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HINKLE ELKOURI LAW FIRM L.L.C.
2000 Epic Center
301 North Main
Wichita, Kansas 67202
(316) 267-2000

FILED

APP DOCKET NO. _____

2010 JUL 26 P 3:54

IN THE EIGHTEENTH JUDICIAL DISTRICT OF DIST. COURT
DISTRICT COURT OF SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

BY _____

JANICE BASTON
and
R. MATTHEW JOYCE,

Plaintiffs,

vs.

CITY OF DERBY, KANSAS a city of the
second class, and KATHLEEN SEXTON, in
her capacity as Derby City Manager,

Defendants.

Pursuant to Chapter 60 of the
Kansas Statutes Annotated.

COPY

Case No. 09 CV 3598

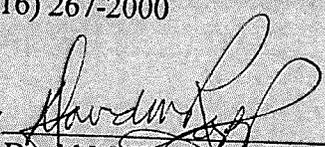
**NOTICE OF HEARING ON CITY OF DERBY, KANSAS AND
KATHLEEN SEXTON IN HER CAPACITY AS DERBY CITY MANAGER'S
MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that the hearing on Defendants' Motion for Summary Judgment in the above-captioned matter will be held before the Honorable Timothy G. Lahey in Division 8, Sedgwick County District Court, Wichita, Kansas on September 2, 2010 in Courtroom 6-3, Sedgwick County Courthouse, 525 N. Main, Wichita, Kansas commencing at 1:30 p.m.

Attended

Respectfully submitted,

HINKLE ELKOURI LAW FIRM L.L.C.
2000 Epic Center
301 North Main
Wichita, Kansas 67202
(316) 267-2000

By 

David M. Rapp - #08802

Roger M. Theis - #07671

Attorneys for Respondents

City of Derby, Kansas and

*Kathleen Sexton, in her capacity
as Derby City Manager.*

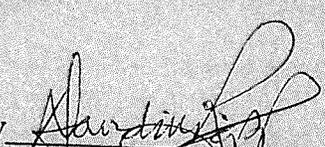
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing **Notice of Hearing on Defendants City of Derby, Kansas and Kathleen B. Sexton, In Her Capacity As Derby City Manager's Motion for Summary Judgment** was forwarded via U.S. Mail addressed to:

Mark Rouleau
The Rouleau Law Firm, P.A.
P.O. Box 780001
Wichita, Kansas 67278
Attorney for Petitioners

on the 26th day of July, 2010, and the original was filed with:

Clerk of the District Court
Sedgwick County Courthouse
525 North Main
Wichita, Kansas 67203

By 

David M. Rapp - #08802

HINKLE ELKOURI LAW FIRM L.L.C.

2000 Epic Center
301 North Main
Wichita, Kansas 67202
(316) 267-2000

FILED _____

2010 JUL 23 PM 4 19

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT OF SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS

BY _____

JANICE BASTON
and
R. MATTHEW JOYCE,

Plaintiffs,

vs.

CITY OF DERBY, KANSAS a city of the
second class, and KATHLEEN SEXTON, in
her capacity as Derby City Manager,

Defendants.

Case No. 09 CV 3598

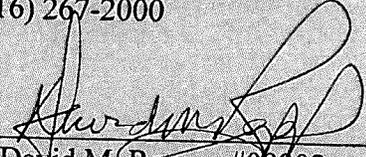
Pursuant to Chapter 60 of the
Kansas Statutes Annotated.

**MOTION FOR SUMMARY JUDGMENT OF
DEFENDANTS CITY OF DERBY, KANSAS AND
KATHLEEN SEXTON, IN HER CAPACITY
AS DERBY CITY MANAGER**

COME NOW Defendants City of Derby, Kansas and Kathleen B. Sexton in her capacity as Derby City Manager, by and through counsel of record, David M. Rapp and Roger M. Theis of Hinkle Elkouri Law Firm L.L.C. and hereby move the Court to grant summary judgment in their behalf pursuant to K.S.A. 60-256 for the reason that there is no genuine dispute as to a material fact and that they are entitled to judgment as a matter of law. Contemporaneously filed herewith are Defendants' Memorandum in Support of their Motion for Summary Judgment and supporting exhibits.

Respectfully submitted,

HINKLE ELKOURI LAW FIRM L.L.C.
2000 Epic Center
301 North Main
Wichita, Kansas 67202
(316) 267-2000

By 

David M. Rapp – #08802

Roger M. Theis – #07671

Attorneys for Respondents

City of Derby, Kansas and

*Kathleen Sexton, in her capacity
as Derby City Manager.*

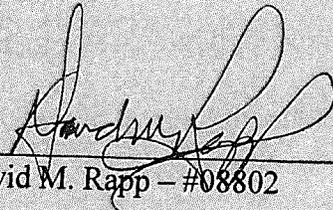
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing **Motion for Summary Judgment of Defendants City of Derby, Kansas and Kathleen Sexton, In Her Capacity As Derby City Manager** was forwarded via U.S. Mail addressed to:

Mark Rouleau
The Rouleau Law Firm, P.A.
P.O. Box 780001
Wichita, Kansas 67278
Attorney for Petitioners

on the 23rd day of July, 2010, and the original was filed with:

Clerk of the District Court
Sedgwick County Courthouse
525 North Main
Wichita, Kansas 67203

By 

David M. Rapp – #08802

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2010 JUL 23 PM 4 19

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT OF SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS
BY _____

JANICE BASTON
and
R. MATTHEW JOYCE,

Plaintiffs,

vs.

CITY OF DERBY, KANSAS a city of the
second class, and KATHLEEN SEXTON, in
her capacity as Derby City Manager,

Defendants.

Case No. 09 CV 3598

Pursuant to Chapter 60 of the
Kansas Statutes Annotated.

**MEMORANDUM OF DEFENDANTS
CITY OF DERBY, KANSAS AND KATHLEEN SEXTON,
IN HER CAPACITY AS DERBY CITY MANAGER, IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION AND SUMMARY.

On September 16, 2009, plaintiffs Janice Baston and R. Matthew Joyce filed this action challenging the validity of an ordinance adopted by the City of Derby regulating residential trash collection and disposal in the City, including a provision authorizing waste collection by a single designated hauler. Specifically, plaintiffs sought declaratory and injunctive relief against the December 1, 2009 implementation of Ordinance No. 1980, contending that the Ordinance was subject to initiative and referendum by the Derby electorate and was invalid as a violation of the Contracts Clause of the United States Constitution for its effect in terminating agreements with

their preferred trash hauler. Following a temporary injunction hearing on October 2, 2009, The Honorable Eric Yost, District Judge, made oral findings and orders, confirmed by a Journal Entry, denying the relief requested on the grounds that: (1) Ordinance 1980 implemented policy previously declared by the Kansas Legislature and was therefore an administrative ordinance exempt from initiative and referendum under K.S.A. 12-3013(e); and (2) the Contract Clause permits abrogation of private contracts pursuant to the reserved police powers of state and local governments to enact legislation promoting a legitimate public interest, such as Ordinance 1980.

Following this adverse ruling, plaintiffs twice filed amended petitions alleging new theories against the validity of the Ordinance, to wit: (1) that the Ordinance's title is deceptive in alleged violation of K.S.A. 12-3004; (2) that the Ordinance's regulation of rates to be charged customers constitutes an unlawful delegation of legislative authority; (3) that benefits received by the City from Waste Connections, Inc., the chosen contractor, exceed the City's costs of regulation rendering the Ordinance a disguised tax and an arbitrary exercise of the police power; and (4) that the franchise fee paid by the contractor to the City is an excise tax allegedly prohibited by K.S.A. 2009 Supp. 12-194. The parties have since stipulated to most of the controlling facts as reflected herein and in the attached Pretrial Order.

Pursuant to K.S.A. 60-256, summary judgment shall be entered when there exists no genuine dispute as to a material fact and a party is entitled to the entry of judgment as a matter of law. There being no genuine dispute here regarding the controlling facts, defendants are entitled to the entry of judgment as a matter of law for the reasons that: (1) the Ordinance is an administrative ordinance exempt from initiative and referendum by Kansas statute; (2) plaintiffs, in their capacity as citizens, do not possess standing to assert alleged public interest theories

claiming illegal taxation and violation of statutes regulating local governmental affairs, which may be brought only by the State or the County Attorney on behalf of the State; (3) the ordinance is a valid exercise of the police powers conferred upon the City by law and plaintiffs can not carry their burden to show that it is arbitrary and capricious , or unreasonably impairs a protected legal interest; (4) the title to the Ordinance reasonably apprises citizens of ordinary intelligence of the contents therein, clearly meeting the requirement of K.S.A. 12-3004; (5) the Ordinance, vesting rate-making authority in the Derby City Council itself, does not delegate legislative power to administrative officials and is not an unconstitutional delegation of legislative authority; (6) the Ordinance does not violate K.S.A. 2009 Supp. 65-3410(a); (7) there is no proof that the benefits received by the City grossly exceed the City's costs of administration and regulation under the Ordinance and the Ordinance is a valid implementation of the City's police power; and (8) the annual fee paid by the contractor to the City is regulatory in nature and not an excise tax. (Plaintiffs' former Contract Clause claim has been abandoned and no argument on that prior issue is presented herein.) These points are set forth in detail below.

II. STATEMENT OF UNCONTROVERTED FACTS.

1. Plaintiff R. Matthew Joyce is, and at all material times has been, an elector and resident of the City of Derby Kansas and resides at 218 Mallard, Derby, Kansas. Plaintiff Joyce was solicited to initiate suit by the owner of Derby Disposal, his then trash collection contractor, who was not awarded the franchise by the City. (Ex. C, Pretrial Order at 11, § 4 (Admissions And Stipulations), ¶ c.; Ex. M, Plaintiff Joyce's Answer to Defs' First Interrogs. at 1, No. 1; *Id.* at 5, No. 15)[All of the referenced Exhibits have been filed together in a separate document].

2. Plaintiff Janice Baston was an elector and resident of the City of Derby until March 1, 2010. On and after that date she resides at 5742 Spruce, Wichita, Kansas. (Ex. C at 11, § 4, ¶ d.).

3. Defendant City of Derby, Kansas, a city of the second class, is a municipal corporation organized and existing under the Constitution and laws of the State of Kansas, whose business address is 611 N. Mulberry Street, Derby, Kansas. Based on the most recent census, the City's population is 22, 923. (*Id.*, ¶ e. ; Ex. K, Aff'd of Kathleen B. Sexton, ¶ 4.),

4. Defendant Kathleen Sexton, in her capacity as Derby City Manager, is and at all material times has been the duly appointed City Manager of the City of Derby. (Ex. C at 12, ¶ f.; Ex. K, ¶ 1).

5. Legislative authority for the City of Derby is vested in and exercised by the Derby City Council. (Ex. C at 12, ¶ g.).

6. In 2008 and before, collection and disposal of residential solid waste in the City of Derby had been performed through multiple contractors individually licensed by the City. In 2008-09, the licensed companies were: (1) Waste Connections, Inc.; (2) Waste Management; (3) Lies Trash Service; and (4) Derby Disposal. Under this system, trucks from these various companies routinely traveled the same streets and served customers at neighboring addresses. (*Id.*, ¶ i.).

7. In June 2008, the City Council directed the City Manager to conduct a study of solid waste disposal in the City and to make recommendations regarding the City's future treatment of waste collection. (*Id.*, ¶ j.).

8. On June 24, 2008, the Council authorized the creation and appointment of a

Recycling/Trash Advisory Board (“the Board”) consisting of six Derby residents to assist the Council in making a determination of the type of trash collection and disposal system that would best serve the City’s needs. The goals of the Board were stated as: (a) help determine the level of service desired by the community; (b) craft specifics of the Request for Proposals (RFPs); (c) evaluate the proposals received from businesses; and (d) make recommendations to the City Council. (*Id.*, ¶ k; Ex. D, Board Minutes (7/22//08) at 1).

9. The Board conducted its study throughout the remainder of 2008. As part of this process, the Board held meetings each month (except for October 2008), advance notice of which was provided to the public in the City’s official newspaper (“The Informer”) and by mail to each of the licensed trash haulers. The City Manager attended each of these meetings. Articles regarding the progress of the study and matters to be considered were contemporaneously published in The Informer and on the City’s website. (Ex. C at 12, ¶ 1.).

10. Included in the Board’s study was the consideration of trash collection systems in other jurisdictions, both locally and nationwide. The study revealed that nationwide approximately fifty-four percent (54%) of municipalities franchised trash collection to private service providers. The study showed that locally, the City of Hutchinson had adopted a franchised collection system, establishing a five percent (5%) fee to be paid by the contractor. (Ex. G, City Council Minutes (2/24/09) at 4).

11. Susan Erlenwein, Director of the Sedgwick County Department of Environmental Resources, attended one or more of the meetings of the Board to provide information regarding the County’s experience with waste collection, including recycling. She advised that Sedgwick County’s experience is that franchised collection results in greater services at lower costs for

municipal residents. She stated that the County's solid waste plan had been in effect for approximately 10 years, and that the County expects all cities in the County to have a solid waste collection contract or franchise in place by January 1, 2011. (Ex. D, Board Minutes (7/22/08) at 1-2).

12. On July 30, 2008, City Engineer Dan Squires sent a memo to the City Manager regarding the "Pavement Impact of Trash Trucks" in comparison to passenger vehicles. The City Engineer concluded that one trash truck is the equivalent of 5,000 to 10,000 passenger vehicles on City streets. The frequent starting and stopping of the trucks further increases damage to the streets. (Ex. C at 12-13, ¶ m; Ex. P, Squires Memo).

13. The findings of the Board were presented to the City Council by the City Manager during the Council's regularly scheduled meeting on November 25, 2008. The Board recommended contracting with a single company for both residential waste and recyclables collection. The City Council directed staff to proceed with the development and issuance of a Request For Proposals (RFPs) to area waste contractors. Council members voted to approve the direction of the Board and the goal of a franchise agreement. However, based on the desires of several Council members to solicit further public input on the issue, final action was deferred until after the public comment period of the December 9, 2008 meeting of the Council. (Ex. C at 13, ¶ n.).

14. The agenda for the Council's meeting of December 9, 2008 gave notice of a public forum to consider the issue of trash collection, including possible transition to a single contractor system. Several citizens appeared and spoke for and against a changeover to a single contractor system. (*Id.*, ¶ o.).

15. On or about January 26, 2009, an RFP was issued by the City Manager to waste collection contractors in Sedgwick County, inviting proposals to become the exclusive residential solid waste contractor in the City of Derby. Proposals were submitted by three firms and one individual, respectively: (1) Waste Connections; (2) Derby Disposal; (3) Waste Management; and (4) Steve McLeland. (*Id.*, ¶ p.).

16. The agenda for the Council's meeting of February 24, 2009 gave notice of the Council's intended consideration of an ordinance permitting adoption of a single contractor system for the collection and disposal of residential trash. Members of the public and the Recycling/Trash Advisory Board addressed the Council. The City Manager presented a staff report regarding the issue, summarizing the study and the proposed Ordinance as follows:

Background:

- Collection, transportation and disposal of solid waste in Derby are currently performed by four private contractors.
- While a permit is required of these contractors, the City does not exercise significant control over services provided or fees charged to customers.
- In establishing its policy priorities, the Council directed staff to examine alternatives to the status quo.
- After reviewing practices throughout the country, the City solicited proposals for residential refuse and recyclables collection and transportation services.
- Several such proposals are expected by the early March submission deadline.
- The proposed ordinance would position the City to execute one or more contracts to authorize collection, transportation, and disposal of residential refuse and recyclables by private firms, with service to begin on or about July 1, 2009.

Financial/Sustainability Considerations

- The proposed ordinance would not entail any direct costs to the City. Indirect costs include staff time associated with development of the Request for Proposals, staffing the Trash/recycling Advisory Board, public communications about the transition to a new system and the ongoing implementation of a curbside recycling program, and development and administration of the contract.
- The contractor(s) selected would pay a franchise fee, anticipated to be 5% of gross revenues, to the City. Such fee revenues would offset the cost to the City for developing and maintaining the program.
- Franchise fee revenue would be available for use as determined by the Council during the annual budget process.

“Direct costs” are “those costs directly attributable to adoption of the ordinance that are also specifically identifiable in the City’s budget and staffing plan.” At the conclusion of the discussion, the proposed ordinance was tabled for one month. (*Id.*, ¶ a; Ex. G, City Council Minutes (2/24/09) at 3-4; Ex. J, Response of Kathleen Sexton to Pls’ First Interrogs., No. 1).

17. Following public notice of the agenda for the March 24, 2009 meeting of the City Council, the Council again considered whether proposed Ordinance 1980, regulating residential solid waste collection and providing single contractor authority, should be adopted. Following a question and answer session between the Council and the City Manager regarding the proposed Ordinance, the Council adopted Ordinance 1980 by an 8-0 vote with an effective date of July 1, 2009. (Ex. C at 13, ¶ r.).

18. The Recycling/Trash Advisory Board again met on March 26, 2009 to discuss issues that might arise from the ordinance’s implementation and to determine whether all parties submitting proposals would be interviewed. The Board voted to eliminate the proposal submitted by Steve McLeland and to interview the remaining three. Waste Management thereafter withdrew its proposal. (*Id.*, ¶ s.).

19. The Board later convened to conduct an interview with and discuss the proposal of Derby Disposal. Everett Reese, owner of the company, appeared for the contractor as well as Mark Rouleau. In response to questions, Reese advised that he started in the business in Derby in 2004 and had five employees in all. The trucks used would be the lightest available. His wife ran the office.

Lies Trash Service would serve as his backup if Derby Disposal experienced personnel or employment issues. The company was not liquid enough to obtain a letter of credit; if the City

was subdivided into zones, Derby Disposal would need approximately 2000 customers to be viable. (*Id.* at 14, ¶ t.; Ex. E, Board Minutes (4/6/09)).

20. On April 9, 2009, the Board convened to conduct an interview and discuss the proposal of Waste Connections. The City Manager, City Attorney, and Susan Erlenwein, Director of the Sedgwick County Department of Environmental Resources, also attended. Jim Spencer and Herschel West attended on behalf of Waste Connections to explain the proposal of Waste Connections. In response to questions, Spencer advised that the company would service Derby by purchasing two new automated trash trucks and two recycle trucks. Trash would be picked up every day, Monday through Friday, while recycling would occur every other week with daily pickup. The trucks, although bigger, have more tires so as to spread the weight and reduce damage to streets. Spencer, having 28 years experience, would be in charge of the contract. Waste Connections would maintain office hours through the week and until noon on Saturdays and would respond to emergencies beyond that. (Ex. C at 14, ¶ u; Ex. F, Board Minutes (4/9/09)).

21. The Board met again on April 14, 2009 to discuss the two proposals. The Board voted 6-0 to recommend awarding the contract to Waste Connections. (Ex. C at 14 ¶ v.).

22. The primary subject on the agenda of the April 28, 2009 meeting of the City Council was the selection of the waste collection contractor under Ordinance 1980. Several citizens spoke during the public comment period. The City Manager presented a staff report again detailing the history of the waste collection study and the prospective selection of Waste Connections as the trash/recyclables contractor. A motion was made to accept the recommendation of the Advisory Board to direct staff to negotiate a contract with Waste

Connections, which was seconded. The motion to adopt the recommendation of the Board was approved by a 7-1 vote. (*Id.*, ¶ w.).

23. Following this meeting, the City began negotiating the terms of a contract for waste and recyclables collection with Waste Connections. (*Id.*, ¶ x.).

24. The agenda for the Council meeting of July 28, 2009 included possible approval of the draft Waste Connections contract and deferral of the effective date of Ordinance 1980. The City Manager presented a staff report outlining the primary terms of the proposed 25 page contract. Among the provisions of the contract was para. 31A, providing that Waste Connections would pay to the City a franchise administration fee of five percent (5%) of its gross revenues actually collected from customers, to be paid quarterly, estimated to total approximately \$60,000 per year. The Contract also provides for receipt of cost-free collection services to the City. A proposed Ordinance No. 1991 was considered to defer the effective date of Ordinance 1980 to December 1, 2009 to coincide with the negotiated contract. Following a Q & A among the Council, the City Manager, the City Attorney and Jim Spencer, the Council voted to approve the contract by an 8-0 margin and adopted Ordinance 1991 by a similar vote. (*Id.* at 15, ¶ y.; Ex. B, Contract at 11, ¶ 16; *Id.*, at 16, ¶ 31A; Ex. I, City Council Minutes (7/28/09) at 7).

25. The rates for trash and recyclables approved by the City Council represented a cost reduction for most residents in the City of Derby. (Ex. I, City Council Minutes (7/28/09) at 7).

26. After adoption of ordinance 1980, the City published website notices to residents regarding steps to facilitate transition to the single contractor system. (Ex. C at 15, ¶ z.).

27. On October 27, 2009, the City Council adopted Ordinance 1997, modifying

certain provisions of Ordinance 1980¹. (*Id.*, ¶ aa.).

28. K.S.A. 65-3401 *et seq.* authorizes the creation of solid waste management plans at the regional or county level. Pursuant to statute, Sedgwick County has adopted the Sedgwick County Solid Waste Management Plan which includes the City of Derby. (*Id.*, ¶ bb).

29. Following adoption of Ordinance 1980, some City residents, including Plaintiffs, circulated a petition seeking its repeal. On May 6, 2009, upon review of the petition, the Sedgwick County Counselor determined that the form of the question complied with Kansas law. The County Counselor did not address whether the subject matter of the proposed repealing ordinance was legally appropriate for placement on the ballot. On August 12, 2009, the proposed repealing ordinance was presented to the City. (*Id.*, ¶¶ cc. and dd.).

30. Kansas law governing the initiative and referendum process requires that a citizen petition seeking a referendum on proposed legislation contain a sufficient number of signatures as one of the prerequisites to placement on the ballot. On August 14, 2009, Sedgwick County Election Commissioner, Bill Gale, certified that the petition contained a sufficient number of signatures (436 electors total, surpassing the requirement of forty percent (40%) of the electors who voted in the last City election in the City of Derby). The City of Derby currently has 12,948 registered voters. (*Id.*, ¶ ee.; Ex. K, Aff'd. of Kathleen B. Sexton, ¶ 4).

31. Pursuant to K.S.A. 12-3013(e), ordinances that are administrative in nature are not subject to a vote of local electors. On September 8, 2009, the City Attorney advised that the

¹ Ordinance 1997 made several relatively minor changes to Ordinance 1980 and constitutes the governing provision here. Defendants therefore refer to the "Ordinance" (singular) throughout this Memorandum to avoid duplication and to Ordinance 1997 where specific reference is made in discussion of the issues.

ordinance was administrative in nature and not subject to initiative and referendum. The City Council determined that, pursuant to K.S.A. 12-3013(e), it was not required to act on the petition. (Ex. C at 15-16, ¶¶ ff. and gg.).

32. On September 16, 2009, Plaintiffs filed a Petition in the District Court of Sedgwick County challenging Defendants' failure to take action on the petition ordinance. The Petition also alleged a violation of rights under the Contract Clause of the United States Constitution. Additionally, Plaintiffs sought a temporary injunction prohibiting the City from taking measures to implement Ordinance 1980 on and before its December 1, 2009 effective date. On October 1, 2009, Defendants filed their Memorandum in Opposition to Plaintiffs' Motion for Temporary Injunction. (*Id.* at 16, ¶¶ hh. and ii.).

33. On October 2, 2009, a hearing was held on Plaintiffs' application for temporary injunction before Judge Eric R. Yost. At the conclusion of the hearing, the district court denied the application and on October 9, 2009, entered a Journal Entry holding in material part as follows (¶¶ 5-7):

"5. The question whether the Ordinance is administrative or legislative is governed by the Kansas Supreme Court's decision in *McAlister v. City of Fairway*, ____, Kan. ____, 212 P.3d 184 (2009). *McAlister* sets forth a four-factor test as follows:

1. An ordinance that makes new law is legislative; while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance.
2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative.
3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of policy.
4. [I]f the subject is one of statewide concern in which the legislature has delegated decision-making power, not to the local electors, but to the local council

or board as the state's designated agent for local implementation of state policy, the action receives an 'administrative' characterization, [and] hence is outside the scope of the initiative and referendum. 212 P.3d at 194-95.

6. The Court does hereby find that: factor 1 is administrative; that factor 2 is more legislative than administrative; that factor 3 is not predominately either legislative or administrative; and that factor 4 is administrative. The Court finds that factors 1 and 4 predominate and that Ordinance No. 1980 executes policy created by the Kansas Legislature rendering the Ordinance administrative in nature and not subject to initiative and referendum.

7. The Court further finds that the Ordinance constitutes a legitimate and reasonable exercise of the police powers conferred upon the City by law and that petitioners have not demonstrated a violation of the Contract Clause." (*Id.* at 16-17, ¶ jj.).

34. On October 28, 2009, Plaintiffs, without Defendants' consent or seeking leave of the court, filed a "Motion for the Amendment of Petition for Declaratory Judgment Adding A Cause of Action For an Illegal Contract Entered Into by Respondents in the Implementation of Derby City Ordinance 1980." Following consultation between counsel for the parties, Defendants consented to the entry of an agreed order permitting the filing of an amendment. (*Id.* at 17, ¶ ll.).

35. On November 23, 2009, Plaintiffs filed an "Amendment of Petition for Declaratory Judgment Adding Causes of Action for City Ordinance That Exceeds Police Power, Illegal Implementation of City Ordinance, and Unlawful Delegation of Legislative Authority ("Amended Petition"). On December 11, 2009, Defendants timely filed their Answer to the Amended Petition denying Plaintiffs' allegations and presenting additional defenses. (*Id.*, ¶¶ mm. and nn.).

36. On December 11, 2009, without seeking Defendants' consent or leave of court, Plaintiffs filed a document entitled "Amendment of Petition for Declaratory Judgment Adding Causes of Action for Derby City Ordinances 1980 and 1997 Violating K.S.A. 12-3004 and

K.S.A. 12-194.” Following consultation between counsel for the parties, Defendants’ consented to the entry of an agreed order permitting the filing of an amendment. (*Id.*, ¶ 00.).

37. On December 23, 2009, Plaintiffs then filed their “Second Amendment of Petition for Declaratory Judgment Adding Causes of Action for Derby City Ordinances 1980 and 1997 Violating K.S.A. 12-3004 and K.S.A. 12-194 (“Second Amended Petition”). On January 12, 2010, Defendants timely filed their Answer to the Second Amended Petition denying Plaintiffs’ allegations and presenting additional defenses. (*Id.* at 17-18, ¶¶ pp. and qq.)

38. On April 7, 2010, the City received the initial payment from Waste Connections pursuant to the contract in the amount of \$19,714.58 for the period December 1, 2009 to March 31, 2010. (Ex. Q, City’s Response to Plaintiffs’ Third Interrogatories, No. 12).

39. The annualized value of the cost-free services provided to the City by Waste Connections is \$43,308.20. The company currently serves 6,904 residential customers in the City. (Ex. K, Aff’d. of Kathleen B. Sexton, ¶¶ 2-3).

III. PLAINTIFFS’ CHALLENGES TO THE CITY ORDINANCE ARE INVALID AS A MATTER OF LAW.

A. The Standard For Summary Judgment.

Like all plaintiffs, plaintiffs seeking injunctive and other equitable relief have the burden of proof to demonstrate entitlement to relief. *Gen’l Bldg Contractors, L.L.C. v. Board of County Comm’ s*, 275 Kan. 525, 542, 66 P.3d 873 (2003). Where, as here, a plaintiff challenges the validity of an ordinance or other official action of a municipal governing body, the action is clothed with a presumption of regularity placing the burden on the challenger to clearly demonstrate legal infirmity. *Executive Aircraft Consulting, Inc. v. City of Newton*, 252 Kan. 421, 424, 845 P.2d 57 (1993).

The established standard for summary judgment was recently described by the Kansas Supreme Court in *Miller v. Westport Ins. Corp.*, 288 Kan. 27, 32, 200 P.3d 419 (2009)(internal punctuation and citation omitted):

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.

The evidence produced must be legally sufficient to support a finding by a jury or finder of fact in favor of the nonmovant to allow entry of judgment in its behalf. *Razorback Contractors of Kan. v. Board of County Comm'rs*, ___ Kan. App. 2d ___, 227 P.3d 29, 40 (2010)(to create a genuine issue of fact to avoid summary judgment, nonmovant was required to produce evidence “from which a jury could conclude” that Board waived its right to notice); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)(to avoid summary judgment, nonmovant must show that “the evidence is such that a reasonable jury could return a verdict for the nonmoving party”).

As explained by the Supreme Court in *Unif. Sch. Dist. No. 232 v. CWD Investments, LLC*, 288 Kan. 536, 555, 205 P.3d 1245 (2009), the moving party satisfies its summary judgment obligation by showing the absence of evidence by the nonmovant to prove a material element of its case:

[W]e agree with the United States Supreme Court that the burden is not on ‘the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, . . . the burden on the moving party may be discharged by ‘showing’ – that is, pointing out to the district court –

that there is an absence of evidence to support the nonmoving party's case. (emphasis in original, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Defendants are entitled to judgment as a matter of law under these governing standards.

B. The Ordinance Is Administrative In Nature And Statutorily Exempt From Initiative and Referendum.

1. Ordinance No. 1997 Implements A State Statutory Policy To Comprehensively Regulate Solid Waste Collection And Is Administrative In Nature.

a. Ordinances Adopted To Execute State-Declared Policy And Exercising Decision-Making Authority Granted To Local Governing Bodies By Statute Are Administrative In Character And Not Subject To Initiative Or Referendum.

Where state statutes delegate decision-making authority directly to local governing bodies to carry out policy declared by the legislature, ordinances adopted in furtherance thereof are not subject to the initiative or referendum process. This basic principle is well-stated in the leading treatise on local government law, McQuillin, *Municipal Corporations* (3d ed.), as follows:

The power of initiative or referendum usually is restricted to legislative ordinances, resolutions or measures, and is not extended to executive or administrative action, although a city charter may dispense with this distinction.... It has been said, however, that if the subject is one of statewide concern in which the legislature has delegated decision-making power, not to the local electors, but to the local council or board as the state's designated agent for local implementation of state policy, the action receives an 'administrative' characterization, hence is outside the scope of the initiative and referendum." 5 McQuillin, §16.54, at 194-95.

Consistent with this established principle, Kansas statutes expressly remove administrative ordinances from the initiative and referendum process. K.S.A. 12-3013(e). This provision has been enforced by Kansas courts to prohibit administrative ordinances from reexamination by local electorates. *Rauh v. City of Hutchinson*, 223 Kan. 514, Syl. ¶2, 575 P.2d

517 (1978) (“Administrative action of the governing body of a city is not subject to initiative and referendum under K.S.A. 12-3013.”).

The Kansas Supreme Court recently revisited the criteria for determining whether a challenged ordinance is legislative or administrative in nature in *McAlister v. City of Fairway*, 289 Kan. 391, 212 P.3d 184 (2009). The question arose after the City of Fairway studied the need for construction of a new city building, the prospective location of which became the focal point of controversy. Several local residents proceeded to draft a proposed ordinance excluding the building from certain areas of the City; a petition to place the ordinance on the ballot garnered sufficient signatures but, as here, the County Counselor did not pass on the validity of the subject matter of the ordinance. The protestors also drafted a separate commercial development ordinance prohibiting such development in the City’s residential and historic areas. Following the City Council’s determination that the ordinances were administrative and not subject to K.S.A. 12-3013, protesting citizens brought an action in district court. The district court upheld the City’s determination, prompting appeal to the Supreme Court.

At the outset, the Supreme Court emphasized that Kansas courts “have never adopted a ‘liberal’ view of the matters which should be subject to initiative and referendum, but quite the contrary.” 289 Kan. at 401 (quoting *City of Lawrence v. McArdle*, 214 Kan. 862, 870, 522 P.2d 420 (1974)). The Court pointed out that “no single act of a governing body is ever likely to be solely legislative or solely administrative.” *Id.* at 402. The determination in any case depends upon the particular facts and circumstances, *Id.*; one factor may so clearly apply and predominate as to itself control the decision in an individual case. *Id.* at 405 (“Finally, we believe it is important to point out that we will not view any one guideline as necessarily controlling over the

others. We will give consideration to each guideline before reaching a final decision. But in doing so, we acknowledge it is possible the weight given to any one guideline may be enough under a particular factual situation to decide that a proposed ordinance intrudes too far into a city's administrative arena. That is a matter best determined in each case.”).

Turning then to the general standards governing the inquiry, the Court reaffirmed the guidelines previously stated in *McArdle* which it rephrased in the following terms:

1. An ordinance that makes new law is legislative; while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance.
2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative.
3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of policy.” *Id.* at 403 (citations omitted)

To these three *McArdle* factors, the Court added a fourth:

“ “[I]f the subject is one of statewide concern in which the legislature has delegated decision-making power, not to the local electors, but to the local council or board as the state's designated agent for local implementation of state policy, the action receives an ‘administrative’ characterization, [and] hence is outside the scope of the initiative and referendum.” *Id.* at 195 (quoting *Rauh v. City of Hutchinson*, 223 Kan. at 519-20 (quoting 5 *McQuillin, Municipal Corporations*, §16.54, at 404-05 (3d ed Rev. 2004))). See also *Id.* (“we will employ the three *McArdle* guidelines and add the language from *Rauh* as a fourth guideline...”). *Id.* at 404.

Applying these guidelines, the Court held that under the first factor, the proposed city hall location ordinance created a new law and was legislative in character. The Court also determined

that the ordinance declared a public purpose (2d factor) and did not address a matter of statewide concern (4th factor), both of which tended to render it legislative in nature. However, finding that local administrative expertise was involved in the location and zoning of property, the Court held that this factor predominated, resulting in a holding that the location ordinance was administrative in nature and therefore not subject to initiative and referendum. *Id.* at 411.

As noted, the Court also applied these guidelines to a separate petition seeking to prevent the City from rezoning or using eminent domain for commercial development in the City's residential or historic areas. Finding that the proposed petition would modify the City's existing development plans and ordinances, and limit execution of existing law, the Court held that the first factor was administrative. While the proposed ordinance declared a public purpose, it would operate within the City's existing ordinances and was neither principally legislative nor administrative under factor two. The effect of the ordinance would lock the City within its current zoning pattern over 90 percent of its boundaries – such an effect and its consequences required administrative expertise, rendering factor three administrative. Finally, the ordinance would diminish authority granted the City (and other entities) by statute to acquire property by eminent domain and thus encroached on a matter of statewide concern as expressed in the Eminent Domain Act and other property acquisition statutes, rendering factor four administrative. *Id.*, at 413-17. The Court held the development ordinance to be predominately administrative in character and not subject to a vote of the local electorate.

The application of *McAlister* to Ordinance No. 1980 is examined in subsection b.

b. **Ordinance No. 1997, Modifying Existing City Waste Collection Ordinances And Executing Authority Granted By The Legislature Over Solid Waste Disposal, Is Administrative In Character And Not Subject To K.S.A. 12-3013**

(1) **Existing Law Regarding Solid Waste Collection And Disposal In Kansas And Its Municipalities**

The collection and management of solid wastes is a matter of statewide concern. Via K.S.A. 65-3401, *et seq.* (Solid Waste Act), the Kansas Legislature has enacted a comprehensive regulatory scheme regarding the collection, processing, and sanitary disposal of solid waste generated throughout the state. K.S.A. 65-3401 “declare[s] that protection of the health and welfare of the citizens of Kansas requires the safe and sanitary disposal of solid wastes.” In order to redress pre-existing inadequate regulation of the subject, the Legislature further declared that “it is the policy of the state to: (a) [e]stablish and maintain a cooperative state and local program of planning and technical and financial assistance for comprehensive solid waste management.” K.S.A. 65-3401(a). Strategies to “reduce, reuse, and recycle materials” are a declared means to further these legislative objectives. “Solid waste” is defined to specifically include “garbage, refuse. . . and other discarded materials.” K.S.A. 2009 Supp. 65-3402(a).

Supervision of this comprehensive scheme is placed under the direction of the Kansas Department of Health and Environment (KDHE) which has extensively regulated in the area. K.S.A. 65-3406 (describing duties of KDHE Secretary); KAR 28-29-2 *et seq.* The statutory goal of development of consistent and coordinated regulation of solid waste is implemented in part by K.S.A. 65-3405(a)’s requirement that each county develop and “submit to the secretary, a workable plan for the management of solid waste in such county.” *See also State v. Moore*, 237

Kan. 523, 534, 701 P.2d 684 (1985) (“[C]ounties by statute are required to organize county solid waste management committees and develop plans for management of solid waste within the county or city.”). K.S.A. 2009 Supp. 65-3410(a) then authorizes cities and counties to “provide for the storage, collection, transportation, processing, and disposal of solid wastes and recyclables generated within its boundaries,” and/or to contract therefor.

Implementing this statutory mandate for creation of coordinated and cooperative local waste management plans, Sedgwick County has developed its Solid Waste Management Plan, including all municipalities in Sedgwick County, particularly including the City of Derby. Consistent with statutorily-declared policy, the Plan promotes a system of waste collection/disposal which is efficiently managed and designed to lessen impact on the public infrastructure. The Plan encourages local efforts to franchise trash collection to a single entity to further these goals. Further evidence of statewide concern regarding waste disposal is manifested by K.S.A. 12-2101 *et seq.* Thus, K.S.A. 12-2102 specifically confers authority upon “[t]he governing body of any city” [to] “provide for the collection and disposal of garbage or trash” as either a strictly municipal function or by contract with private entities engaged in the business. Specifically applicable here is K.S.A. 12-2103, again conferring authority directly upon “the governing body” of any city to enter contracts such as challenged here by petitioners:

“When the governing body decides to provide for the collection and disposal of garbage or trash or both by contract or as a municipal function it shall pass an ordinance describing the duties of persons, householders, business establishments, industrial and manufacturing plants and others as regards garbage and trash and may prohibit others than the contractor or city from making collections.”

Cross-referencing K.S.A. 65-3410, K.S.A. 12-2110 further authorizes cities to license waste collectors and limit their number to promote coordinated and efficient collection and

disposal:

“The governing body of any city which provides no refuse or solid waste collection and disposal service as herein specified or as authorized by K.S.A. 65-3410 may regulate and license garbage or trash collectors, or both, and limit the number of licenses and pass ordinances as authorized by K.S.A. 12-2106 and 65-3410.”

Ordinance No. 1997 does not mark the City of Derby’s initial entry into the realm of solid waste regulation. For many years preceding the consideration and adoption of Ordinance No. 1997, the City had adopted a series of ordinances regulating collection, transportation, and disposal of commercial and residential refuse, providing for the licensing and regulation of private contractors. Ch. 5.28, Derby Municipal Code. As stated in the preamble to Ordinance No. 1997, the new ordinance serves to amend existing law in the City of Derby. *Id.*, §1.

(2) The McAlister Factors Show That The Ordinance Is Principally Administrative In Character.

1st Factor – Whether the Ordinance makes a new law or executes existing law.

The subject matter of the Ordinance is not a matter of first impression arising from a regulatory vacuum where no government has previously tread. To the contrary, the Ordinance executes state policy as expressly declared by the Kansas Legislature in furtherance of the statutorily- mandated Sedgwick County Waste Management Plan. The Ordinance’s provision for entry into an agreement with a single contractor is not a policy developed by the City’s governing body but rather executes specific authority conferred by K.S.A. 12-2103 – the State has created the policy authorizing municipalities to engage a single contractor for disposal of solid wastes which may then be executed by local government. The heavy footprint of the Kansas Legislature over the subject of solid waste collection and disposal is manifest from even a cursory review of

state statutes.

Moreover, the Ordinance does not mark the City of Derby's initial entry into the regulation of solid waste. By its terms, the Ordinance modifies previously-existing ordinances of the City addressing the substance and manner of trash collection within the City's boundaries by amending Chapter 5.28 of the City Code. The fact that it does so in greater detail than the prior ordinances does not render it a new law. Like the commercial development ordinance championed by the citizen protestors in *McAlister*, the Ordinance's modification of existing ordinances is administrative in nature.

Plaintiffs' argument that the Ordinance is legislative because the Kansas Legislature merely authorized, but did not mandate, agreements with an exclusive contractor, misapprehends the nature of the inquiry. The question is not whether the City is ministerially-mandated to execute an unyielding state policy but whether state statutes have substantively developed a policy which may then be executed by local government. Here, the City of Derby has not fashioned policy regarding exclusive contracts but is exercising a policy choice enacted by the Legislature. This act is therefore administrative – not legislative.

Plaintiffs' parallel argument that K.S.A. 12-2103 is merely an enabling statute providing no standard is, for the same reasons, wrong. The *McAlister* Court held that a statute merely authorizing a city to acquire public buildings set forth no policy regarding where such a building could be located and that location of city hall was not an execution of state policy. In contrast here, the legislature has expressly authorized the very thing addressed by the Ordinance and complained of by petitioners – substantively authorizing cities to enter contracts with a single hauler. The City's execution of this policy could not more clearly be administrative.

2nd Factor – Whether the Ordinance declares a public purpose and provides ways to accomplish that purpose and/or deals with a small segment of an overall policy question.

The Ordinance does not declare a public purpose. Clearly, its intent is to promote efficiencies in trash collection through regulation of a single hauler and enhance health and sanitation in the City of Derby through regulations executing authority granted by the Legislature. Undoubtedly, the point of concern to petitioners prompting this suit is the provision authorizing a single contractor, a small segment of the Ordinance overall. This factor is neither principally legislative or administrative and at most for plaintiffs, mildly tends toward legislative in character.

3rd Factor – Whether the Ordinance involves matters requiring specialized training and experience in municipal government.

The third *McAlister* factor focuses on whether the subject matter of the ordinance and its operation and implementation implicate matters requiring administrative expertise or knowledge of the financial affairs of city government. The subject matter of the Ordinance and its administration by the City once in operation clearly do require an intimate knowledge of governmental affairs and administrative coordination of a number of different regulatory areas, including finance and regulation of service rates. Implementing the Ordinance, the negotiated contract places a number of requirements upon Waste Connections, including billing and collection; records maintenance for compliance with environmental statutes; inspection and audit of the contractor by the City; submission of reports to the City; issuance of a letter of credit of over a million dollars for the benefit of the City; and maintenance of insurance coverage. (Ex. B, Contract at ¶¶ 24, 26, 28, 29, 36 and 37). Application of the Ordinance thus involves financial and regulatory matters requiring keen administrative oversight in order to regulate the contractor

and maintain an efficient and safe method of waste collection in the City. The implementation and administration of the Ordinance renders this factor administrative in nature.

4th Factor – Whether the subject matter of the Ordinance is one of statewide concern whereby the legislature has delegated decision making power directly to the governing body rather than its citizens.

Waste collection and disposal is the focus of numerous Kansas statutes and regulations clearly evincing state concern over the development of efficient, coordinated, and sanitary systems for trash and recyclables collection and disposal. The very matter targeted by plaintiffs in their protest, the decision of the City Council to perform trash collection via a single contractor, has been specifically delegated by the Kansas Legislature to “the governing body” of the City of Derby. As held in *McAlister*, where “the legislature delegates decision-making power to local councils or boards rather than local electors, the city’s action is administrative in character.” 289 Kan. at 392, Syl. ¶10. Factor four is purely administrative.

Clearly, by adoption of the Ordinance, the City of Derby did not act in a regulatory vacuum or develop policy from whole-cloth but rather executed policies designed by the Legislature pursuant to express grants of authority to its governing body to so act. The first and fourth *McAlister* factors are dominantly, and indeed, purely administrative in character while its second and third factors are collectively neutral, one tending toward legislative (2d) and the other administrative (3d). Noteworthy is the fact that in *McAlister*, a strong showing on a single factor (there, factor 3) rendered the location ordinance administrative even where the other factors were each determined to be legislative; the Court held that one factor may so predominate as to itself determine the result. Here, the first and fourth factors predominate and compel a conclusion that Ordinance 1980 is administrative. *McAlister*, moreover, reaffirms a long tradition of judicial

refusal to accord liberal construction to the initiative/referendum statutes, requiring plaintiffs here to carry a strict and heavy burden of proof. Plaintiffs cannot do so and the substantive right they assert for the receipt of injunctive relief is plainly devoid of merit.

(3) **Cases Addressing Protests To Single Contractor Waste Ordinances Hold That They are Not Subject To Initiative or Referendum.**

The Ohio Supreme Court has recently rejected a challenge virtually identical to that made by plaintiffs here. *State ex rel. City of Upper Arlington v. Franklin Co. Bd. of Elections*, 895 N.E. 2d 177 (Oh. 2008). The City of Upper Arlington adopted an ordinance authorizing the city manager to enter into a contract with a single contractor for collection and processing of the city's trash. The effect of the ordinance was to change the city's method of trash collection from a city-run system to one of privatization. Like here, certain electors disapproving of the measure acquired sufficient signatures on a protest petition calling for repeal of the ordinance by plebiscite. Contending that the ordinance was administrative in nature, the city filed an action to enjoin the election commissioner from placing the proposed repealer on the ballot.

In Ohio, “[t]he test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence.” *Id.* at 181 (internal citation omitted). Finding that the city had existing ordinances regulating trash collection, including one authorizing the city manager to enter contracts for waste disposal, the Ohio Supreme Court held that the single contractor ordinance merely executed or administered a law already in place. *Id.* at 182 (“[A]n act or resolution which merely carries out the policy or purpose already declared by the legislative body’ is an administrative action that is not subject to

initiative.”) (internal citation omitted). As did the City of Upper Arlington, the City of Derby here merely executed a law already in existence in adopting its single contractor ordinance – authority granted by K.S.A. 12-2103 to do precisely what it did. Plaintiffs have no right to interfere with or second-guess the Kansas Legislature’s delegation of authority to “the governing body” of the City of Derby. *See also Jack Gray Transport, Inc. v. Ervin*, 833 P.2d 1349 (Or. App. 1992) (similarly holding that city’s action in arranging for waste disposal by a single entity was administrative action not subject to electoral challenge). These cases, directly on point, confirm the determination resulting from application of the *McAlister* factors themselves - Ordinance 1997 is administrative and is exempted from a plebiscite under K.S.A. 12-3013(e).

Following a hearing on October 2, 2009, Judge Yost, applying the *McAlister* factors, held that the Ordinance was administrative and not subject to the initiative and referendum process.

Specifically, the court ruled:

The Court does hereby find that: factor 1 is administrative; that factor 2 is more legislative than administrative; that factor 3 is not predominately either legislative or administrative; and that factor 4 is administrative. The Court finds that factors 1 and 4 predominate and that Ordinance No. 1980 executes policy created by the Kansas Legislature rendering the Ordinance administrative in nature and not subject to initiative and referendum.

This eminently correct ruling constitutes the law of the case and should be followed here.

C. **Plaintiffs Have Shown No Special Injury And Do Not Have Standing To Challenge The Validity Of The Ordinance Or The Operation Of The Franchise.**

Kansas law requires any potential plaintiff to demonstrate cognizable harm before he/she may possess standing to sue. Where a challenge to governmental action is involved, Kansas law requires a showing of special injury distinct from that of other citizens in order for a citizen to possess standing to challenge official action by public officers. Kansas law additionally requires

that issues involving claimed violations of statutory duties by public officers or other claimed abuses of official powers affecting the public at large be brought by the State (usually by the Attorney General) or by an official delegated authority by the State (usually by the County Attorney or Counselor). Failing to meet these standards, plaintiffs' various claims of unlawful taxation and abuse of governmental authority in adoption and implementation of the Ordinance should be dismissed for lack of jurisdiction.

1. **Kansas Law Of Standing.**

“Standing is a question of whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” *312 Educ. Ass’n v. U.S.D. No. 312*, 273 Kan. 875, 882, 47 P.3d 383 (2002)(quoting *Warth v. Seldin*, 422 U.S. 490, 495 (1975)). “In order to have standing to file suit in Kansas courts [], a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct.” *Board of County Comm’rs v. Bremby*, 286 Kan. 745, 761, 189 P. 3d 494 (2008) (citing, *inter alia*, *Moorhouse v. City of Wichita*, 259 Kan. 570, 574, 913 P.2d 172 (1996)). Ordinarily, “a private person, merely by virtue of being a citizen and taxpayer, may not maintain an action against a public board or its members unless the person pleads and proves that as a result of the action complained of, he or she has or will suffer special damage distinct in kind from that of the public generally.” *Bonner Springs U.S.D. 204 v. Blue Valley U.S.D.*, 32 Kan.App.2d 1104, 1110, 95 P.3d 655 (2004). Thus, suits seeking to require a public official to comply with a legal duty must “be brought by the state on the relation of the county attorney or the attorney general” and can not be maintained by private litigants. *Smith v. City of Prairie*

Village, 175 Kan. 469, 471-72, 264 P.2d 1053 (1953). Standing implicates the court's jurisdiction and its existence presents a question of law. *Bremby*, 286 Kan. at 500.

These principles have been applied in a number of cases demonstrating plaintiffs' lack of standing here to challenge fees they do not pay. Thus, in *KAKE-TV & Radio, Inc. v. City of Wichita*, 213 Kan. 537, 516 P.2d 929 (1973), the Supreme Court held that the plaintiff, a competing entity with a cable company granted a franchise by the City, did not possess standing to bring a declaratory judgment action against city officials challenging the validity of the franchise. Quoting the *McQuillin* Treatise, the Court confirmed that "[u]sually a taxpayer or an abutting owner cannot attack the validity of a franchise, at least unless he sustains some special injury because of it, or unless the right to test the validity of the franchise is granted to private persons by statute." 213 Kan. at 541. Similarly, in *Haines v. Rural High Sch. Dist. No. 3*, 171 Kan. 271, 232 P.2d 437 (1951), the Court denied standing to citizens seeking to enjoin the alleged illegal expenditure of public funds since the plaintiffs had not demonstrated that "any tax or assessment to be levied is peculiar to them as different from the burden to be cast upon the general taxpayers of the district involved." 171 Kan. at 274 (citations and internal punctuation omitted). Absent a specific statute conferring individual standing or a showing of "special damage different in kind from that of the public generally," an individual citizen possesses no standing to obtain injunctive relief against alleged abuses of power by municipal officers and "[s]uch actions must be presented by the state or one of its officers charged with the responsibility

of scrutinizing the acts of public officers.”² *Id.* at Syl. ¶¶ 1 and 2. Moreover, absent a showing of special injury, a citizen is without standing to challenge how a local government uses public funds. *Crow v. Bd. of County Comm’rs*, 243 Kan. 287, 290, 755 P.2d 545 (1988)(“[Plaintiff’s] objection is to the use of tax funds. Absent a showing he was injured differently than other members of the public, [plaintiff] has no standing to raise the issue); *Weinlood v. Simmons*, 262 Kan. 259, 267, 936 P.2d 238 (1997)(plaintiffs were without standing to challenge use of service fees imposed by public official; “interests to protect the public at large must be brought by the proper public official”).

Specific to this very situation, the decision in *State ex rel. Brewster v. Cumiskey*, 97 Kan. 343, 155 P.47 (1916), involving a suit by the Attorney General challenging the legality of an inspection fee, demonstrates by example that citizens at large lack standing to challenge the validity of regulatory charges. Further reinforcing the rule prohibiting individual suits regarding matters affecting the public at large, the Court in *Linsea v. Board of County Comm’rs*, 12 Kan App. 2d 657, 753 P.2d 1292 (1988), rejected, for lack of standing, a citizen suit brought to enjoin the removal of trees from the courthouse lawn on the basis that the citizen-taxpayer plaintiffs had not shown “a special injury not suffered by other citizens and taxpayers of Chase County.” 12 Kan.App.2d at 661. Equally relevant also are cases such as *Rector v. City and County of Denver*, 348 F.3d 935 (10th Cir. 2003) holding that persons who do not pay a fee alleged to be illegal are without

² In apparent recognition of this principle, the plaintiffs filed their initial petition describing the plaintiffs as “*State ex rel. Janice Baston v. City of Derby*, a city of second class, and Kathleen Sexton, in her Capacity as Derby City Manager” despite the absence of any such official as a party-plaintiff. Plaintiffs have since filed amended petitions naming only themselves as the plaintiffs herein.

standing to challenge it.

As shown below, these principles negate plaintiffs' standing to assert the claims made in this case.

2. Plaintiffs' Lack Of Standing.

Plaintiffs described themselves as residents of the City of Derby in their original petition and amended petitions. Discovery shows that plaintiff Janice Baston now resides in the City of Wichita and is no longer subject to the jurisdiction of the City of Derby. (Stat. of Uncont. Fact, ¶ 2). Before proceeding to the broader question of lack of standing for the claims asserted, it is evident that putative plaintiff Janice Baston lacks standing to assert claims for declaratory relief against a jurisdiction she does not inhabit and she should be dismissed from the action.

There is also a legitimate question revealed by the record regarding whether plaintiff Joyce is a true plaintiff in his own right or an attempted stand-in for Derby Disposal, a competitor for award of the franchise, who was not selected by the City. Thus, in response to interrogatories, plaintiff Joyce admitted that he had been recruited as a plaintiff by the owner of Derby Disposal (his former contractor) and consistently therewith, plaintiffs' original petition, briefs, and discovery claimed a violation of the Contract Clause and made other allegations that were relevant only to Derby Disposal, a non-party. (Ex. M, Pl. Joyce's Answers to Defs' First Interrogs, No. 15). It is fundamental that a party to litigation can not assert the rights of parties not before the court. While the Contract Clause claim has now been abandoned following the adverse ruling of Judge Yost, the record places in question the true basis for initiation of this suit.

Nonetheless, whether or not genuine, plaintiff Joyce is without standing to assert the claims of abuse of governmental authority made here. Virtually all of plaintiffs' theories, in one fashion or another, involve the claim that the receipt of the franchise fee by the City from Waste Connections is in fact an unlawful tax laid in violation of statute or an abuse of the police power designed to enrich the City at the expense of its citizens at large. Plaintiffs additionally complain of the City's use of the franchise fee and its placement in the City's general fund. Beyond the fact that there is no evidence to present a material question of fact on these claims, Kansas law clearly renders plaintiff Joyce without standing to assert them.

In the absence, as here, of the State as a party-plaintiff or any special statute conferring standing on individuals in these circumstances, Kansas law requires plaintiff Joyce to demonstrate a special injury distinct from that of other residents in order to possess common law standing to challenge the validity of the franchise fee, its use, or amount. Special injury is clearly absent, however, as the record reveals nothing to distinguish or elevate plaintiff's alleged injury over that of other residents (none of whom have joined this action). The *Crow* decision plainly denies plaintiff standing to attack the manner in which the City uses the franchise fee received from Waste Connections. Moreover, plaintiff in fact, has demonstrated no harm of any sort to a personal legal right or interest protected by law. Plaintiff, of course, does not even pay the challenged fee and has produced no evidence that the rate he pays for trash service is so unreasonable as to be confiscatory or an arbitrary abuse of power, the standard of proof governing his claim. See Defs' Memo *infra*, at 35-37 (citing Kansas cases requiring a party challenging municipal

service rates to prove that the rate paid is itself arbitrary, unreasonable, and confiscatory).

Plaintiff's mere academic disagreement with the content of the City's waste ordinance or his desire to preserve relations with his former hauler is not the type of injury sufficient to accord him standing under the law. In the absence of the State as a party-plaintiff, plaintiffs' complaints, *inter alia*, that *Waste Connections* is really paying a tax rather than a fee in alleged violation of statute and that the fee is not being maintained by the City in a segregated fund for accounting purposes, clearly fail for lack of standing³.

D. Plaintiffs Can Not Carry Their Summary Judgment Burden To Show That The Ordinance Is An Arbitrary Exercise Of The Police Power And That The Rates Paid Are Excessive And Confiscatory.

1. The Adoption Of The Ordinance.

Summary judgment is appropriate where there exists an absence of evidence on a material element on which a plaintiff possesses the burden of proof. Duly adopted municipal ordinances are presumed valid, placing the burden of proof on a challenger to show, by evidence, to overcome the presumption and show that the ordinance is arbitrary, unreasonable, and an abuse of the police power conferred upon local governments. Plaintiffs can not carry this evidentiary burden here.

The record shows that the City's adoption of the Ordinance followed a lengthy period of study and public comment regarding what model of waste collection would best serve the public interest. A six-member citizens panel conducted a series of public meetings spanning six months to obtain information regarding the comparative benefits of

³ Defendants' Memorandum hereafter addresses the merits of plaintiffs' claims of abuse of governmental authority. Defendants submit that these issues need not be reached in view of plaintiffs' lack of jurisdictional authority to assert them.

various collection systems, including consideration of a single contractor system against the then current system licensing multiple haulers. Among the information acquired was that showing the degradation of city streets caused by trash trucks and that adoption of a franchised system was expected to result in a substantial rate reduction for most, but not all, city residents. Following consideration of such information and receipt of public comments at several meetings of the City Council, the Council accepted the recommendation of the Citizens Advisory Board and adopted Ordinance 1980 on March 24, 2009 (later modified in minor particulars by Ordinance 1997 on July 28, 2009). The Board then conducted interviews of contractors submitting proposals regarding their service capabilities and projected rates, and its recommendation of Waste Connections was accepted by the Council. During the ensuing contract negotiation process, Waste Connections proposed inclusion of cost-free collection services to various City facilities, and a contract providing for such and payment of a five percent (5%) franchise fee was agreed to by the parties.

2. Plaintiffs Can Not Establish That The Ordinance Is Arbitrary And An Abuse Of The City's Authority Under The Police Power.

Like all local ordinances, the Ordinance here is presumed to be valid and regular in all respects. *Executive Aircraft Consulting, Inc. v. City of Newton*, 252 Kan. 421, 424, 845 P.2d 57 (1993) (“The defendants correctly assert that the ordinance is entitled to a presumption of validity and should not be stricken unless its infringement upon a statute is clear beyond substantial doubt.”); *Schulenberg v. City of Reading*, 196 Kan. 43, 53, 410 P.2d 324 (1966) (“Presumptively, the ordinance creating the sewer district was valid, the

existence of such facts as were essential to its validity is to be presumed, and the ordinance was sufficient to make a *prima facie* case in favor of the city.”). A party attacking the validity of an ordinance has the burden to present clear evidence to overcome the presumption and to demonstrate its invalidity. *City of Haven v. Gregg*, 244 Kan. 117, 119, 766 P.2d 143 (1988). The burden imposed is high and courts may intervene only upon proof that the ordinance is so arbitrary and subversive of private rights as to constitute a clear abuse of power. *Schulenberg*, 196 Kan. at 52 (“Courts have no supervisory power over the policy of municipal legislation and are not permitted to substitute their judgment for that of the governing body of the city. []. Courts can only interfere to curb action which is *ultra vires* because of some constitutional impediment or lack of valid legislative authority, or unlawful acts under a valid statute, or because action under a valid statute is so arbitrary, capricious, unreasonable and subversive of private rights as to indicate a clear abuse rather than a *bona fide* exercise of power.”). *See also Id.*, at 53 (the standard for review governing plaintiff’s challenge to municipal action is whether the acts were “unlawful or so oppressive, arbitrary or capricious as to amount to fraud.”). This same standard applies to a challenge to “any official act” of a municipality. *Id.*

These principles equally apply to challenges to rates authorized for municipal or franchised services provided to city residents. Thus, rates for services are presumed reasonable and the challenger possesses the burden to make a clear showing that the rates allowed are excessive or confiscatory. *Mitchell v. City of Wichita*, 270 Kan. 56, 61, 12 P.3d 402 (2000)(“It is generally recognized that water rates set by a municipality are presumed to be valid and reasonable until the contrary has been established. The burden

of overcoming this presumption rests upon the party challenging the rates.”); *Id.*, 270 Kan. at 62 (rates must be shown to be “excessive or confiscatory”); *KN Energy, Inc. v. City of Scottsbluff*, 447 N.W. 2d 227, 234 (Neb. 1989)(“The plaintiff had the burden to prove that the rates fixed by the defendants were arbitrary, unreasonable, and confiscatory.”). See also 12 *McQuillin on Municipal Corp.*, § 35:56 (3d. ed) (“rates must not be confiscatory;” it will be presumed that the municipality acted properly); *Apt. and Off. Bldg. Assoc. of Metro. Washington v. District of Columbia*, 415 A. 2d 797, 799 (D.C. App. 1980)(same); *H.A. Sack Co., Inc. v. Forest Beach Pub. Serv. Dist.*, 250 S.E. 2d 340, 341 (S.C. 1978)(same); *Iowa-Ill. Gas and Elec. Co. v. Iowa City*, 124 N.W. 2d 840, 843 (Iowa 1963)(burden is on challenger to show that rates were “clearly, palpably, and grossly unreasonable”). *Id.*

From the outset, plaintiffs’ theory of the case has been that the City can not receive benefits from the operation of the franchise in excess of costs. Plaintiffs then proceed to argue that the City’s receipt of a franchise fee and free services from the contractor is prohibited by law and that such receipt, inherently and without more, renders their rates as Waste Connection customers arbitrary and unreasonable. However, the law is to the contrary and such facts do not approach the threshold necessary to sustain plaintiffs’ burden of proof.

Plaintiffs’ burden of proof is not met by reliance on an assumption that their rates could be lower absent the benefits received by the City - they must prove that the rate they pay is excessive and unreasonable in and of itself. *Collerain v. City of Granbury*, 760 S.W. 2d 364, 367 (Tex. App. 1988)(“the plaintiff must prove the rate charged was

unreasonable in and of itself"). Emphasizing this evidentiary requirement, the Kansas Supreme Court has flatly rejected a challenge to municipal utility rates where plaintiffs produced no evidence that their rate itself was arbitrary. *Usher v. City of Pittsburg*, 196 Kan. 86, 89, 410 P.2d 419 (1966) ("The [plaintiffs] make no attempt to show what a reasonable rate should be or that the rate established was not reasonable."). *See also Apt. and Off. Bldg. Assoc. of Metro. Wash.*, 415 A.2d at 799 (plaintiffs' challenge to water and sewer rates failed for lack of evidence to show rates were unreasonable; plaintiffs' reliance on isolated comments from legislative history of ordinance did not overcome presumption of regularity and did not present a question of fact barring summary judgment). Prevailing law has long recognized that municipalities may collect a fee for the privilege of allowing a franchise to use city infrastructure to provide a service to residents. 12 *McQuillin, Municipal Corporations*, § 34:53 ("A municipal corporation, having control of its streets and the power to impose conditions on granting a franchise to use the streets, may require compensation for their use by public service companies, as a condition of the grant of the right to use them, unless forbidden by statute or contrary to public policy.").

Moreover, this leading treatise on municipal law emphasizes that municipalities are authorized to receive cost-free or discounted services from a franchised service provider and violate no rights in doing so. 12 *McQuillin*, § 34:54 (3d ed.) ("Where a municipality may impose conditions on granting a franchise to use the streets, it may stipulate for a free supply for certain public purposes, or at a discount."). *See also Burns v. City of Seattle*, 164 P.3d 475, 483 (Wash. 2007); *Twitchell v. City of Spokane*, 104 P.150 (Wash. 1909); *Consolidated Ice Co. v. City of Pittsburgh*, 118 A. 544 (Pa. 1922); 12 *McQuillin*, § 35:63

(“If the municipality owns its own plant and the rates charged are reasonable in amount, consumers cannot complain that water is furnished free to the various city departments and to charitable and educational institutions.”). Thus, whether received from municipal or franchised utilities, the rights of resident users of services are not infringed by the city’s receipt of free services which, after all, furthers the public interest of all citizens.

The City’s adoption and implementation of the Ordinance is presumed reasonable and plaintiffs bear the burden to show that it is an arbitrary exercise of power. Specifically here, plaintiffs must show that the action of the City arbitrarily affects them as ratepayers. Thus, the controlling issue is not the benefits received but whether, on summary judgment, plaintiffs have produced evidence sufficient to warrant a finding and judgment that the rate they pay is itself unreasonable and confiscatory. Accordingly, even assuming that the benefits received by the City are passed through to ratepayers, a point on which there is no evidence, no rights of plaintiffs are infringed by the City’s mere receipt of some benefits from operation of the franchise. Plaintiffs’ focus is misdirected - and absent proof of an arbitrary rate, their case can not proceed. As in *Usher v. City of Pittsburg*, there is no evidence to prove this essential element and plaintiffs’ case fails as a matter of law. 12 *McQuillin*, § 35:63.

E. **The Title Of The Ordinance Reasonably Apprises Citizens Of The Subject Matter Being Addressed And Does Not Violate K.S.A. 12-3004.**

Ordinance 1997, adopted pursuant to the City’s police power to comprehensively regulate residential trash collection and disposal in the City, contains the following title:

An Ordinance Amending Chapter 5.28 Of The Derby Municipal Code, Regulating Accumulation, Storage, Collection And Transportation Of Solid Waste And Recyclables, And Establishing Penalties For Violation Thereof; And Repealing

Original Chapter 5.28 Of Said Code As Amended By Ordinance No. 1980 Of The City.

Plaintiffs' Second Amended Petition (filed December 23, 2009), alleges that the Ordinance is "in violation of K.S.A. 12-3004, by failing to state in the title [] of the [] ordinance [] that the body of the [] ordinance includes a revenue purpose and the ability to set waste collection rates," contending that these "failures" are intentionally deceptive and designed to mislead the public as to its contents. Kansas law, however, does not require an ordinance's title to be an index to its provisions and renders it void only if substantive matter entirely unconnected with the title is contained therein. Clearly apprising persons of common intelligence of the subject of the ordinance, Ordinance 1997's title, and the Ordinance itself, are fully compliant with Kansas law.

The Kansas Constitution requires that any statute enacted by the legislature contain only one subject, which must be clearly expressed in its title. (Art. 2, § 16). City ordinances are subject to this same requirement by virtue of statute. Thus, K.S.A. 12-3004 provides that "no ordinance shall contain more than one subject which shall be clearly expressed in its title. ..."

The purposes behind both the statutory and constitutional provisions are the same, as explained by the Supreme Court in *Garten Enterprises, Inc. v. Kansas City*, 219 Kan. 620, 622, 549 P.2d 864 (1976):

The purposes of the constitutional section which is the exemplar for 12-3004 have been stated many times. They include the prevention of a matter of legislative merit from being tied to an unworthy matter, the prevention of hodge-podge or logrolling legislation, the prevention of surreptitious legislation, and the lessening of improper influences which may result from intermixing objects of legislation in the same act which have no relation to each other. The court has held these purposes are fulfilled even though a city ordinance does not include in its title all

the details of the provisions of the ordinance. It is sufficient if the title is broad enough to indicate in general terms the provisions of the ordinance (*Taneyhill v. Kansas City*, 133 Kan. 725, 728-729, 3 P.2d 645. This principle is elaborated in 5 McQuillin on Municipal Corporations, s. 16:19:

‘The title of an ordinance suffices, and the ordinance is valid, where objects or matters germane to the single general subject expressed by the title are united in the ordinance. Stated somewhat differently, a subject may embrace many objects; the title may state the subject and the ordinance include the objects. The word ‘subject’ should be given a broad meaning so that all matters having a logical or natural connection are included.

‘The title of an ordinance is a label and need only set forth its object, not its product. It is sufficient if it fairly advises the city council and the public of the real nature and subject matter of the legislation sought to be enacted, and if the minor features of the ordinance have a reasonable and natural connection with the subject named in the title. The title is not objectionable unless substantive matter entirely disconnected with the named legislation is included within the folds of the ordinance.’

The *Garten* Court there upheld a municipal ordinance whose title referenced the regulation of the hours of operation of private clubs against a contention that the title was deceptive for failing to state that the ordinance also prohibited the presence of any persons on the premises during closing hours. The Supreme Court has indicated that the title of a law/ordinance should be liberally construed to effectuate and validate its intended purposes. *Bankers Serv. Life Ins. Co. v. Sullivan*, 188 Kan. 783, 788, 366 P.2d 264 (1961).

Construing like provisions, a number of courts have emphasized that a law’s title need not serve as an index to its provisions and contents. *Webber v. City of Scottsbluff*, 50 N.W. 2d 533, 540 (Neb. 1951); *Elliott v. City of Leavenworth*, 85 P.2d 1053, 1056 (Wash. 1938). Similarly here, Kansas law does not require that an ordinance’s title serve

as an index to all of its subparts. *State v. Campbell*, 217 Kan. 756, 768, 539 P.2d 329 (1975) (“It is not necessary that the title be an index, a synopsis or abstract of the entire Act in all its details.”)(citation omitted). The title is sufficient, and the law/ordinance is valid, if the provisions of the law are germane and logically connected to the effectuation of an overall purpose of the enactment as stated in the title. Thus, in *City of Wichita v. Bd. of County Comm’rs*, 110 Kan. 471, 204 Pac. 693 (1922), the Supreme Court rejected a challenge to a statute entitled “An act for the regulation and support of common schools,” which alleged that the failure of the act to describe its many different subprovisions rendered it void.

Look at the general act of 1876 relating to public education Its title is, ‘An act for the regulation and support of common schools.’ Under this simple title there lies the entire statutory foundation of our public-school system, covering not only such matters as schools and school districts, and school officers and their duties, but matters so distantly related thereto as the disposition of the federal land grants for school purposes, and including such details as the mode of settlement and acquisition of school lands, duties of the state auditor and governor in relation to the issue of land patents, criminal proceedings and penalties for waste or trespass on school-land properties, etc. But though the title to this act gives no hint of these far-reaching details, yet because they are mere details of the general scheme of the act for the effective regulation and support of common schools, and are germane and pertinent to the principal purpose of the act, they are not subject to the constitutional infirmity under section 16 of article 2. 110 Kan. at 473.

These principles compellingly apply to validate Ordinance 1997. The title clearly apprises ordinary citizens of the purpose of the ordinance - the regulation of solid waste collection and storage in the City of Derby. The provisions of the Ordinance are related to its title, all being germane and reasonably connected to establishing a comprehensive waste collection system. The collection of fees are commonly and inherently part of the

regulation of franchises and licenses and are germane here to implementation of the regulatory system; conversely, it clearly cannot be said that they are “entirely disconnected with the named legislation.” *Garten*, 219 Kan. at 622 (quoting 5 *McQuillin*, § 16.19). Nor is the title defective for failure to mention customer rates - rates for service are inherently part of any trash collection system and would be expected as covered within by any reasonable person. The specificity demanded by plaintiffs is contrary to established law.

Plaintiffs’ reliance in their amended petition upon *State ex rel. Moore v. City of Wichita*, 184 Kan. 196, 335 P.2d 786 (1959) is misplaced. *Moore* held a state statute authorizing cities to impose occupational taxes invalid for its failure to describe taxation within its title. The case result turns on the distinction, commonly recognized in Kansas law between fees and taxes - the statute’s provisions expressly authorized cities to raise revenue, rendering it subject to the rule of strict construction against the power and a requirement that the power to tax be “unequivocally” expressed. 184 Kan. at 201. The Court distinguished this from authority to regulate under the police power, recognizing that regulatory fees or charges on franchises or licensees are inherently part of regulation and that such fees would have been permissible and reasonably related to the title “conferring power on cities to license trades,” etc. *Id. at 200* (“A regulation charge is one exacted for a privilege or as a condition precedent to the carrying on of the business, and is an exercise of the police power, while an occupation tax is imposed under the power of taxation.”)(citation omitted). *Moore* confirms the validity of Ordinance 1997 by recognizing the inherent connection between regulation and fees paid by franchisees or

licensees. The fee paid by Waste Connections here is regulatory in nature under the City's police powers and need not be separately described in the title.

Like other legal doctrines, the law here incorporates the standard of a reasonable person in assessing the government's obligations to citizens. Accordingly, the "clearly expressed" requirement does not relieve citizens of any duty to review the contents of legislation to discern the particulars of an enactment. Similar to the case law regarding reasonable notice and due process, courts have held that members of the public have a duty of reasonable inquiry to inform themselves regarding the specific provisions of a law after review of its title. *City of Harrisburg v. Pass*, 93 A.2d 447, 449 (Pa. 1953)(title "is sufficient if it gives notice of its tenor to interested persons of a reasonably inquiring state of mind"); *Drury v. City of Cape Girardeau*, 66 S.W. 3d 733, 739 (Mo. 2002)(adopting test of a "reasonable reader"); *Dodd v. City of Jackson*, 118 So. 2d 319, 323 (Miss. 1960)(title should "lead to an inquiry into the body [of the ordinance]"). Plaintiffs here, ordinary citizens of common intelligence, were not misled by the Ordinance's title, having admitted in discovery that they read the Ordinance and readily discovered the fee and rate provisions now claimed to be deceptive. Ex. N, Pl. Joyce's Answer to Defs' First Req. For Admiss., No. 12; Ex.O, Pl. Baston's Responses to Defs' First Req. For Admiss. No. 12. Their demand for specificity is disingenuous and seeks what the law does not require. Ordinance 1997 does not violate K.S.A. 12-3004.

F. **The Ordinance Does Not Unconstitutionally Delegate Legislative Authority.**

Another claim added by plaintiffs following the adverse ruling from the district court contends that the Ordinance unconstitutionally delegates legislative authority to set

rates for customer service to administrative officials. The provision in question (§ 5.28.100) provides:

Rates and Charges

Customer shall pay such fees and charges for collection and transportation of residential refuse and recyclables, and other services rendered incident thereto, as have been established and approved from time to time by the City.

The Ordinance, however, delegates legislative authority over rates to no one - the establishment of rates is a function of the City Council itself, the City's legislative body. Thus, plaintiffs' unconstitutional delegation claim fails at the outset due to the absence of any delegation at all.

An unlawful delegation of legislative authority violative of the separation of powers doctrine "occurs when there is a delegation of legislative authority to another branch of government without sufficient standards to guide such authority." *State v. Ponce*, 258 Kan. 708, 712, 907 P.2d 876 (1995). The contention normally arises in challenges to actions by administrative bodies or officers, contending that an agency or administrative official is making or establishing governmental policy properly vested only in elected and accountable legislative bodies. As stated in 16A Am. Jur. 2d, *Constit. Law*, § 312:

The purpose of the doctrine that legislative power cannot be delegated is to assure that truly fundamental issues will be resolved by the legislature and that a grant of authority is accompanied by safeguards adequate to prevent its abuse. The nondelegation doctrine insures the protection of citizens against discriminatory and arbitrary actions of public officials, and it provides the assurance that duly authorized, politically accountable officials make fundamental policy decisions. Where the legislature has provided reasonable limitations and standards for carrying out delegated duties, there is no unconstitutional delegation of legislative authority. The preciseness required of the standards for determining whether a legislative delegation of power is valid depends on the complexity of the subject

matter at issue.

The principle does not bar delegation *per se* but only prohibits legislative bodies from abdicating their policy-making function to the standardless discretion of administrative officials.

Kaufman v. State of Ks. Dept. of SRS, 248 Kan. 951, 956, 811 P.2d 876 (1991):

Legislative authority may be delegated to an administrative body where guidelines are set forth in the statute that establish the manner and circumstances of the exercise of such power. Where the legislature enacts general provisions for regulation and grants a particular state agency the discretion to fill in the details, we will not strike down the legislation as constitutionally impermissible unless such provisions fail to fix reasonable and definite standards to govern the exercise of such authority.

The power to set the rates of a regulated entity is legislative in nature. *Quality Oil Co., Inc. v. E.I. DuPont De Nemours And Co., Inc.*, 182 Kan. 488, 495-96, 322 P.2d 731 (1958) (“The power to fix rates or prices for the rate of services or commodities binding upon all parties, whether or not they consent, is a legislative power, and the legislature may not abdicate its function and delegate that power to a governmental agency, official, board or to a private organization or person.”); *Eudora Devel. Co. of Ks. v. City of Eudora*, 276 Kan. 626, 629, 78 P.3d 437 (2003) (holding that the City of Eudora’s exercise of statutory power to set “reasonable” rates for water and sewer service was a “legislative function”). Under these holdings, the City of Derby’s determination of customer rates for trash service is legislative in character. Accordingly, the rates must be established by the City Council itself or by a city official action pursuant to legislatively-determined standards expressing the official policy of the city.

Necessarily, petitioners must at the outset show that some delegation of legislative authority has occurred before an unlawful delegation claim can proceed. Here, however, this foundational element is lacking as the Ordinance provides that the rates to be charged will be

determined by the City. § 5.28.100. Thus, the Ordinance invests the City Council, the legislative branch of the City and its governing body, with the power to set rates for customer service by the contractor. Therefore, plaintiffs' claim fails due to the absence of any delegation whatsoever.

Plaintiffs' amended petition further asserts that the Ordinance is unconstitutional for its failure to enumerate a list of standards governing rates. However, the non-delegation doctrine does not require that a legislative body define standards governing its own future discretion but only requires sufficient guidelines when an executive body or official is delegated authority to implement legislative policy. The determination of rates here by the City Council will occur only following a public hearing upon consideration of all relevant evidence produced by the contractor and citizens and is constrained by the requirement that it be reasonable in amount under Kansas law. *Eudora Devel*, 276 Kan. at 629; *Shawnee Hills Mobile Homes, Inc. v. Rural Wat. Dist.*, 217 Kan. 421, 429, 537 P.2d 210 (1975). It is presumed that municipalities will properly exercise their authority to establish reasonable rates. *Shawnee Hills, Id.* In analogous circumstances, courts have rejected claims that a standard based on reasonableness or public interest is defective as an unconstitutional delegation of legislative authority. *See J.M. Mills, Inc. v. Murphy*, 352 A.2d 661 (R.I. 1976); *Greggio v. City of Orange*, 174 A.2d 390 (N.J. Super. 1961)(standards of "best public interest," "public convenience and necessity" and "just and reasonable" did not violate non-delegation doctrine). *See also* K.S.A. 66-101b (KCC must establish "just and reasonable rates"). While the law does not require the Ordinance to set standards governing the Council's discretion, the implicit standard of reasonableness imposed by Kansas law inherently guides the rate-setting determination and additionally negates plaintiffs' argument here. The law

presumes it will be faithfully applied here.

There is no unlawful delegation here and plaintiffs' claim is devoid of merit.

G. Plaintiffs' Claim Of Violation Of The Solid Waste Act Is Without Merit.

Unmentioned in their various petitions, plaintiffs added to their contentions in the Pretrial Order a claim that the City's benefits violate K.S.A. 2009 Supp. 65-3410(a) by allegedly burdening ratepayers with excessive costs. Such claim is without support in the language of the statute.

This provision, part of the Solid Waste Act, confers authority on cities to perform all steps to develop an effective solid waste management system. Plaintiffs fails to show how the receipt of benefits in exchange for grant of a franchise to a qualified contractor in any manner impedes the maintenance of an efficient waste collection system. Beyond their lack of standing and failure to show special injury or harm of any sort, plaintiffs' refrain of excessive benefits fails for lack of any evidence that the rates paid by citizens are excessive or unreasonable. Indeed, the evidence is to the contrary, showing that most Derby residents will experience a cost reduction following adoption and implementation of the Ordinance. The City's action is fully consistent with § 3410(a) and plaintiffs' claim fails for lack of legal and evidentiary support.

H. The Ordinance Is Regulatory In Nature Under The City's Police Powers And Does Not Have A Revenue-Raising Purpose Nor Constitute An Unauthorized Tax.

1. Kansas Municipalities Are Entitled to Reasonably Recoup The Costs of Regulation Under The Police Power.

Via a further amendment to their original claims, plaintiffs contend that the Ordinance is intended as a revenue-raising measure and constitutes an unauthorized tax rather than a valid regulatory measure under the police power. Plaintiffs contend that certain benefits received by

the City from the regulated entity, Waste Connections, exceed the costs and burdens of regulation, transforming the Ordinance into a revenue-raising device rather than an exercise of police power and that the City acted in bad faith in adopting the Ordinance and entering the contract. (Pretrial Order at 4). In addition to plaintiffs' lack of standing to assert claims belonging only to Waste Connections, plaintiffs' claim fails on the merits due to the absence of evidence necessary to present a viable issue of bad faith on summary judgment.

a. **Kansas Law Distinguishes Between Fees And Taxation.**

The law has long recognized a distinction between fees and taxes. Thus, the leading treatise on municipal law, *McQuillin on Municipal Corporations*, states (Vol. 9, § 26.16 (3d ed.)):

There is a noted distinction between a license fee imposed under the police power for the purpose of regulation and a tax imposed under the taxing power for revenue. A license fee or tax under the police power is a fee only as will legitimately assist in regulation and will not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business or other subject that it covers. Consistently, municipal police power to license as a mode of regulation is distinguished from municipal power to license for revenue. On the one hand, a tax that is not in any sense regulatory and is imposed expressly for general revenue purposes is based upon the taxing power, and even though called a license fee it is in truth a tax and not a regulatory exaction under the police power. On the other hand, charges to cover the cost of regulation of a business or occupation and not to raise revenue are license fees and not taxes for revenue. A revenue tax may not be imposed under the guise of police regulation or licensing. With this rule in mind, courts will look into ordinances with a view of determining whether they are passed for the purpose of revenue, although sought to be upheld as police regulations.

Kansas law likewise distinguishes "fees" from "taxes." The distinction was the focal point of *Executive Aircraft Consulting, Inc. v. City of Newton*, 252 Kan. 421, 427, 845 P.2d 57 (1993). *Executive Aircraft* operated an aircraft refurbishing business at the city airport which utilized large quantities of aviation fuel. The City maintained the only source of retail aviation

fuel available at the airport. Executive Aircraft started purchasing fuel off-site for use at its facility and the city, concerned about loss of revenue from defections by plaintiff and possibly other tenants, imposed a fuel flowage charge on all aircraft fuel purchased outside the airport. Challenging the legality of the charge it was now required to pay, Executive Aircraft contended that it was, in fact, a tax imposed without statutory authority.

En route to deciding the issue, the Supreme Court reviewed a number of cases nationwide addressing the distinction between fees and taxes, from which it distilled the following rules:

Thus, a tax is a forced contribution to raise revenue for the maintenance of governmental services offered to the general public. In contrast, a fee is paid in exchange for a special service, benefit, or privilege not automatically conferred upon the general public. A fee is not a revenue measure, but a means of compensating the government for the cost of offering and regulating the special service, benefit, or privilege. Payment of a fee is voluntary—an individual can avoid the charge by choosing not to take advantage of the service, benefit, or privilege offered. 252 Kan. at 427 (citations omitted).

Emphasizing the point that labels were not controlling, the Supreme Court held that the City's imposition of the fuel flowage charge was in fact an illegal excise tax imposed without statutory authority rather than a fee voluntarily paid in exchange for a benefit. A significant fact driving this determination, absent in this case, was the City's admission that the charge imposed was for the purpose of generating revenue, the primary feature of a tax. *Id.* at 428 ("Counsel for the defendants [City] admitted at oral argument in the trial court that the fuel flowage fee was a 'revenue raising measure.'").

A related line of Kansas cases confirm that local governments are entitled to recoup the costs of regulation under the police power. Thus, the costs of regulation, whether direct or indirect, may be recovered by a municipality. What Kansas law prohibits is use of police power to enhance public coffers grossly in excess of the cost of regulation so as to raise revenue outside

the taxing power. As shown by the cases below, the discretion afforded municipalities is wide and there is no requirement of a precise equivalency between costs and benefits.

Thus, in *State ex rel. Brewster v. Cumiskey*, 97 Kan. 343, 155 P.47 (1916), the legislature had enacted a statute imposing a fee of \$.10 per barrel upon all kerosene, gasoline and other petroleum products processed by a business and offered for sale. While the fee purported to be compensatory to recoup the costs of inspection of facilities by the State, the evidence revealed that the charge produced a sum two to three times the actual costs of inspection and was, admittedly, intended as a revenue measure. While acknowledging that some inequalities will be permitted between receipts and regulatory costs, the Court invalidated the fee as an attempt to extract revenue under the guise of the police power:

As an incident of the police power the state may reimburse itself for the cost of inspection by charging the necessary expense upon the business or commodity creating the necessity for inspection. When, however, adequate remuneration has been secured, the police power is exhausted. Of course, the books need not precisely balance. It is not possible to determine in advance exactly what sums may be realized from the administration of an inspection law, and there is no objection that some revenue above the cost of inspection may result. Such revenue, however, must be purely incidental to the practical operation of the law, and, whenever revenue and not recompense becomes the palpable and unmistakable object, the law fails as an inspection law. *Id.* at 352.

The Court's judgment voided the section of the law imposing the fee.

Relying on these same concepts, the Court upheld a license fee imposed upon sellers of milk in *City of Beloit v. Lamborn*, 182 Kan. 288, 321 P.2d 177 (1958).

Rejecting the call for a precise equality between fees and costs, the Court held "that there must be a wide discretion vested in the governing bodies of cities as to the amount of a license fee [] [and] that the courts will not interfere unless the fee imposed is flagrantly excessive." 182 Kan. at 294. Quoting from *State ex rel. Ross*, 101 Kan. 377, 379, 166 P.

505 (1917), the Court explained:

The mere fact that the fees charged under such a statute exceeded the expense of its execution is not enough to render it invalid . . . To have that effect one of two conditions must be met: either the discrepancy must be so great that the court is forced to the conclusion that the legislature in the first instance acted in bad faith, and intended to produce a revenue under the pretext of requiring an inspection, or else the law-making body must have neglected an opportunity to revise the charges exacted after experience had demonstrated beyond controversy that as previously imposed they were unreasonably and unnecessarily high. 182 Kan. at 294-95.

This principle can apply to franchise relationships. *Capitol Cable, Inc. v. City of Topeka*, 209 Kan. 152, 495 P.2d 885 (1972).

Reimbursement is not limited to direct costs, but can appropriately include indirect costs, such as staff time and costs of administration, not separately segregated in a governmental budget. See *Seton Co. v. City of Newark*, 477 A.2d 397, 402 (N.J. Super. App.Div. 1984); *City of Las Vegas v. Cragin Indust. Inc.*, 478 P.2d 585, 588 (Nev. 1970). Equally relevant is the fact that a franchise relationship is present here, a contractual relationship involving payment of a fee in return for the privilege of operation and use of city infrastructure, including streets. 12 *McQuillin*, § 34:53 (3d ed.). Franchise fees are often characterized as akin to “rental” payments for the ability to use publicly-maintained facilities in operation of the franchise conferred. *Burns v. City of Seattle*, 164 P.3d 475, 483 (Wash. 2007)(“A franchise fee is in the nature of rental for the use and occupation of the streets.”)(citation omitted); *Berea College Utils v. City of Berea*, 691 S.W. 2d 235, 237 (Ky.App. 1985).

The benefits received under the Ordinance fully comply with these standards and do not constitute an unauthorized tax.

b. **The Evidence Relied On By Plaintiffs Is Insufficient To Create An Issue Of Fact Upon Summary Judgment.**

Under Kansas law, ordinances duly enacted by a municipality or other official acts performed by a local government are presumed to be regular and in accordance with law. *Executive Aircraft*, 252 Kan. at 424. Possessing the burden of proof, plaintiffs have the burden to overcome this presumption by presenting facts sufficient to create a jury question that the ordinance and contract are intended as a revenue measure and produce benefits “flagrantly excessive” of the costs of regulation. *City of Beloit v. Lamborn*, 182 Kan. at 294. A summary judgment movant discharges its burden by pointing out the absence of evidence sufficient to create a submissible issue. As shown below, plaintiffs’ evidence and the surmise they invite are insufficient for this claim to go forward.

The summary judgment record first reveals that adoption and implementation of this franchised contractor system entailed a substantial expenditure of time and effort by City personnel in investigating and developing the structure of the system, attending meetings, drafting the Ordinance, and addressing citizen inquiries. Such efforts continued after the adoption of Ordinance 1980 (March 24, 2009) in selecting the contractor, drafting the contract therewith, notifying the public and implementing the transition to the system. Included in this transition was the handling of a number of requests from citizens for exemption or permission to share carts based on their special circumstances. Ex. L (including Attach. A). The contract requires the contractor to submit periodic reports to the City and renders it subject to audit and inspection. The record shows that a primary continuing cost of a trash collection system is the accelerated street repair caused by the heavy weight of trash trucks.

Plaintiffs' pleadings and discovery evince a misplaced primary reliance on the following statement of the City Manager during the February 24, 2009 meeting of the City Council preceding adoption of the Ordinance:

- The proposed ordinance would not entail any direct costs to the City. Indirect costs include staff time associated with development of the Request for Proposals, staffing the Trash/recycling Advisory Board, public communications about the transition to a new system and the ongoing implementation of a curbside recycling program, and development and administration of the contract.
- The contractor(s) selected would pay a franchise fee, anticipated to be 5% of gross revenues, to the City. Such fee revenues would offset the cost to the City for developing and maintaining the program.
- Franchise fee revenue would be available for use as determined by the Council during the annual budget process.' See Defs' Stat. of Uncont. Fact No. 16.

Plaintiffs erroneously attempt to characterize this statement as an admission that operation and administration of the franchised system will be cost-free to the City and, accordingly, that receipt of a 5% franchise fee is a mere device to engorge City coffers. This conclusion is contradicted by the face of the statement itself, revealing that the fee would help "offset the cost to the City for developing and maintaining the program," and referencing the "indirect costs" entailed in administration and enforcement of the Ordinance and contract. As shown in discovery, "direct costs" refers to those costs directly attributable to adoption of the ordinance that are also specifically identifiable in the City's budget and staffing plan, i.e., a direct cost for a specifically-budgeted expense category. (See Defs' Stat. of Uncont. Fact, No. 16.). Established law developed in cases addressing fees or rates under the police power confirm that governments are not limited to recovery of direct costs but may also recoup the many indirect costs, such as staff time

and administration, incurred in providing service. The direct cost reference does not create an issue of fact here.

Nor do other statements cited by plaintiffs support their taxation/enrichment theory of the case. The fact that the fees previously paid by haulers under the former licensing system were smaller in comparison to the fee paid by Waste Connections does not, as claimed by plaintiffs, mean that the larger fee so paid grossly exceeds the costs incurred. It simply means that prior to the adoption of the Ordinance, the City had not acted to establish a compensatory system to reimburse itself for the costs of administration and regulation of solid waste collection. Such comparison has no force toward carrying plaintiffs' summary judgment burden.

Similarly, plaintiffs' repeated reliance on the placement of the fees in the City's general fund does not support the "tax" assertion they urge upon the court. There is no requirement that regulatory fees must be kept in segregated funds and where the City deposits the fee is without relevance at all. *See Chamber of Commerce of the U.S. v. Edmondson*, 594 F.3d 742, 763 (10th Cir. 2010)(placement of fee in general fund did not render it a tax); *Twitchell v. City of Spokane*, 104 P.150, 150-51 (Wash. 1909)(there is no general requirement that municipal receipts be kept in segregated funds and such may be deposited in general fund). *See also Travaille v. City of Sioux Falls*, 240 N.W. 336, 339 (S.D. 1932)(municipalities are vested with discretion regarding deposit of funds and the wisdom of such act is not subject to judicial supervision; funds received from sale of water could be placed in general fund). Its presence in the general fund will nonetheless help defray the costs of administration, including staff time, in overseeing the franchise,

which are paid from the general fund. The true question is not that posed by plaintiffs but whether the benefits received pursuant to the Contract are “flagrantly excessive” over the costs of administration and whether plaintiffs have carried their burden to demonstrate a submissible issue. There is an absence of evidence on this issue.

The cost-free collection service provided by the contractor to City sites under the Contract does not alter plaintiffs’ summary judgment threshold. Consistent with the conjectural theme of their case, plaintiffs impermissibly seek to draw an inference that receipt of such services must somehow exceed the costs to be incurred by the City in administration, enforcement, street repair, and other regulatory costs and burdens. The receipt of cost-free services in itself has no logical force toward demonstrating gross excess which plaintiffs are required to prove. Moreover, plaintiffs have produced no evidence whatsoever to statistically prove that the City’s benefits “flagrantly exceed[]” its regulatory costs. *City of Beloit v. Lamborn*, 182 Kan. at 294.

In addition, established law authorizes the receipt of franchise fees in exchange for the provider’s mere use of public infrastructure, akin to a payment of rent. Thus, irrespective of street degradation, the City is entitled to compensation for use of its streets. Plaintiffs’ evidence wholly fails to show that the sum received is palpably excessive.

Kansas law accords the City of Derby broad discretion in estimating and projecting costs to be incurred in the future attributable to residential waste collection. *State ex rel. Brewster v. Cumiskey*, 97 Kan. at 352. It is plaintiffs’ burden “to show the lack of any reasonable relation between the fee and the costs of regulating.” *Southview*

Co-op. Hous. Corp. v. Rent Control Bd. of Cambridge, 486 N.E. 2d 700, 705 (Mass. 1986). Nothing in the record supports plaintiffs' bald allegations of bad faith or otherwise shows that the City has exercised this discretion in an arbitrary and capricious manner. Plaintiffs' case remains one premised on theory and innuendo and there is an absence of relevant evidence to establish this required element of plaintiffs' case. Summary judgment should be entered on behalf of defendants.

2. **The Fee Paid By Waste Connections Is Not An Excise Tax Under K.S.A. 2009 Supp. 12-194.**

a. **Summary and Nature Of The Charge.**

A new claim added by plaintiffs' second amended petition contends that the annual fee paid by Waste Connections pursuant to the Ordinance and Contract is actually an excise tax prohibited by K.S.A. 2009 Supp. 12-194. As previously described, Kansas law however has long distinguished taxation for the purposes of revenue from the collection of fees imposed for regulatory purposes under the police power. Applying by its terms to excise taxation, the statute does not apply to an annual fee paid to the City as partial compensation for the City's regulatory burdens and costs in administering the franchise conferred.

The right of Waste Connections to operate in the City of Derby exists pursuant to the grant of a franchise. "The term 'franchise' designates a right or privilege conferred by law for the provision of some public purpose or service which cannot be exercised without the express permission of the sovereign power." 36 Am.Jur. 2d, *Franchises From Public Entities*, § 1, at 593. See also *Id.*, § 3 at 595, 596 (franchises concern services affecting the "public welfare" or businesses of a "public nature"). The franchise

relationship is contractual in nature and commonly involves the payment of a fee by the service provider in exchange for the privilege and the use of local government infrastructure such as streets. *Id.*, § 4, at 596; 12 *McQuillin*, § 34:53 (3d ed.) (“A municipal corporation having entire control of its streets and the power to impose conditions on granting a franchise to use the streets, may require compensation for their use by public service companies, as a condition of the grant of the right to use them [].”) The contractual nature of franchises distinguishes them from licenses, the latter being more temporary in nature and more readily subject to termination. *Id.*, § 2, at 595. See also *City of LaGrange v. Troup Co. Elec. Mem. Corp.*, 408 S.E. 2d 708, 710 (Ga.App. 1991)(distinguishing terms “franchise” and “license,” court emphasizes contractual nature of franchises).

Pursuant to § 5.28.110 of Ordinance 1997, the sum paid by the contractor to the City is designated as a franchise fee for the privilege of engaging in the waste collection franchise.

Any Contractor collecting residential refuse or recyclables within the City shall pay to the City a franchise fee for such privilege. The franchise fee therefor shall be established by resolution.

The nature and amount of the fee are then described in ¶ 31A of the Contract as follows:

In consideration of this Agreement, WCI will pay to City an amount equal to five percent (5%) of its gross revenues actually collected from customers for all services performed pursuant to this Agreement. Such franchise administration fee shall be paid to the City quarterly, not later than the 30th day of the month next following the close of each quarter.

The legislative history preceding adoption of the Ordinance confirms that the charge was regulatory in nature to reimburse the City for regulatory burdens and costs

incurred by the City. Thus, the City Manager observed that the fee “would offset the cost to the City for developing and maintaining the program. In addition to the costs of administration, the record showed that a primary cost to the City was damage inflicted on city streets over time due to the operation of trash trucks.

b. Plaintiffs’ Contentions

Plaintiffs contend that the Legislature prohibits a Kansas municipality from entering a consensual fee agreement with a contractor providing services within a city. Specifically, plaintiffs contend that K.S.A. 2009 Supp. 12-194, prohibiting the levy of excise taxes by cities and counties (with certain exceptions), prevents Waste Connections from agreeing to pay a fee to the City designed to partially defray the costs of administration and damage to City infrastructure. The statute provides:

12-194. Same; city and county excise taxes prohibited, exceptions; rate increase for certain development excise taxes, election required

(a) Subject to the provisions of subsections (b) and (c), no city or county shall levy or impose an excise tax or a tax in the nature of an excise, other than a retailers’ sales tax and a compensating use tax, but the provisions of this section shall not be construed as prohibiting any city from: (1) contracting with a utility for a fixed charge based upon a percentage of gross receipts derived from the service permitted by grant, right, privilege or franchise to such utility; (2) imposing an occupation tax or license fee for the privilege of engaging in any business, trade, occupation or profession, or rendering or furnishing any service, but the determination of any such license fee shall not be based upon any amount the licensee has received from the sale or transfer of personal or real property, or for the rendering or furnishing of a service, or on the income of the licensee; (3) levying any occupation tax or license fee imposed by such city prior to the effective date of this act; (4) retaining any development excise tax as levied or imposed by such city in existence on January 1, 2006; or (5) levying an excise tax on tickets for admissions to concerts, theatrical performances, sports contests or other similar performances which take place on property owned by a city or county.

* * *

c. **The Consensual Fee Paid By Waste Connections Is Not Prohibited By K.S.A. 2009 Supp. 12-194.**

Further analysis of the decision in *Executive Aircraft Consult. Inc. v. City of Newton*, 252 Kan. 421, 424, 845 P.2d 57 (1993), emphasizing the conceptual distinction between fees and taxes, negates plaintiffs' attempted reliance on § 194. As previously noted, *Executive Aircraft* involved the validity of a charge labeled as a "fuel flowage fee" imposed by the City of Newton upon an aircraft refurbisher which purchased aviation fuel outside the City's airport to avoid buying it from the City at a higher cost. The refurbisher contended that the "fee" designation was, in fact, cover for a tax, asserting it was prohibited by K.S.A. 79-3424 (specifically prohibiting any political subdivision from imposing a motor-vehicle fuel tax) and K.S.A. 12-194 (prohibiting a city or county from imposing an excise tax upon the sale or transfer of personal and real property other than a retailers rates tax and a compensating use tax). The plaintiff argued that it received no services in exchange for the charge, thus negating its status as a fee. In turn, the City contended that the charge was imposed for the purpose of allowing a fuel distributor to enter the City Airport premises and do business but, however, admitted at the hearing that the fee was a "revenue raising measure." 252 Kan. at 428.

Employing these standards, the Court held that the charge was a tax preempted by K.S.A. 79-3424. The Court held that "[t]he distinction between a fee and a tax does not depend upon its label, but rather on the nature and function of the charge." *Id.* at 431. Significantly, the Court observed that where a charge is paid voluntarily, such as pursuant to contract, the sum will be deemed regulatory in nature rather than a tax. *Id.* ("Thus, there must be some aspect of contract or consent; otherwise the charge is a tax."). *See*

also Id. (observing that had the sum been incorporated in a lease agreement, it would have been a fee). Relying on the City's admitted revenue purpose in imposing the fuel charge, the Court held that the charge was a tax on motor fuel prohibited by the Legislature.

Moreover, courts nationwide have rejected claims that franchise fees are taxes. Reviewing cases nationwide, the Kentucky Court of Appeals held that "[t]he common conclusion shared by these opinions is that a franchise fee such as that involved [based on three percent of gross revenues] is not a tax, but is instead a charge bargained for in exchange for a specific property right, i.e., rental or compensation for use of public streets." *Berea College Utils v. City of Berea*, 691 S.W. 2d 235, 237 (Ky.App. 1985)(citing cases).

The Legislature did not intend, via § 194, to prohibit a consensual fee paid by a private contractor to a municipality which defrays costs incurred in regulation. By its terms, § 194 addresses taxation which, under Kansas law, means the raising of revenue by forced exactions upon the party subject to the law. *Executive Aircraft*, 252 Kan. at 427. The sum paid by Waste Connections is paid voluntarily as the result of a negotiated agreement to which the parties have mutually consented. The legislative history attending adoption of the ordinance reveals its regulatory purpose to offset costs incurred by the City due to operation of the franchise. Under the governing test of *Executive Aircraft*, "the nature and function of the charge" is consensual and regulatory, features not characteristic of a tax.

Wrongly, plaintiffs contend that the sum paid by Waste Connections is a license

fee based on licensee receipts, allegedly barred by implication by subsection (a)(2) of the statute. (Pretrial Order at 7(Count 6)). The argument is wrong on several counts and ignores the rule that statutory language must be construed in context. Section (a)(2)'s reference to "an occupation tax or license fee" upon "any business, trade, occupation, or profession" is directed at entire categories of businesses or trades, prohibiting in effect city income taxes or other exactions designed to generally raise revenue from a field of labor or commerce based on the laborer's receipts. The fee paid here is specific to Waste Connections and paid pursuant to agreement and is not a general charge upon a category of occupations or trades. Moreover, plaintiffs' argument ignores the distinction between franchises and licenses and the fee paid is not a "license fee" under the statute.

Consistent with its taxation focus, the section concerns forced exactions and does not involve voluntary fees such as here, paid as a *quid pro quo* in exchange for benefits accruing to a contractor pursuant to the grant of a franchise.

Equally unavailing is plaintiffs' refrain that the placement of the fee in the general fund transforms it into a prohibited tax. See Defs Memo, *supra* at 54-55. The language of the Ordinance and its legislative history show that the sum paid is compensatory for the costs associated with administration and operation of the franchise, i.e., that "the nature and function" of the charge is regulatory and not a forced exaction. Plaintiffs' argument is based on the faulty supposition that fees or receipts not maintained in a segregated fund thereby transmuted into taxes. The law does not rest on such a transparent distinction and the placement of the fee does not transform its regulatory character.

The fee paid by Waste Connections to the City is both voluntary and regulatory in

nature and accordingly is not an excise tax prohibited by K.S.A. 2009 Supp. 12-194.

d. **The Fee Is Not A Matter For Which An Election Is Required By K.S.A. 12-137.**

Continuing their taxation theme, plaintiffs contend that the fee paid to the City by Waste Connections must be submitted for approval to the City electorate as a precondition to receipt. For reasons similar to those just discussed, this argument also fails.

K.S.A. 12-137 provides:

12-137. Limitations and procedures for exercise of constitutional home rule power of taxation or other revenue measures; ordinance; notice; referendum

Where, under the power of cities granted by paragraph (b) of section 5 of article 12 of the constitution of Kansas, the governing body of any city by ordinance proposes to levy for revenue purposes any tax, excise, fee, charge or other exaction other than permit fees or license fees for regulatory purposes, which is not limited or prohibited or a procedure for the levy of which is not otherwise prescribed by enactment of the legislature as provided by said paragraph (b), such ordinance shall require a two-thirds (2/3) vote of the members-elect of the governing body and shall be published once each week for two (2) consecutive weeks in the official city newspaper.

No such ordinance shall take effect until sixty (60) days after its final publication, and if within sixty (60) days of its final publication a petition signed by a number of electors of the city equal to not less than ten percent (10%) of the number of electors who voted at the last preceding regular city election shall be filed with the county election officer of the county in which such city is entirely or primarily located demanding that such ordinance be submitted to a vote of the electors, it shall not take effect until submitted to a referendum and approved by a majority of the electors voting thereon. The governing body of any city may submit any ordinance providing for such levy to a referendum without petition. Ordinances authorizing such levies submitted to referendum without petition may be passed by a majority vote of the governing body and shall be published once in the official city newspaper.

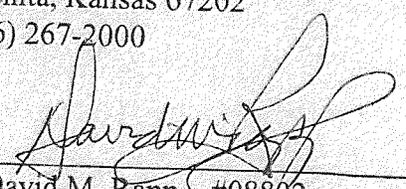
Interpreting the statute according to its terms, the Supreme Court has described K.S.A. 12-137 as a tax statute. *See generally, Clark v. City of Overland Park*, 226 Kan. 609, 610, 602 P.2d 1292 (1979) (“These sections [K.S.A. 12-137 and 138] provided in substance that any city proposing to levy any tax could pass an ordinance by a two-thirds vote of a governing body []”). The fee paid by Waste Connections is paid voluntarily pursuant to contract to partially offset the costs to the City for administering the operation of the franchise. As such, the fee is not a tax but a fee imposed “for regulatory purposes,” exempt from the scope of the statute. Accordingly, collection of the fee is not subject to petition and a vote of the local electorate.

IV. CONCLUSION

There exists no genuine issue as to a material fact and defendants are entitled to judgment as a matter of law. For the foregoing reasons, summary judgment should be entered in behalf of defendants City of Derby and Kathleen Sexton, in her capacity as City Manager.

Respectfully submitted,

HINKLE ELKOURI LAW FIRM L.L.C.
2000 Epic Center
301 North Main
Wichita, Kansas 67202
(316) 267-2000

By 

David M. Rapp #08802

Roger M. Theis - #07671

Attorneys for Respondents

*City of Derby, Kansas and
Kathleen Sexton, in her capacity
as Derby City Manager.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Memorandum of
**Defendants City of Derby, Kansas and Kathleen Sexton, In Her Capacity As Derby
City Manager, In Support of Motion for Summary Judgment** was forwarded via U.S.

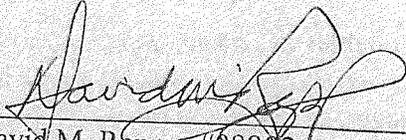
Mail addressed to:

Mark Rouleau
The Rouleau Law Firm, P.A.
P.O. Box 780001
Wichita, Kansas 67278
Attorney for Petitioners

on the 23rd day of July, 2010, and the original was filed with:

Clerk of the District Court
Sedgwick County Courthouse
525 North Main
Wichita, Kansas 67203

By


David M. Rapp - #08802

HINKLE ELKOURI LAW FIRM L.L.C.
2000 Epic Center
301 North Main
Wichita, Kansas 67202
(316) 267-2000

FILED _____

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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT OF SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT
CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS

BY _____

JANICE BASTON
and
R. MATTHEW JOYCE,

Plaintiffs,

vs.

CITY OF DERBY, KANSAS a city of the
second class, and KATHLEEN SEXTON, in
her capacity as Derby City Manager,

Defendants.

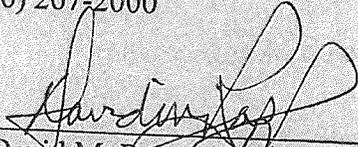
Case No. 09 CV 3598

Pursuant to Chapter 60 of the
Kansas Statutes Annotated.

**EXHIBITS TO DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Respectfully submitted,

HINKLE ELKOURI LAW FIRM L.L.C.
2000 Epic Center
301 North Main
Wichita, Kansas 67202
(316) 267-2000

By 
David M. Rapp - #08802

Roger M. Theis - #07671

Attorneys for Respondents

*City of Derby, Kansas and
Kathleen Sexton, in her capacity
as Derby City Manager.*

HINKLE ELKOURI LAW FIRM L.L.C.

2000 Epic Center
301 North Main
Wichita, Kansas 67202
(316) 267-2000

IN THE EIGHTEENTH JUDICIAL DISTRICT
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JANICE BASTON
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- C. Pretrial Order.
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- E. Trash Recycling Board Minutes - 4/6/09.
- F. Trash Recycling Board Minutes - 4/9/09.
- G. City Council Minutes - 2/24/09.
- H. City Council Minutes - 4/28/09.
- I. City Council Minutes - 7/28/09.

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- K. Affidavit of Kathleen B. Sexton.
- L. Response of City of Derby to Plaintiffs' Second Interrogatories.
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