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

JANICE BASTON
and
R. MATTHEW JOYCE,

Petitioners,

vs.

Case No. 09 CV 3598

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

Respondents

Pursuant to Chapter 60 of the
Kansas Statutes Annotated.

**RESPONDENTS' ANSWER
TO 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**

COME NOW respondents The City of Derby, Kansas and Kathleen Sexton in her capacity as Derby City Manager, and for their Answer To The 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, do allege and state as follows¹:

¹Paragraphs 1-48 of Respondents' Answer directly respond to the like-numbered paragraphs of the Amendment to Petition ("Amended Petition"). In these paragraphs, Petitioners' allegations are first stated (verbatim without correction of typographical errors) followed by Respondents' reply. Paragraphs 49 to 58 state additional defenses.

1. Derby City Ordinance 1980 was enacted by the Derby City Council on March 24, 2009, with the primary purpose of allowing the City of Derby to franchise residential waste collection.

RESPONSE:

Respondents deny the allegations of paragraph 1 of the Amended Petition. Ordinance 1980 was adopted to provide a comprehensive and efficient system for waste collection and disposal in the City, one of whose means was to utilize a single contractor for such service.

2. On February 24, 2009, prior to the Derby City Council's passing Ordinance 1980, Kathleen Sexton, Derby City Manager, presented a staff report to the Derby City Council regarding Ordinance 1980. Per the minutes of that Derby City Council meeting Ms. Sexton stated the following:

“The proposed ordinance WOULD NOT ENTAIL ANY DIRECT COSTS to the City. Indirect costs include staff time associated with the 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.” (emphasis added)

“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.”

“The dearth of local regulation has some unwelcome consequences: . . . “Excessive wear and tear on residential streets used by collection trucks representing multiple contractors.”

RESPONSE:

The minutes of the Derby City Council speak for themselves and to the extent that Petitioners’ description is inconsistent therewith, such allegations are denied. Petitioners’ added emphasis is denied. Respondents anticipate that the system of waste collection and disposal established by the Ordinance will require substantial and ongoing regulation and oversight by the City.

3. Kathleen Sexton, Derby City Manager, during the March 24, 2009 Derby City Council presented a staff report regarding Ordinance 1980. Per the minutes of that Derby City Council meeting the report presented repeated the statements quoted above in paragraph 2 from the February 24, 2009 Derby City Council meeting.

RESPONSE:

Respondents admit that Kathleen Sexton presented a staff report to the Derby City Council. The minutes of the Derby City Council speak for themselves and to the extent that Petitioners’ description is inconsistent therewith, such allegations are denied. Respondents anticipate that the system of waste collection and disposal established by the Ordinance will require substantial and ongoing regulation and oversight by the City.

4. Kathleen Sexton, Derby City Manager, during the April 28, 2009 Derby City Council presented a staff report regarding Ordinance 1980. Per the minutes of that Derby City Council meeting the report presented repeated the statements quoted in paragraph 2 from the February 24, 2009 Derby City Council meeting.

RESPONSE:

Respondents admit that Kathleen Sexton presented a staff report to the Derby City Council. The minutes of the Derby City Council speak for themselves and

to the extent that Petitioners' description is inconsistent therewith, such allegations are denied. Respondents anticipate that the system of waste collection and disposal established by the Ordinance will require substantial and ongoing regulation and oversight by the City.

5. Regarding residential solid waste collection and Ordinance 1980 as reported in the minutes of the Derby City Council meeting held on April 28, 2009, Council Member Horyna asked:

“how we as a city will address customer service issues if we experience sub par performance.”

Per the Council meeting minutes, Kathleen Sexton responded:

“... if the counsel authorizes staff to negotiate a contract there are a lot of details to work out in the contract in this regard. Certainly there will be customer service expectations set in that contract including reporting requirements. She would anticipate the first year of the franchise would have quarterly meetings to review information and make sure we understand and make sure we are all on the same page. After that, we will probably have annual meetings.”

Summarizing Kathleen Sexton's reply, the extent of city involvement once the residential waste collection franchise is commenced will be four meetings to review information during the first year, and one annual meeting for each year after the first year of the seven year contract.

RESPONSE:

The minutes of the Derby City Council speak for themselves and to the extent Petitioners' description is inconsistent therewith, such allegations are denied. The quoted extract was not intended to address all burdens imposed upon the City by the Ordinance and Petitioners' summary of the meeting is denied. Respondents anticipate that the system of waste

collection and disposal established by the Ordinance will require substantial and ongoing regulation and oversight by the City.

6. In a City Council Agenda Report entitled “Ordinance Deferring Effective Date of Solid Waste Ordinance” prepared by Kathleen Sexton and presented at the Derby City Council meeting on July 28, 2009 states:

“The contract includes collection of trash and recyclables at all City owned facilities for NO ADDITIONAL COST and provides that a 5% franchise fee be paid to the City, which would yield approximately \$60,000 per year. Such fee revenue would offset the cost to the City for developing and maintaining the program.” (emphasis added)

In exchange for only one annual meeting with the contractor after the first year of the contract, the City of Derby is compensated \$60,000 a year from franchise fee revenue, along with NO COST solid waste collection at all city facilities.

RESPONSE:

The minutes of the Derby City Council speak for themselves and to the extent Petitioners’ description is inconsistent therewith, such allegations are denied. Respondents deny Petitioners’ added emphasis and characterization of the Contract. Respondents anticipate that the system of waste collection and disposal established by the Ordinance will require substantial and ongoing regulation and oversight by the City.

7. Kathleen Sexton states that there is very little for city staff to do under the franchise of residential solid waste.

Per the Derby City Council minutes from the July 28, 2009 meeting:

“Council Member Meidinger asked if there would be any city staff designated as a liaison person to Waste Connections.

Ms. Sexton advised at this point that it is her . . . there will be very little for city staff to do but there will be some routine things like quarterly reports and annual reports and annual meetings., etc.”

From this statement it is extremely clear that the burden on the city in regulating the waste collection franchise is small. After the first year, the Derby City Manager expects to hold only one meeting a year with the contractor.

RESPONSE:

The minutes of the Derby City Council speak for themselves and to the extent Petitioners’ description is inconsistent therewith, such allegations are denied. Respondents deny Petitioners’ characterization of the burdens imposed upon the City in implementing the Ordinance and administering the Contract. The quoted extract was not intended to address all burdens imposed upon the City by the Ordinance and Petitioners’ summary of the meeting is denied. Respondents anticipate that the system of waste collection and disposal established by the Ordinance will require substantial and ongoing regulation and oversight by the City.

8. Ordinance 1980, and as subsequently re-enacted in Ordinance 1997 (Ordinance 1997 is attached hereto as Exhibit H), continues to require license fees payable to the City of Derby in addition to the estimated \$60,000 franchise fee revenue and free waste collection to city facilities. Section 5.28.190 in Ordinance 1997 states:

“No person, firm or corporation shall, within the city limits, collect or dispose of solid waste unless a permit is first obtained from the city clerk prior to issuance of said license.”

Section 5.28.220 in Ordinance 1997 states:

“An annual permit fee as established by resolution of the governing body of the city for each vehicle licensed shall be paid by the Collector to the city clerk”

Therefore, the City of Derby receives funds from license fees to monitor the performance of the solid waste collector in addition to the franchise fee revenue estimated to be \$60,000.00

RESPONSE:

Respondents deny the allegations of paragraph 8 of the Amended Petition. The quoted provisions concern the collection and transportation of non-residential waste and are not relevant herein.

9. Derby City Ordinance 1997 Section 5.28.110 Franchise Fee states:

“Any Contractor collecting 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.”

This franchise fee provision does not state a minimum or maximum franchise fee or guidelines for its calculation.

RESPONSE:

Respondents admit that Section 5.28.110 has been accurately quoted. Respondents admit that the provision does not itself set the fee which is left to the determination of the City Council by further resolution.

10. The Derby City Council passed a resolution on July 28, 2009 authorizing Kathleen Sexton, Derby City Manager to execute a contract for residential waste and recyclables collection (hereafter “Waste Contract” attached hereto as Exhibit I) with Waste Connections of Kansas, Inc. (Hereafter WCI). By authorizing the execution of the residential waste collection contract, the Derby City Council authorized the 5% franchise fee, and the receipt of free solid waste collection for all City of Derby Facilities as outlined in the Waste Contract.

RESPONSE:

Respondents deny the allegations of paragraph 10 of the Amended Petition as stated. The Derby City Council approved the Contract and directed the City Manager to sign it.

11. On July 30, 2009 the Kathleen Sexton, City Manager of the City of Derby executed the Waste Contract for the collection of all residential waste and recyclables in the City of Derby.

RESPONSE:

Respondents admit the allegations of paragraph 11 of the Amended Petition.

12. The Waste Contract specifically states the franchise fee revenue and free waste collection services to be provided to the City of Derby by WCI as follows:

A. Paragraph 16 of the Waste Contract "Service to City Facilities. WCI shall provide trash and refuse collection service at **NO CHARGE TO ALL PROPERTIES** used by the City for governmental or proprietary operations, including but not limited to City Hall, Derby Police and Courts Building, Senior Center, Derby Public Library, all Derby Fire stations, Derby Public Works Department, Wastewater Treatment Facility, Derby Recreation Center, all City parks, and the Rock River Rapids Aquatic Park. The frequency and character of such service shall be determined by the City on a reasonable basis." (emphasis added)

B. Paragraph 31 of the Waste Contract "Franchise Administration Fee. A. In consideration of this Agreement, WCI will pay to the City an amount equal to five percent (5%) of its gross revenues actually collected from customers for all services performed pursuant to this Agreement."

RESPONSE:

The Contract speaks for itself and to the extent that Petitioners' description is inconsistent therewith, such allegations are denied. Petitioners' added emphasis is denied.

13. On October 27, 2009, the Derby City Council enacted Derby City Ordinance 1997 (Exhibit H), which is entitled:

“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.

RESPONSE:

Respondents admit the allegations of paragraph 13 of the Amended Petition.

14. On page seven of Ordinance 1997 section 5.28.100 entitled “Rates and Charges” it states:
- “Customer shall pay such fees and charges for collection and transportation of residential waste and recyclables, and other services rendered incident thereto, as have been established or approved from time to time by the City.”

RESPONSE:

Respondents admit that Section 5.28.100 is accurately quoted.

15. Petitioners hereby incorporate by reference all of the allegations, statements, averments, and exhibits in paragraphs 1 through 79 as set forth in Petitioners' “Petition for Declaratory

Judgment, Writ of Mandamus, Unconstitutionality of Ordinance and Damages” as if fully set forth herein, along with paragraphs 1 through 14 above as stated in this document.

RESPONSE:

Respondents hereby incorporate their responses to paragraphs 1 through 79 of the Petition and to paragraphs 1 through 14 of the Amended Petition as if fully set forth herein.

16. K.S.A. 12-2101 et seq. give a municipality statutory authority to create a franchise for solid waste collection. Nowhere in these statutes is there authority to collect franchise fee revenue for solid waste collection, or obtain compensation in any form, monetarily or by receipt of free services, which exceeds the cost burden on the City for the regulation of a solid waste collection franchise.

RESPONSE:

Respondents admit that K.S.A. 12-2101 et seq. authorize a city to select a single contractor for solid waste collection and disposal. Respondents deny the remainder of this paragraph and state that Kansas law does not prohibit the imposition of reasonable fees in connection with regulation of solid waste collection and disposal.

17. Ordinance 1997, which re-enacts many provisions of Ordinance 1980, requires the wastecollection contractor to obtain a permit (section 5.28.190), a license (section 5.28.130 A.), and to pay an annual permit fee for each licensed vehicle (5.28.220). These exactions appear to be adequate remuneration to the City of Derby for the cost burden of regulating and inspecting the waste collection services of WCI.

RESPONSE:

Respondents deny the allegations of paragraph 17 of the Amended Petition. The quoted provisions concern the collection and transportation of non-residential waste and are not relevant herein.

18. In *Panhandle Eastern Pipe Line Company v. Richard T. Fadely, State Treasurer of Kansas et al*, 183 Kan. 803, 332 P.2d 568 , (hereafter “*Panhandle*”), the Court states at 806:

“At the outset, it is clear that under its police power the state may reimburse itself for the costs of otherwise valid regulation and supervision by charging the necessary expenses to the businesses or persons regulated. (*State, ex rel. v. Cumiskey*, 97 Kan. 343, 352, 155 Pac. 47; *Gt. Northern Ry. v. Washington*, 300 U.S. 154, 160, 57 S. Ct. 397, 81 L. Ed. 573). A statute, however is void if it shows on its face that some part of the exaction is to be used for a purpose either than the legitimate one of supervision and regulation (*Gt. Northern Ry. V. Washington*, *pra*, pp. 160-161), or if more than adequate remuneration is secured (*State, et rel. v. Cumiskey*, *supra*; *State ex rel, v. Ross*, 101 Kan. 377, 166 Pac. 505).”

RESPONSE:

Respondents admit that the case language cited is accurately quoted.

19. The Respondents have stated regarding Ordinance 1980 and the contract executed under its authority, the City of Derby is placing the entire annual \$60,000 franchise fee revenue in the general fund for use as the City Council directs during the annual budget process. Kathleen Sexton, Derby City Manager, as also stated “the proposed ordinance would not entail any direct costs to the City” (see paragraph 2 of this document). The City of Derby receives remuneration for regulation and inspection through license and permit fees authorized in the ordinance. These statements and actions clearly indicate that the franchise fee revenue estimated to be \$60,000 was known at the inception of the enactment of Ordinance 1980 to

be greatly in excess of the cost of regulation. The City of Derby did not take the opportunity to correct this illegal revenue provision with the subsequent enactment of Ordinance 1997.

RESPONSE:

Respondents admit that the franchise fee will be placed in the general fund but deny the remainder of this paragraph. The only relevant fee provision cited is reasonable and is fully compliant with Kansas law.

20. In *City of Beloit v. Lamborn*, 182 Kan. 288; 321 P.2d 177, in Syllabus 5 the Court states:
- “The disproportion between the amount of fees collected under an ordinance of a city of the second class purporting to be an inspection measure and the expenses incurred in its execution will justify a court in holding the ordinance to be invalid only when one of two conditions is met: either the discrepancy must be so great that the court is forced to the conclusion that the city in the first instance acted in bad faith and intended to provide a revenue under the pretext of requiring an inspection, or else the city must have neglected an opportunity to revise the charges exacted after experience had shown those previously imposed to be excessive.”

RESPONSE:

Respondents admit that the case language is accurately quoted.

21. Since the Respondents knew and stated before and after enactment, that the franchise fee revenue from Ordinance 1980, and as re-enacted with Ordinance 1997, would produce revenue and cost savings to the City far in excess of the cost of regulation or Ordinance 1980 and as re-enacted with Ordinance 1997, it must be concluded that the City intended to provide revenue by enacting Ordinances 1980 and 1997. This is an act of bad faith on the part of the Respondents, as declared in the *Beloit* case by intending to provide revenue to the

city under the pretext of regulation. Based on the guidelines in the *Beloit* case it must be concluded that the franchise fee estimated to raise \$60,000 for the city in Ordinances 1980 and 1997 is invalid and should be void.

RESPONSE:

Respondents deny the allegations of paragraph 21 of the Amended Petition. The fee provisions of the Ordinances are intended to reasonably compensate the City for the regulatory burdens imposed in administering the Contract and Ordinance and to place ultimate responsibility for costs upon the party who has caused them to occur.

22. In *Capitol Cable, Inc. V. City of Topeka, Kansas et al.*, 209 Kan. 152; 495 P.2d 885 (1972)(here after "*Capitol Cable*") the Court states at 165:

“The annual franchise fee exacted by a city for the issuance of license or franchise must be reasonable and commensurate with the expense encountered to administer the public aspect of the business licensed or receiving the franchise.

RESPONSE:

Respondents admit that the case language is accurately quoted.

23. The *Capitol Cable* court struck down the franchise to Cablecom-General claiming the excessive franchise fees were unreasonable by stating at 166:

“Accordingly, ordinance No. 12986, whereby the City of Topeka attempts to grant a franchise to Cablecom-General of Topeka is permeated with arbitrary and unreasonable action on the part of the governing body of the City of Topeka and must be set aside as void.”

RESPONSE:

Respondents admit that the case language is accurately quoted. Respondents deny the remainder of this paragraph and affirmatively state that the fees imposed are fully compliant with Kansas law.

24. The franchise fee should only compensate the City for the costs associated with regulating and inspecting residential waste collection. In *Executive Aircraft Consulting, Inc. v. The City of Newton, Kansas et al.*, 252 Kan. 421; 845 P.2d 57 (hereafter “*Executive Aircraft*”) the court states at 427:

“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.”

RESPONSE:

Respondents admit that Kansas law authorizes the imposition of fees to meet the costs of regulation. Respondents deny the implication that the fees imposed are inconsistent with Kansas law.

25. A Michigan court stated in *Bray v. Department of State*, 418 Mich. 149, 160; 341 NW 2d 92 (1983);

“. . . to pass the test of a “regulatory fee,” an exaction must not produce revenue in excess of the cost of the regulation.”

RESPONSE:

Respondents admit that the case language is accurately quoted but deny the implication that the fees imposed are inconsistent with Kansas law.

26. In *State of Kansas v. Cumiskey*, 97 Kan. 343, (hereinafter “*Cumiskey*”) the court states at 352:

“Authority to enact law is derived from the police power of the state, reserved to it from the grant of powers to the federal government. As an incident of the police power that state may reimburse itself for the cost of inspection by charging 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.

The remuneration secured by the franchise fee by the Respondents is significantly in excess of the expense necessary to regulate the ordinance. The \$60,000 franchise fee revenue to be received annually by the City of Derby cannot be viewed as merely an incidental amount from regulatory fees. Therefore, the Respondents exceeded their police power and Ordinances 1980 and 1997 must fail per *Cumiskey*.

RESPONSE:

Respondents admit that the case language is accurately quoted in material part. Respondents deny the remainder of this paragraph and state that the fees imposed are fully compliant with Kansas law.

27. In *Panhandle*, the Courts states at 808:

“When a regulatory measure openly becomes a revenue enactment, that portion thereof which exacts revenue fails as a valid exercise of the police power.

Based on all the prior analysis, Ordinances 1980 and 1997 are together revenue enactments, and at a minimum the provision for franchise fee revenue in these ordinances must fail and be of no force or effect.

RESPONSE:

Respondents admit that the case language is accurately quoted. Respondents deny the remainder of this paragraph and state that the fees imposed are fully compliant with Kansas law.

28. All of these cases indicate that regulatory or inspection fees must be reasonably related to the cost of the regulation. Revenue cannot become the object of the law. If the regulatory fees exceed the reasonable expected cost of the regulation they exceed the city's police power and are void.

RESPONSE:

Respondents admit that fees should be reasonably commensurate with the costs of regulation but deny the implication that the fees imposed are inconsistent with Kansas law.

29. Using the judicial analysis outlined above, the franchise fee provision in Ordinances 1980 and 1997 is revenue measure for the City of Derby. The City Manager's instruction on the use of significant revenue from the franchise fee when introducing Ordinance 1980, and as re-enacted under Ordinance 1997, was as follows:

“Franchise fee revenue would be available for use as determined by the Council during the annual budget process.”

Note that the City Manager uses the word “revenue” along with franchise fee. The franchise fee revenue simply goes to the general fund and is applied in whatever way the City Council deems appropriate. City Manager also states as documented by minutes of the Derby City Council meetings that:

“No direct costs to the City from Ordinance 1980;”

and in regards to monitoring the solid waste franchise with WCI:

“very little for city staff to do.”

The franchise fee revenue is outrageously in excess of the costs to the City of Derby associated with the regulation and inspection of the residential waste collection franchise. The franchise fee revenue far exceeds the City of Derby’s burden of regulation and inspection, exceeds the Respondents’ police power, and therefore must be void.

RESPONSE:

Respondents deny the allegations of paragraph 29 of the Amended Petition.

30. The only conclusion is that Ordinance 1980, and its re-enactment by Ordinance 1997, is a revenue measure for the City of Derby by allowing the collection of revenue through franchise fees in excess of the regulatory burden to the city. Because franchise fee provision in Ordinance 1980, and its re-enactment in Ordinance 1997, is a revenue measure, it exceeds the police power of the Respondents and must be declared void.

RESPONSE:

Respondents deny the allegations contained in paragraph 30 of the Amended Petition. Respondents further deny that Petitioners are entitled to relief as claimed in this paragraph.

31. Petitioners hereby incorporate by reference all of the allegations, statements, averments, and exhibits in paragraphs 1 through 79 as set forth in Petitioners’ “Petition for Declaratory Judgment, Writ of Mandamus, Unconstitutionality of Ordinance and Damages” as if fully set forth herein, along with paragraphs 1 through 30 above as stated in this document.

RESPONSE:

Respondents hereby incorporate their responses to paragraphs 1 through 79 of the Petition and to paragraphs 1 through 30 of the Amended Petition as if fully set forth herein.

32. Per paragraph 12 of this document, the City of Derby in the Waste contract with WCI under the authority of Derby City Ordinance 1980 and as re-enacted in Ordinance 1997, results in numerous free services for the City of Derby which are of substantial value. The contract with WCI provides that all city facilities are to receive waste collection service at no charge. Obtaining free services for the granting of a franchise has been determined by the courts to be an arbitrary and unreasonable action by the governing body of a city.

RESPONSE

Respondents admit that the Contract provides the City with cost-free waste collection service but denies the remainder of this paragraph. Any benefits received by the City are reasonably commensurate with the burdens imposed in administering and implementing the Contract and the Ordinance and are fully compliant with Kansas law.

33. While Ordinances 1980 and 1997 do not specifically require these free services to be part of the contract for waste collection services, the actual implementation of the ordinances through the contract for waste collection results in the receipt of free services and a substantial economic benefit to the Respondents.

RESPONSE:

Respondents admit that the Ordinances do not contain provisions regarding cost-free waste collection and disposal service to the City but that such obligation is set forth in the Contract. Respondents deny the remainder of this paragraph.

34. Courts have struck down the receipt of additional benefits to a city when coupled with the franchise fee, since the total benefit goes beyond what is reasonably necessary for regulatory purposes. In *Capitol Cable, Inc. V. City of Topeka, Kansas et al.*; 209 Kan. 152; 495 P.2d 885 (1972)(hereinafter "*Capitol Cable*")the court states at 165:

“When the cost to Cablecom-General of Topeka of these additional benefits to the community are added to the annual fee which it is required to make to the City under the enabling ordinance, the total fee exacted by the City for administering the CATV system by the City governing body is far beyond what is reasonably necessary for regulatory purposes.

RESPONSE:

Respondents admit that the case language cited is accurately quoted but deny its applicability and the legal characterizations and conclusions in this paragraph.

35. Any fee for licensing or franchise must be reasonable and in tune with the actual expenses incurred by the City in the regulation of the franchise or licensed service. The City of Topeka was seeking free cable service and broadcasting for Washburn University. The *Capitol Cable* Court further states at 165:

“One of the major reasons for holding the enabling ordinance of the City of Wichita void (*Community Antenna TV of Wichita, Inc. V. City of Wichita*, supra) was that the charges made by the City for the franchise were excessive and bore no reasonable relationship to the expense and inconvenience to be occasioned by the City. Washburn University is a municipal university deriving the majority of its support from the taxpayers of the City of Topeka. Any financial benefit received by Washburn University as a result of the issuance of the franchise to Cablecom-General of Topeka would inure indirectly to the City and be over and above the annual fee required by the enabling ordinance.”

RESPONSE:

Respondents admit that the case language cited is accurately quoted but deny its applicability and the legal characterizations and conclusions in this paragraph.

36. In *Capitol Cable* the court found that the City of Topeka received benefits over and above the franchise fee and that the contract was given to the highest bidder. The similarity to the present action can be seen by quoting the *Capitol Cable* Court at 164-165:

“Cablecom-General of Topeka, to whom the franchise was granted, under the foregoing provision in its application made a generous offer of fringe benefits to the City. “Fringe Benefits” is a term used by Lauren Nash, one of the City Commissioners of Topeka, in his deposition testimony taken during discovery which was before the trial court. Mr. Nash indicated in awarding a franchise he took into consideration the financial ability of the applicant to perform, how much experience the company had, “these all were taken into consideration besides the fringe benefits, as you might put it.”

RESPONSE:

Respondents admit that the case language cited is accurately quoted but deny its applicability and the legal characterizations and conclusions in this paragraph.

37. Later at 165 the *Capitol Cable* Court states:

“Grantee has offered and the City accepts grantee’s proposal to pay Washburn University in connection with KTWU Television Station annually an amount equal to two (2) percent of its gross revenues . . . When the cost to Cablecom-General of Topeka of these additional benefits to the community are added to the annual fee

which it is required to make to the City under the enabling ordinance, the total fee exacted by the City for administering the CATV system by the City governing body is far beyond what is reasonably necessary for regulatory purposes . . . Accordingly, ordinance No. 12986, whereby the City of Topeka attempts to grant a franchise to Cablecom-General of Topeka is permeated with arbitrary and unreasonable action on the part of the governing body of the City of Topeka and must be set aside as void.”

RESPONSE:

Respondents admit that the case language cited is accurately quoted but deny its applicability herein.

38. From *Capitol Cable* it can be concluded that the acceptance of fringe benefits, such as free waste collection at city facilities by the Respondents, benefits the Respondents beyond what is reasonably necessary for regulatory purposes. The acceptance of such fringe benefits is an arbitrary and unreasonable act on the part of the Respondents.

RESPONSE:

Respondents deny the allegations of paragraph 38 of the Amended Petition.

39. The free waste collection services and franchise fee received by the Respondents as part of the franchise contract with WCI can be interpreted as a tax since the cost savings and revenue are applied to the general fund and are in excess of the cost of regulation. The *Executive Aircraft* court cites case law in other states to support its decision that any fees in excess of regulatory requirements are taxes and states at 427:

“ . . . any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefits is a tax. On the

other hand, a fee is generally regarded as a charge for some particular service. *Dickson, Sheriff v. Jeff. Co. Bd. Of Education*. 311 Ky. 781, 786, 225 S.W. 672 (1949).”

“In South Dakota, the distinction between fees and taxes is that taxes are imposed for the purpose of general revenue while license or other fees are ordinarily imposed to cover the cost and expense of supervision or regulation. [Citation omitted.] *Valandra v. Viedt*, 259 N.W. 2d 510, 512 (S.D. 1977).”

RESPONSE:

Respondents admit that the case language cited is accurately quoted but deny its applicability and the legal characterizations and conclusions in this paragraph. Any benefits received by the City are reasonably commensurate with the burdens imposed in administering and implementing the Contract and Ordinance and are fully compliant with Kansas law.

40. The free waste collection services received by the City of Derby reduces general operating costs. The cost savings from free waste collection at city facilities along with the \$60,000 franchise fee revenue and other benefits, have no relation to the costs incurred by the city in the regulating and inspecting the waste collection franchise. Based on the legal analysis in the cases cited above, because the cost savings and franchise fee revenue are for the general benefit of the City of Derby and are not reasonably associated with the regulation of residential waste collection, these benefits and charges amount to taxes imposed on the recipients of waste collection services under the franchise contract. As a result, the court in *Capitol Cable* declared as void the ordinance awarding the contract for the franchise. This Court should reach the same result by declaring Ordinance 1980, and as re-enacted in Ordinance 1997 and the Waste Contract void.

RESPONSE:

Respondents deny the allegations of paragraph 40 of the Amended Petition. Respondents further deny that Petitioners are entitled to relief as claimed in this paragraph.

41. Petitioners hereby incorporate by reference all of the allegations, statements, averments, and exhibits in paragraphs 1 through 79 as set forth in Petitioners' "Petition for Declaratory Judgment, Writ of Mandamus, Unconstitutionality of Ordinance and Damages" as if fully set forth herein, along with paragraphs 1 through 40 above as stated in this document.

RESPONSE:

Respondents hereby incorporate their responses to paragraphs 1 through 79 of the Petition and to paragraphs 1 through 40 of the Amended Petition as if fully set forth herein.

42. The Derby City Council enacted Ordinance 1997 on October 27, 2009. Section 5.28.100 Rates and Charges states:

"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 or approved from time to time by the City."

The Ordinance does not give any guidance on how the rates and charges are to be established, who or what body within the City of Derby shall set the rates and charges, and no method of protest to the rates and charges established. The result is an arbitrary delegation of legislative power binding on persons whether or not they consent.

RESPONSE:

Respondents admit that section 5.28.100 of the Ordinance is accurately quoted but deny the remainder of this paragraph. There is no unlawful delegation of legislative authority under the Ordinance.

43. In *Quality Oil Co. V. Du Pont & Co.*, 182 Kan. 488 the Court states at 495-496:

“The power to fix rates or prices for the sale of services or commodities binding on all persons whether or not they consent is a legislative power which may not be delegated by the legislature to a governmental agency, official, board, or to a private organization or person.”

RESPONSE:

Respondents deny that the case language cited is accurately quoted.

44. In *Kaufman v. Kansas Dept. Of SRS*, 248 Kan. 951, at 956-7 the Court states:

“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, [the appellate court] 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 (citation omitted).”

This can be interpreted to mean that the lack of guidelines, as shown in the text of Ordinance 1997, regarding rates and charges to be established, make the enactment an impermissible delegation of legislative authority.

RESPONSE:

Respondents admit that the case language cited is accurately quoted. Respondents deny that the cited language has any applicability to the situation existent herein and deny the remainder of this paragraph.

45. In *State, ex. Rel. V. Fadely*, 180 Kan. 652, 308 P.2d 537, Syl. Para. 7, the Court stated:

“The legislature may not delegate its power to make laws but may enact a law in general terms which confers upon an officer or board administrative duties to enforce or apply the law, and, to accomplish that end, to ascertain the existence or nonexistence of some future fact, event or condition which the officer or board is required to ascertain; but, the statute must prescribe reasonably clear standards by which those vested with the duty to make the statute operate will do so in the manner intended.”

RESPONSE:

Respondents admit that the case language cited is accurately quoted but deny its applicability herein.

46. In *Wesley Medical Center et al. V. McCain*, 226 Kan. 263; 597 P.2d 1088, (hereinafter “*Wesley*”) the Court states at 269:

“The matter of delegation of legislative authority was masterfully interpreted by M. Justice Burch in *State, ex rel. v. Hines*, 163 Kan. 300, 308, 182 P.2d 865 (1947). The court said:

“[P]erhaps the act can be considered as valid insofar as the delegation of power concerned, provided standards are fixed therein upon which a fact-finding administrative board is empowered to take action. But standards there must be.”

RESPONSE:

Respondents admit that the case language cited is accurately quoted but deny its applicability herein.

47. Further in *Wesley* the Court states at 270-271:

“From the cases, cited herein, we know the legislature is prohibited from delegating its lawmaking authority but may delegate the power to apply a law to an administrative agency if it provides adequate standards and guide rules to the agency.

State ex rel. v. Hines, 163 Kan. 300.”

RESPONSE:

Respondents admit that the case language cited is accurately quoted but deny its applicability herein.

48. Nowhere in Derby City Ordinance 1997 section 5.28.100 are there guidelines for the establishment of rates and charges for residential waste collection. Section 5.28.100 merely states that the rates and charges will be “established or approved from time to time by the City.” The ordinance does not lay out any judicial review of the rates, any limits on the rates to be established, any guidelines on how to determine rates, and does not name a specific person, board or group of persons that are involved to establish the rate. This section of Ordinance 1997 clearly creates the possibility of capricious, arbitrary, unreasonable acts, or whom by whomever is given the power to set rates and charges. For these reasons, section 5.28.100 of Derby City Ordinance 1997 is an unconstitutional delegation of legislative power.

RESPONSE:

Respondents deny the allegations of paragraph 48 of the Amended Petition. Respondents further deny that Petitioners are entitled to relief as claimed in this paragraph. There is no unlawful delegation of legislative authority under the Ordinance.

OTHER DEFENSES

49. Except as specifically admitted above, Respondents deny each and every allegation of the Amended Petition.
50. Petitioners lack standing to present claims alleging harm to parties not before the Court.
51. Ordinance 1997 executes policies declared by the Kansas Legislature and constitutes a valid exercise of decision-making authority expressly conferred upon the governing body of the City of Derby by the Legislature. Implementation and administration of the Ordinance also involves experience in municipal government and knowledge of the fiscal and other affairs of the City. Ordinance 1997 is therefore administrative in character and exempted from initiative and referendum by K.S.A. 12-3013(e). The Ordinance's administrative nature is confirmed by the ruling of the Sedgwick County District Court in denying Petitioners' Motion For Temporary Injunction on October 2, 2009.
52. Private contracts are not insulated from regulation or change by local governments by virtue of the Contract Clause. This provision of the Constitution permits local governments to exercise their police powers to further the best interests of their citizens despite limitation of privileges conferred by private contracts. Ordinance 1997 constitutes a reasonable exercise of the police powers held by the City of Derby and violates no rights of Petitioners under the Contract Clause.
53. Ordinance 1997 does not establish an unlawful delegation of legislative authority.
54. Any benefits provided to the City of Derby are reasonably commensurate with the burdens imposed upon the City in administering and implementing the Contract and Ordinance and are fully authorized by Kansas law.

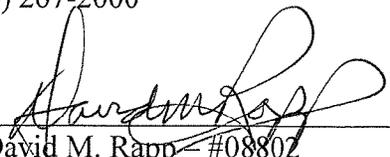
55. The Amended Petition fails to state a claim against Respondents.
56. The action is barred by estoppel and laches.
58. The actions of Respondent Kathleen Sexton, in her capacity as City Manager, were at all times performed in accordance with her official duties as City Manager and pursuant to authority granted by law and this Respondent is immune from any claims for damages herein.
59. The actions of Respondent City of Derby, Kansas were conducted pursuant to legislative authority and this Respondent is immune from any claim for damages herein.

WHEREFORE, having answered Petitioners' Amended Petition, Respondents City of Derby, Kansas, a city of the second class, and Kathleen Sexton, in her capacity as Derby City Manager, request that the Court deny Petitioners all relief sought in the Petition and Amended Petition and enter judgment on behalf of Respondents and that the Court grant Respondents such other and further relief as the Court deems just and equitable including, but not limited to, recovery of their reasonable attorney's fees as are permitted by law.

Respectfully submitted,

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

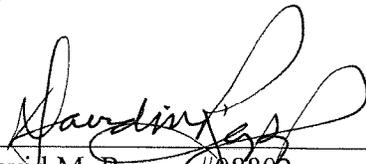
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing **Respondents' Answer To Amended Petition for Declaratory Judgment, Adding Causes Action For, City Ordinance That Exceeds Police Authority, Illegal Implementation of City Ordinance, and Unlawful Delegation of Legislative Authority** was forwarded via email and U.S. Mail addressed to:

Mark Rouleau
E-Mail: mark46077@yahoo.com
The Rouleau Law Firm, P.A.
P.O. Box 780001
Wichita, Kansas 67278
Attorney for Petitioners

on the 11th day of December, 2009, 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