are not in the record and have never been transcribed. The only references in the record to the depositions appear as docket entries on May 14, 17 and 21, 2002 (LF 3) when notices of plaintiff's intention to depose eleven individuals were filed with the court.

If, as counsel asserted, facts were learned at those depositions in support of a Sunshine Law claim, then the plaintiff at that point had approximately two weeks in the month of May, the entire month of June, and the first nine days of July, 2002 in which to move for leave to file an amended petition, and still be within the one year period of

limitation provided in Section 610.027.4 RSMo. Presumably, even if the plaintiff had filed a separate lawsuit for the enforcement of the Sunshine Law anytime prior to July 9, 2002, the one year anniversary date of the enactment of Ordinance Number 5405, there would have been no statute of limitation problem. The trial court was, therefore, never provided by plaintiff with any reason for its failure to timely move for leave to file its first amended petition, except for the reference to unspecified facts claimed to have been learned as a result of untranscribed depositions taken in May of 2003. The plaintiff has offered no plausable explanation for not moving to file an amended petition prior to July 9, 2002. When attempting to overcome a trial judge's discretionary act in denying a motion for leave to amend, the articulation of factual reasons for the amendment are important. *Curnutt v. Scott Melvin Transport, Inc.*, supra, L.C. 194.

REJ's contention that it should now be allowed to amend its petition to request a remedy under the Sunshine Law becomes even more tenuous in view of the position it has taken with regard to discovery. On October 15, 2001, Raymond C. Leible, in his capacity as Sikeston City Attorney, filed a Certificate of Service in regard to defendant's interrogatories to plaintiff. (LF 1) Those interrogatories and the plaintiff's objections are in the record. (Supp. LF 7, 8, 12-16, 17-21) (Tr. 2, 3, 4) By Interrogatory No. 11, the City inquired as to any contention that the Sunshine Law was violated. The plaintiff objected to that question on the grounds that it "is over-broad, unduly burdensome, and <u>not reasonably calculated to lead to the discovery of admissible evidence</u>". (Supp. LF 20). A motion relative to the objections was argued by telephone conference for which

no record was made. The record does contain a proposed order relative to the discovery issues which was prepared and submitted by Corinne Darvish, one of the attorneys for plaintiff. Counsel for the City responded to the proposed order by letter dated February 1, 2002. (Supp. LF 10, 11)

By that letter, counsel for the defendant City set forth his recollection of the events at the hearing on the objections to interrogatories and informed counsel that the proposed order did not correctly spell out how the discovery issues were resolved. (Supp. LF 10, 11) No other order was ever submitted on that issue nor entered by the court and no response was made to the letter dated February 1, 2002.

The plaintiff is, therefore, in the interesting position of being on record with a refusal to respond to discovery on the issue of the Sunshine Law on the ground that the inquiry into the Sunshine Law is "unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence"; while now claiming that it had pleaded a cause of action for the enforcement of the Sunshine Law from the outset.

This kind of inconsistency is a good illustration of why courts consider a moving party's reasons to be an important factor in evaluating whether a trial court has abused its discretion by refusing to allow an amendment. We submit, in view of the plaintiff's objection to Interrogatory No. 11; its failure to respond to the February 1, 2002 letter; its failure to submit a revised form of order relative to the discovery issues; its failure to supplement its answer to Interrogatory No. 11; its failure to seek leave to amend until faced with dismissal; that the only real reason for the attempted amendment was

to avoid the fact that its suit for declaratory judgment and injunction became moot when the City repealed Ordinance Number 5405.

One of the other factors for consideration on whether a trial court has abused its discretion is whether granting the motion would result in any hardship to the non-moving party. In its brief, REJ, Inc. asserts that the City has offered no facts to support its contention that it will be prejudiced because of an adverse effect on planning and development within the City. The City's contention is described as "laughable". (Appellant's Brief, page 24)

We submit that the efforts by appellant in this case and by Mr. Montgomery in the companion case which he filed against the Scott County Health Department are sufficient in and of themselves to demonstrate the hardship to the City. By the time this case is heard and decided, it will be well over two years during which the City's efforts to plan for the growth and development of the City have been impacted by the two lawsuits.

It is also argued that there is no issue as to the factor of timeliness relative to the Motion to Amend because, it is said, REJ filed its Motion to Amend shortly after taking the depositions of City officials, at which REJ claims to have learned "of the additional facts that were the subject of the First Amended Petition". (Page 24, Appellant's Brief)

Actually, it was a total of fourteen weeks from May 17, the last day of depositions, until August 26, when the plaintiff finally got around to moving for leave to amend its petition. July 9, 2002, when the statute of limitations expired, falls almost exactly in

the middle of that fourteen week period.

Appellant's assertion that the City at no time raised any objection to the timeliness of REJ's Motion for Leave to Amend (Page 24, Appellant's Brief and page 30 of the Substitute Brief) is patently false. The City had no reason to raise an objection to timeliness at any time prior to receipt of the Motion, which was filed in court on August 26, 2002 (LF 4), because it had no way of knowing about the Motion until it was filed. Four days after the Motion was filed, the City raised the issue of timeliness by filing written objections to the Motion for Leave to Amend, along with a supporting Memorandum of Law. (LF 108-117) In paragraph 5 of its objections, the City raised the issue of timeliness by alleging the expiration of the statute of limitations. (LF 109) The issue of timeliness was also raised in paragraphs 7 and 8 of the City's objections. (LF 109) The Memorandum of the City in support of its objections is incorporated into and made a part of the objections. (LF 109) The issue of timeliness is discussed on pages 2, 3 and 4 of the Memorandum. (LF 112-114)

In the Conclusion to its Brief, REJ continues with its contention that the City possessed and concealed from REJ all of the information relating to the passage of Ordinances Number 5405 and 5406. (Page 26 of Appellant's Brief) REJ found it "laughable" that the City raises the issues of prejudice to the City. If there really is anything "laughable" in this case, it is the implication that REJ didn't know what was going on when Ordinance Number 5405 was enacted.

Until faced with dismissal after Ordinance Number 5405 was repealed,

Ordinance Number 5406 had not even been mentioned in this case. REJ's representatives actively participated in opposing the adoption of Ordinance Number 5405 at both the Planning and Zoning Commission stage and at the meeting of the City Council on July 9, 2001, when the ordinances were passed. (LF 7, 8, 33, 34) Moreover, even if REJ's assertion that it only learned of the alleged violations as a result of depositions taken in May of 2002 is taken at face value, it does not explain why REJ waited another fourteen weeks before seeking to amend its petition. During that period, it did absolutely nothing to correct any omissions in its pleadings; and during that period of inactivity, the statute of limitations expired.

Only when it was faced with the reality that its lawsuit had become moot did REJ engage in a knee-jerk reaction to try to salvage its case by attempting to amend its petition.. Ordinance Number 5406 had nothing to do with the zoning issues in this case and was never mentioned until the original claim became moot.

Although REJ claims to have learned facts at depositions in May of 2002 which it argues will demonstrate "pervasive and egregious" conduct on the part of the City of Sikeston (Page 23, Appellant's Brief); and REJ further argues that it was not aware of "the nature and extent of the City's egregious violation" until city officials were deposed in May of 2002 (Page 23, Appellant's Brief), it has failed to even have those depositions transcribed, let alone included in the record. The truth is that all of the real criticisms of the City are directed the adoption of Ordinance Number 5405, which has now vanished in its entirety as a result of having been repealed by the enactment of

Ordinance Number 5491. *C.C. Dillon Company v. City of Eureka*, supra at 325. See the discussion of the impact of the repeal of Ordinance Number 5405 in the City's argument under Point I above.

This is not a case where there was an abuse of discretion on the part of the trial court in refusing to allow an amendment.

C.

EVEN IF THE COURT SHOULD FIND THAT THE TRIAL COURT IS NOT BARRED BY THE STATUTE OF LIMITATIONS FROM GRANTING LEAVE FOR THE FILING OF PLAINTIFF'S FIRST AMENDED PETITION; AND, IF THE COURT FURTHER FINDS THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION, THIS CASE CAN BE REMANDED ONLY FOR THE LIMITED PURPOSE OF A TRIAL ON THE ISSUE OF WHETHER THE CITY OF SIKESTON ACTED IN VIOLATION OF THE SUNSHINE LAW AND, IF SO, THE AMOUNT OF CIVIL FINE WHICH SHOULD BE IMPOSED AGAINST THE CITY, NOT TO EXCEED $500.00; AND WHETHER THERE IS ANY BASIS FOR AN AWARD OF ATTORNEY FEES AGAINST THE CITY. THE CITY COUNCIL MEMBERS AND OTHER CITY OFFICIALS ARE NOT PARTIES AND THE COURT HAS NO JURISDICTION TO IMPOSE A FINE OR ATTORNEY FEES AGAINST ANY OF THEM INDIVIDUALLY. THE COUNCIL MEMBERS AND OTHER CITY OFFICIALS CAN NO LONGER BE ADDED AS DEFENDANTS BY AMENDMENT IN A SUNSHINE LAW CLAIM BECAUSE

THE STATUTE OF LIMITATIONS HAS EXPIRED.

In the First Amended Petition, REJ asserts that it has a viable cause of action under the Sunshine Law against the City, the individual members of the City Council, and "relevant city officials". (LF 87) In paragraph 28 of Count I of the First Amended Petition, it is alleged that the city, as a single entity or through one or more of its members, and city officials including, but not limited to, the City Attorney and City Manager, purposely violated Section 610.027 RSMo. (LF 86)

Presumably the word "members" refers to members of the City Council. We know who holds the offices of City Attorney and City Manager. We are left to guess at the identity of the "other relevant city officials" against whom REJ would seek to impose civil fines.

(LF 87).

This failure to identify the individuals is significant for several reasons. By the time this case is decided, there will have been at least three annual city elections. The generic reference to city council members does not identify the parties against whom REJ would impose civil fines. In addition, the form of municipal government in Sikeston has changed substantially by the adoption of a city charter on April 2, 2002. A copy of the charter is attached to the petition in the Joel Montgomery case. (Supp LF 125-158). The charter changed the number of city council members from five to seven. (Supp LF 126) The turn-over resulting from annual elections and the addition of two members to the council as a result of the charter renders the reference to individual

members of the City Council in the First Amended Petition totally meaningless in the context of a claim for civil fines against individuals.

Moreover, there has never been any attempt to have any individuals added to this case as parties defendant. The only defendant in this case is the City of Sikeston. Nothing in the First Amended Petition would change that.

It is axiomatic that the trial court has no jurisdiction to enter judgment against any individual members of the City Council, nor against the City Manager, the City Attorney, nor any of the other unnamed "relevant city officials". A judgment ordering a defendant to pay money is void when the court has no jurisdiction over the person of the defendant. *Gaffney v. Gaffney,* 528 S.W.2d 738, 742 (Mo, banc 1975) A judgment entered by a court lacking jurisdiction over the parties is void. *Settles v. Settles,* 913 S.W.2d 101, 103-04 (Mo. App. SD 1995) When a court enters judgment when no valid personal jurisdiction has been obtained over the defendant, the judgment is void. *Grooms v. Grange Mutual Casualty Co.,* 32 S.W.3d 618, 621 (Mo. App. ED 2000)

Before a court may rightfully award a money judgment against a party, there must have been either personal service of process on or a general appearance by the party himself or through counsel. *Cloyd v. Cloyd*, 564 S.W.2d 337, 342 (Mo. App. W.D. 1978) When the requirements for service of process are not met, the court lacks power to adjudicate. *West Publishing Co v. Phillips,* 31 S.W.3d 496, 497 (Mo. App. W.D. 2000)

The record in this case is totally devoid of any attempt by REJ to have any of the

Sikeston City Council members or any other city officials named as parties to this lawsuit. It naturally follows that there is no record of any service of process on any of such persons.

The failure of REJ to join as defendants any of the City Council members and "other relevant city officials" is a defect which cannot be cured by a second amended petition, even if this court should find that the trial court erred in overruling REJ's Motion for Leave to File a First Amended Petition. The statute of limitations has already expired, as noted in Part I of this Argument. An amended pleading which seeks to add a party defendant after the expiration of a statute of limitations is not permissible. *Smith v. Overhead Doors Corporation of Texas*, 859 S.W.2d 151, 152 (Mo. App. WD 1993); *Ellison v. Valley View Dairy, Inc.*, 905 S.W.2d 93, 97-98 (Mo. App. SD 1995)

REJ attempts to excuse its delay in pleading a cause of action for remedies under the Sunshine Law with the argument that it learned additional facts "in connection with the City's conduct [and] various city officials conduct that were in violation of both the procedural state law and the Sunshine Law" when depositions were taken. (Tr. 13)

The flaw in this argument is that the depositions which are not in the record were taken in May of 2002, so whatever information REJ claims to have obtained at that time was known to it within the limitations period. The statute of limitations expired on July 9, 2002, the one year anniversary date of the City Council meeting at which ordinances 5405 and 5406 were enacted. No attempt was made to amend REJ's

pleadings until August 26, 2002 (LF 4, 60) and even then no attempt was made to join any individuals as parties-defendant. A plaintiff who has notice of the *identity and potential liability* of a proper party defendant before a statute of limitations expires and yet fails to timely bring that party into the action cannot later do so by amended pleadings after the applicable limitation period has expired. *Tyson v. Dixon*, 859 S.W.2d 758, 763 (Mo. App. WD 1993)

REJ may be attempting to rely on the theory of excusable neglect in its argument that it learned new facts at the depositions. Missouri courts have refused to adopt the excusable neglect theory to permit the addition of a party defendant when the additional party was not joined during the applicable statute of limitations period. *Shroyer v. McCarthy*, 769 S.W.2d 156, 159-160 (Mo. App. W.D. 1989)

There is, therefore, no basis for proceeding against the individual members of the City Council, the City Manager, the City Attorney nor any other city officials in their individual capacity.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the trial court

properly found that when Sikeston City Ordinance No. 5405 was repealed, the issues in the plaintiff's lawsuit became moot and the trial court's judgment of dismissal should be affirmed in its entirety. It is further submitted that the plaintiff's belated attempt to change this case to a suit to enforce remedies under the Sunshine Law was out of time because the statute of limitations for the enforcement of a Sunshine Law claim had expired on July 9, 2002 at the very latest. If, however, the court finds that the trial court had jurisdiction to consider the Motion for Leave to Amend, we further submit that the trial court acted within the proper bounds of its discretion and its judgment should be affirmed on that ground. If the court finds that the trial court still had jurisdiction to entertain an amendment to convert the case to a claim for remedies under the Sunshine Law; and that it abused its discretion by failing to allow the amendment, then we would finally submit that this case can be remanded solely for the purpose of further proceedings to determine whether the City did, in fact, commit a Sunshine Law violation, and if so, the amount which should be awarded to plaintiff as a civil fine, not to exceed $500.00, and whether the violation was purposeful, so as to authorize the assessment of attorney fees if plaintiff is entitled to recover any of its attorney fees under the

Sunshine Law Claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that two (2) copies of the enclosed SUBSTITUTE BRIEF OF RESPONDENT were served upon Mr. James Mello, attorney of record in the above action for Appellant, and upon Mr. John L. Oliver, Jr., attorney of record for Intervenors, by enclosing same in an envelope addressed to said counsel at their regular business addresses as disclosed in the record, and by sending it by regular United States Mail this 18th day of February, 2004.

_

_____

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ATTORNEYS FOR RESPONDENT
City of Sikeston

IN THE SUPREME COURT OF MISSOURI

R.E.J. INC.,)
a Missouri Corporation,)

	Plaintiff/Appellant,	**)**
	vs.	**) Case No. SC85711**
CITY OF SIKESTON,		**)**
	Defendant/Respondent,	**)**
	and	**)**
GREERS GROVE DEVELOPMENT, LP,		**)**
	Intervenors.	**)**

CERTIFICATE AS REQUIRED BY RULE 84.06(c)1-4

1. That the attorney for Respondent, City of Sikeston, does hereby certify, by executing and signing the Respondent's Substitute Brief, that it is representing to the Court that to this attorney's knowledge, information and belief, after making reasonable inquiry, that the contentions and arguments are supported by the evidence in that the arguments of law are honestly debatable under the law of the State of Missouri.

2. That to the best knowledge and belief of counsel for Respondent, the Brief complies with the limitations contained in rule 84.06(b) in that the Brief does not exceed ninety percent of 31,000 words or 2,200 lines of text.

3. That the number of words in the Brief are 12,326.

4. That the number of lines of monospaced type in the Brief are 1240.

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IN THE SUPREME COURT OF MISSOURI

R.E.J. INC.,	**)**

a Missouri Corporation,	**)**
	)
Plaintiff/Appellant,	**)**
	)
vs.	**) Case No. SC85711**
	)
CITY OF SIKESTON,	**)**
	)
Defendant/Respondent,	**)**
	)
and	**)**
	)
GREERS GROVE DEVELOPMENT, LP,	**)**
	)
	)
Intervenors.	**)**

CERTIFICATE AS REQUIRED BY RULE 84.06(g)

That in accordance with Rule 84.06(a), in addition to filing the Substitute Brief of Respondent with the Court, as further required by Rule 84.05(a), a floppy disk is contained, which is double-sided, high density, IBM-PC compatible 1.44 MB, 3 ½ inch size and there is an adhesive label affixed to each disk legibly identifying the caption of the case, the party or amicus curiae filing the disk, the disk number and the word processing format, i.e., WordPerfect 9. Furthermore, the disk has been scanned for viruses and to the best knowledge and belief of the undersigned, it is virus free.

_____

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