

**HINKLE ELKOURI LAW FIRM L.L.C.**

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

STATE EX REL. 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 PETITION FOR DECLARATORY JUDGMENT,  
WRIT OF MANDAMUS,  
UNCONSTITUTIONALITY OF ORDINANCE  
AND DAMAGES**

COME NOW respondents The City of Derby, Kansas and Kathleen Sexton, City Manager and for their Answer To The Petition for Declaratory Judgment, Writ of Mandamus, Unconstitutionality of Ordinance and Damages do allege and state as follows<sup>1</sup>:

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<sup>1</sup>Paragraphs 1-79 of Respondents' Answer directly respond to the like-numbered paragraphs of the Petition. In these paragraphs, Petitioners' allegations are first stated (verbatim, as written in the Petition, without correction of typographical errors) followed by Respondents' reply. Paragraphs 80-86 state additional defenses to the Petition.

1. Petitioner R. Matthew Joyce, is now and at all times material herein has been an elector and resident of the City of Derby, Sedgwick County, Kansas and resides at 218 Mallard, Derby, Kansas.

**RESPONSE:**

**Respondents admit the allegations of paragraph 1 of the Petition.**

2. Petitioner Janice Baston, is now and at all times material herein has been an elector and resident of the City of Derby, Sedgwick County, Kansas and resides at 1614 N. Woodlawn, Derby, Kansas.

**RESPONSE:**

**Respondents admit the allegations of paragraph 2 of the Petition.**

3. Petitioner R. Matthew Joyce and Petitioner Janice Baston are hereafter collectively referred to as "Petitioners."

**RESPONSE:**

**Respondents admit the allegations of paragraph 3 of the Petition.**

4. Respondent City of Derby, Kansas, is now and at all times material herein, a municipal corporation, organized and existing under the general laws of the State of Kansas and can be served with process at 611 N. Mulberry Street, Derby, Kansas.

**RESPONSE:**

**Respondents admit the allegations of paragraph 4 of the Petition.**

5. Respondent Kathleen Sexton, Derby City Manager, is now and at all times material herein, employed by the City of Derby and can be served with process at 611 N. Mulberry Street, Derby, Kansas.

**RESPONSE:**

**Respondents admit the allegations of paragraph 5 of the Petition.**

6. Respondent City of Derby and Respondent Kathleen Sexton, City Manager, are hereafter collectively referred to as “Respondents.”

**RESPONSE:**

**Respondents admit the allegations of paragraph 6 of the Petition.**

7. Jurisdiction and venue are proper in this Court because the causes of action arose in the City of Derby, Sedgwick County, Kansas.

**RESPONSE:**

**Respondents admit the allegations of paragraph 7 of the Petition.**

8. City of Derby Ordinance 1980, incorporated herein as “Exhibit A” was approved by the Derby City Council on March 24, 2009. City of Derby Ordinance 1980 which was enacted to regulate the collection and transportation of solid waste. Generally, this ordinance gives the City of Derby the ability to select a single waste collection company to serve all residents, allow the City of Derby to set all residential waste collection rates, to collect a franchise fee, and establish new criminal acts for the public among other powers.

**RESPONSE:**

**Respondents admit that a copy of Ordinance 1980 is attached to Petitioners’ Petition, marked “Exhibit A”, which speaks for itself as to its terms. To the extent that Petitioners’ description of the Ordinance is inconsistent with its terms, such allegations are denied.**

9. K.S.A. 12-3013 provides electors in the State of Kansas the ability to petition their government, and sets forth procedures to follow with regard to an initiative petition.

**RESPONSE:**

**Respondents admit that K.S.A. 12-3013 governs the initiative and referendum process regarding municipal ordinances. The statute speaks for itself and to the extent that Petitioners' description of the statute is inconsistent with its terms, such allegations are denied.**

10. K.S.A. 25-3601 also sets forth procedures to follow with regard to an initiative petition.

**RESPONSE:**

**Respondents admit that K.S.A. 25-3601 concerns initiative petitions. The statute speaks for itself and to the extent that Petitioners' description of the statute is inconsistent with its terms, such allegations are denied.**

11. On August 12, 2009, a petition to repeal City of Derby Ordinance 1980, hereafter referred to as "Petition Ordinance" attached hereto and incorporated herein as "Exhibit B" is a true and accurate copy of the Petition Ordinance, which was delivered to Respondents.

**RESPONSE:**

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

12. The Petition Ordinance seeks to pass an ordinance that would repeal City of Derby Ordinance 1980.

**RESPONSE:**

**Respondents admit the allegations of paragraph 12 of the Petition.**

13. K.S.A. 12-3013(a) states:

"...If the petition accompanying the proposed ordinance is signed by the required number of electors qualified to sign, the governing body shall either (a) pass such ordinance without alteration within 20 days after attachment of the clerk's certificate to the accompanying petition; or (b) if not passed within

20 days, forthwith call [sic] special election, unless a regular city election is to be held within 90 days thereafter, and at such special or regular city election submit the ordinance, without alteration, to the vote of the electors of the city.”

**RESPONSE:**

**Respondents admit that K.S.A. 12-3013(a) has been accurately quoted in material part. However, K.S.A. 12-3013 (e) exempts administrative ordinances from the initiative and referendum process.**

14. On August 14, 2009, the Petition Ordinance was certified by Bill Gale, Commissioner of Elections, Sedgwick County, Kansas as having the required number of signatures of electors of the City of Derby. Attached hereto and incorporated herein as “Exhibit C” is a true and accurate copy of the certification letter.

**RESPONSE:**

**Respondents admit that a document marked “Exhibit C” is attached to Petitioners’ Petition whose contents speak for itself. To the extent that Petitioners’ description of Exhibit C is inconsistent with its terms, such allegations are denied.**

15. Petitioner R. Matthew Joyce and Petitioner Janice Baston both executed the Petition Ordinance.

**RESPONSE:**

**Respondents admit the allegations of paragraph 15 of the Petition.**

16. After the review of the Petition Ordinance by the Sedgwick County Counselor, that office determined that the form of the question in the Petition Ordinance complied with K.S.A. 25-

3601. Attached hereto and incorporated herein as Exhibit "D" is a true and accurate copy of the Sedgwick County Counselor letter.

**RESPONSE:**

**Respondents admit that a document marked "Exhibit D" is attached to Petitioners' Petition whose contents speak for itself. To the extent that Petitioners' description of Exhibit D is inconsistent with its terms, such allegations are denied. The County Counselor did not pass on the issue of whether the subject matter of the Petition Ordinance was appropriate for submission to the electors under K.S.A. 12-3013.**

17. K.S.A. 25-2601(e) states:

"Any action challenging the validity of the form of a question in a petition shall be filed in the district court within 20 days after such petition has been filed with the county election office."

**RESPONSE:**

**Respondents deny the allegations of paragraph 17 of the Petition as stated. K.S.A. 26-3601(e) contains similar language and speaks for itself. To the extent that Petitioners' description of the statute is inconsistent with its terms, such allegations are denied.**

18. The Respondents did not file any action challenging the validity of the form of the question in the Petition Ordinance in the district court within 20 days after the Petition Ordinance was filed with the Sedgwick County Election Office on August 13, 2009. Therefore, the Respondents are barred from challenging the form of the question contained in the Petition Ordinance.

**RESPONSE:**

**Respondents admit only that no challenge was filed regarding the form of the questions submitted and deny the further legal conclusion asserted in this paragraph.**

19. As of the date of this filing, which is more than 20 days and less than 90 days from the date of certification of the Petition Ordinance, a special election is the only action available to Respondents to comply with K.S.A. 12-3013. Since more than 20 days have passed since the certification of the Petition Ordinance, a City Council resolution that may have been passed on September 8, 2009 or any date thereafter to repeal City of Derby Ordinance 1980 would not be timely under the statute and therefore would be ineffective.

**RESPONSE:**

**Respondents deny that a special election is necessary in order to comply with K.S.A. 12-3013. Respondents admit that the Petition Ordinance could not now be passed by the governing body of the City.**

20. In a City Council Agenda Report for the September 8, 2009 Derby City Council meeting Phil Alexander, City Attorney states: "Thorough analysis of the proposed ordinance, relevant precedents and other authorities leads [sic] to the conclusion that because the proposed ordinance is administrative in character, K.S.A. 12-3013 does not require the Council to act on the petition." Mr. Alexander's Agenda Report is attached hereto and is incorporated herein as "Exhibit E."

**RESPONSE:**

**Respondents admit that a document marked "Exhibit E" is attached to Petitioners' Petition whose contents speak for itself. To the extent that Petitioners' description of Exhibit E is inconsistent with its terms, such allegations are denied.**

21. Based on this report from Phil Alexander, the Derby City Council passed a resolution, at their September 8, 2009 meeting, to take no further action on the Petition Ordinance.

**RESPONSE:**

**Respondents deny the allegations as stated in paragraph 21 of the Petition and further state that a motion was passed by the City Council on September 8, 2009 to take no further action regarding the Petition Ordinance.**

22. By deciding to take no action relative to the Petition Ordinance, the Respondents have affirmed their position not to hold a special election within 90 days of attachment of the clerk's certificate on the Petition Ordinance as required under K.S.A. 12-3013.

**RESPONSE:**

**Respondents deny that a special election is necessary in order to comply with K.S.A. 12-3013 and therefore admit that no special election will be scheduled regarding repeal of Ordinance 1980.**

23. K.S.A. 12-3013(e) provides;

“(e) The provisions of this section shall not apply to:

(1) Administrative ordinances...”

**RESPONSE:**

**Respondents admit the allegations of paragraph 23 of the Petition.**

24. In *City of Wichita v. Fitzgerald*, 22 Kan.App.2d 428 the court states:

“Where the effect of a proposed ordinance is to repeal a previous ordinance, it is necessary to review the earlier ordinance to determine whether it is administrative or legislative.”

**RESPONSE:**

**Respondents deny the accuracy of the quotation in paragraph 24 of the Petition.**

25. Respondents claim that City of Derby Ordinance 1980 is administrative and therefore K.S.A. 12-3013 which requires the special election does not apply.

**RESPONSE:**

**Respondents do claim that Ordinance 1980 is administrative and so admit. Respondents deny that K.S.A. 12-3013 requires a special election.**

26. Petitioners maintain that the Petition Ordinance is legislative because City of Derby Ordinance 1980 is legislative.

**RESPONSE:**

**Respondents admit that Petitioners so contend.**

27. The Kansas Supreme Court in *McAlister et al v. City of Fairway, Kansas*, 212 P.3d 184 (2009) (hereafter "*McAlister*") outlined a four part test to determine if a city ordinance is legislative or administrative. The Petitioners believe that under this "*McAlister* test" the Petition Ordinance is legislative.

**RESPONSE:**

**Respondents admit that *McAlister v. City of Fairway*, 212 P.3d 183 (2009) sets forth a four part test to determine whether an ordinance is administrative or legislative in character. Respondents admit that Petitioners contend the Ordinance is legislative.**

28. Then [sic] first analysis under the *McAlister* test asks whether the ordinance creates a new law or policy. If the ordinance creates new law or policy it is legislative.

**RESPONSE:**

**Respondents admit Petitioners' characterization of the first step of the *McAlister* analysis. Respondents deny the legal conclusion stated in the second sentence of this paragraph and assert that analysis of all four factors is required to determine the administrative or legislative character of an ordinance.**

29. The City of Derby Ordinance 1980 creates numerous new laws because it gives the City of Derby the ability to select a single waste collection company to serve all residents, allow the

City of Derby to set all residential waste collection rates, to collect a franchise fee, and it establishes new policies and laws with criminal penalties which include fines and imprisonment for public violations of Ordinance 1980.

**RESPONSE:**

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

30. A table entitled "Analysis of Law Changes in Ordinance 1980" is attached hereto and incorporated herein as "Exhibit F." The table shows the substantial amount of new legislation which comprises Ordinance 1980.

**RESPONSE:**

**Respondents admit that Petitioners have attached their analysis as Exhibit F as stated in the first sentence hereof but deny the accuracy of the analysis. Respondents further deny the legal conclusion that Ordinance 1980 creates new law.**

31. Due to the substantial amount of new law and criminal penalties associated with Ordinance 1980, it can only be concluded that Ordinance 1980 creates enough new law that is [sic] must be a legislative ordinance under the first analysis of the *McAlister* test.

**RESPONSE:**

**Respondents deny the allegations of paragraph 31 of the Petition and assert that Ordinance 1980 is administrative in nature.**

32. Under the second *McAlister* test if the ordinance declares a public purpose and provides a means to accomplish that purpose, the ordinance is legislative.

**RESPONSE:**

**Respondents admit Petitioners' characterization of the second part of the *McAlister* test but deny the legal conclusions stated in paragraph 32. Analysis**

**of all four factors is required to determine the administrative or legislative character of an ordinance.**

33. The City of Derby Ordinance 1980 states more than one public purpose and is a means to accomplish those purposes. In summary, the purposes mentioned are, (a) efficient collection of refuse, (b) reducing the number and size of vehicles for refuse collection, (c) facilitate recycling, (d) assume municipal control of refuse collection and disposal, and (e) comprehensive and effective regulation of nonresidential refuse.

**RESPONSE:**

**Respondents deny Petitioners' summary and characterization of Ordinance 1980.**

34. These numerous public purposes and the extensive laws providing a means to accomplish those purposes support the conclusion that under the second *Mcalister* test Ordinance 1980 is legislative.

**RESPONSE:**

**Paragraph 34 states a legal conclusion to which no response is required. To the extent any response is required, Respondents deny the allegations of paragraph 34 of the Petition.**

35. Under the third *Mcalister* test if the ordinance does not intrude into areas of government requiring specialized training and expertise the ordinance is legislative.

**RESPONSE:**

**Paragraph 35 states a legal conclusion to which no response is required. To the extent any response is required, Respondents deny the allegations of paragraph 35 of the Petition.**

36. The City of Derby formed a “Recycling/Trash Advisory Board” comprising of six persons with no specialized training in [sic] city affairs, administration, or fiscal matters. In addition, these persons did not have specialized knowledge of waste collection and transportation.

**RESPONSE:**

**Respondents admit only that the City of Derby formed a Recycling/Trash Advisory Board comprised of six citizens of the City. Respondent is, at present, without sufficient knowledge as to the truth of the remaining allegations and therefor denies them.**

37. The Recycling/Trash [sic] Advisory Board was empowered to make all particular decisions on the implementation of residential waste and recycling including the review of all bids and the selection of contractors to provide the service.

**RESPONSE:**

**Respondents deny the allegations of paragraph 37 of the Petition and state that the Recycling/Trash Advisory Board was, as its name implies, advisory only.**

38. The lack of the requirement of specialized knowledge in city administration and fiscal matters to participate in the decisions regarding Ordinance 1980 supports the conclusion it is legislative.

**RESPONSE:**

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

39. The fourth *Mcalister* test is whether or not the ordinance addresses matters of statewide concern. If the City is executing comprehensive state statutory enactments then the ordinance is administrative.

**RESPONSE:**

**Respondents deny Petitioners' characterization of the fourth part of the McAlister test and state that such test speaks for itself. Where the Legislature has declared public policy and delegated decision-making power directly to the local governing body regarding its implementation, such factor demonstrates that an ordinance is administrative in character.**

40. The particulars of the collection and transportation of residential solid waste is not a matter of statewide concern, and is not part of the execution of a comprehensive set of state statutes. Lacking a comprehensive set of state statutes for waste collection, under this analysis the Petition Ordinance is legislative.

**RESPONSE:**

**Respondents deny the allegations of paragraph 40 of the Petition.**

41. Ordinance 1980 is legislative under all four *McAlister* tests, and should be deemed legislative by this Court.

**RESPONSE:**

**Respondents deny the allegations of paragraph 41 of the Petition.**

42. Since Ordinance 1980 is legislative, the repealing Petition Ordinance is also legislative.

**RESPONSE:**

**Respondents deny the allegations of paragraph 42 of the Petition.**

43. Because the Petition Ordinance is legislative it is therefore appropriate for this Court to enforce K.S.A. 12-3013 and require compliance with that statute by the Respondents.

**RESPONSE:**

**Respondents deny the allegations of paragraph 43 of the Petition. Ordinance 1980 is administrative in character and exempt from initiative and referendum under K.S.A. 12-3013.**

44. Petitioners incorporate by reference all of the allegations, statements, averments in paragraphs 1 through 43 as if fully set forth herein.

**RESPONSE:**

**Respondents hereby incorporate their responses to paragraphs 1 through 43 of the Petition as if fully set forth herein.**

45. K.S.A. 60-1704 states:

“Any person having an interest under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may seek determination of any question of construction or validity arising under that enactment, document or agreement and may obtain a declaration of rights, status or other legal relations thereunder.”

**RESPONSE:**

**Respondents admit that K.S.A. 60-1704 has been accurately quoted.**

46. The Petitioners is [sic] this case are asking for a declaratory judgment which is permitted under K.S.A. 60-1704. The Petitioners are questioning the construction and validity of a municipal ordinance and the threatened violation of K.S.A. 12-3013 by the Respondents memorialized by a City Council resolution stating that it will take no action on the Petition Ordinance and thereby not hold the special election required under the statute.

**RESPONSE:**

**Respondents admit that Petitioners seek a declaratory judgment but deny that Petitioners are entitled to any remedy as sought herein.**

47. K.S.A. 60-1707 states:

“The enumeration of K.S.A. 60-1704, 60-1705 and 60-1706 does not limit or restrict the exercise of the general powers conferred in K.S.A. 60-1701, in any proceeding where declaratory relief is sought, in which a judgment will terminate the controversy or remove an uncertainty.”

**RESPONSE:**

**Respondents admit that K.S.A. 60-1707 has been accurately quoted.**

48. This Court’s Declaratory Judgment on the issue of whether City of Derby Ordinance 1980 is legislative or administrative will both remove an uncertainty and terminate the controversy. Therefore, a Declaratory Judgment action is [sic] the Court is proper.

**RESPONSE:**

**Respondents deny the characterization and legal conclusions as stated in this paragraph.**

49. Petitioners are affected by the Respondents’ failure to comply with state law K.S.A. 12-3013 by failing and refusing to follow the statute’s instructions.

**RESPONSE:**

**Respondents deny the allegations of paragraph 49 of the Petition.**

50. Petitioners are entitled to a determination of a question of construction or validity arising under the Respondents’ failure and refusal to comply with State Law K.S.A. 12-3013 and process the Petition Ordinance.

**RESPONSE:**

**Respondents deny any violation of K.S.A. 12-3013 and assert that Petitioners are not entitled to the relief sought.**

51. The Respondents' position that the Petition Ordinance is administrative in nature and therefore is not the proper subject of an initiative petition under K.S.A. 12-3013 is not supported by the facts or the law.

**RESPONSE:**

**Respondents deny the allegations of paragraph 51 of the Petition.**

52. The Petition Ordinance is a legislative ordinance and therefore is subject to the provisions of K.S.A. 12-3013.

**RESPONSE:**

**Respondents deny the allegations of paragraph 52 of the Petition.**

53. The City was required under K.S.A. 12-3013 to (a) pass by City Council resolution the Petition Ordinance without alteration within 20 days after attachment of the clerk's certificate; or (b) of [sic] not passed by the [sic] within 20 days by City Council resolution, forthwith call a special election, unless a regular city election is to be held, within 90 days thereafter, submit the Petition Ordinance without alteration, to the vote of the Electors of the City of Derby.

**RESPONSE:**

**Respondents deny the allegations of paragraph 53 of the Petition.**

54. The Respondents' refusal and resolution to not process the Petition Ordinance, has significant detrimental effects on the Petitioners and is an unlawful denial of the Petitioners' rights granted under state statute.

**RESPONSE:**

**Respondents deny the allegations of paragraph 54 of the Petition.**

55. The Petitioners are entitled to a declaration of this Court of whether or not the Petition Ordinance is legislative or administrative.

**RESPONSE:**

**Respondents deny the allegations of paragraph 55 of the Petition.**

56. The Petitioners are entitled to a declaration of this Court of whether or not the Respondents' actions violated state law.

**RESPONSE:**

**Respondents deny the allegations of paragraph 56 of the Petition.**

57. Because of the foregoing, a controversy presently exists between the Petitioners and Respondents. The interests of the Petitioners and Respondents are adverse. Petitioners have a legally protectable interest and it is timely that a judicial determination be made. This Court's declaratory judgment would terminate uncertainties causing the controversy between the parties. Petitioners have no adequate remedy at law and to grant declaratory judgment and any other appropriate relief herein would avoid multiplicity of litigation from thousands of individual Electors of the City of Derby, Kansas.

**RESPONSE:**

**Respondents deny the allegations of paragraph 57 of the Petition. Respondents further deny that Petitioners are entitled to relief as claimed following this paragraph.**

58. Petitioners incorporate by reference all of the allegations, statements, averments in paragraphs 1 through 57 as if fully set forth herein.

**RESPONSE:**

**Respondents hereby incorporate their responses to paragraphs 1 through 57 of the Petition as if fully set forth herein.**

59. K.S.A. 60-801 is titled “Nature of Mandamus” and provides:

“Mandamus is a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law.”

**RESPONSE:**

**Respondents admit that K.S.A. 60-801 has been accurately quoted.**

60. K.S.A. 60-802 is titled “Procedure for Relief” states:

“a) *Generally*. Relief in the form of mandamus shall be obtained under the same procedure as relief in other civil actions. If it be desired in connection with any mandamus proceeding to stay any proceedings or acts pending the [sic] determination of the mandamus proceeding, the plaintiff may combine therewith an application for relief under article 9 of this chapter. The judgment in mandamus shall specify with particularity the act or acts which the defendant is compelled to perform or enjoined from performing.

b) *Peremptory order*. When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory order of mandamus may be allowed in the first instance.

c) *Damages*. If judgment be given for the plaintiff, he or she may also recover such damages as he or she may have sustained by reason of the failure of the defendant to perform the specified duty, together with costs.”

**RESPONSE:**

**Respondents admit that K.S.A. 60-802 has been accurately quoted in material part.**

61. This proceeding is to compel the City of Derby and the City Manager to perform a specified duty, which duty results from operation of law.

**RESPONSE:**

**Respondents deny that the remedy of mandamus applies to this action.**

62. The City of Derby’s duty was to (a) pass the Petition Ordinance without alteration within 20 days after attachment of the clerk’s certificate to the same; or (b) if not passed within 20 days, forthwith call a special election, unless a regular city election is to be held within 90 days thereafter, and at such special or regular city election submit the Petition Ordinance without alteration, to the vote of the Electors fo [sic] the City.

**RESPONSE:**

**Respondents deny the allegations of paragraph 62 of the Petition.**

63. The City Manager’s duties related to (a) and (b) above.

**RESPONSE:**

**Respondents deny the allegations of paragraph 63 of the Petition.**

64. The Respondents have not performed either task required by K.S.A. 12-3013 and has [sic] specifically refused to perform the legally required tasks through the passing of a City

Council resolution dated September 8, 2009 stating that the City of Derby and the City Manager shall not respond in any way or perform any tasks regarding the Petition Ordinance.

**RESPONSE:**

**Respondents admit that the City of Derby did not pass the Petition Ordinance nor place it on the ballot but deny that such action violated any legal duty owed to Petitioners.**

65. The Respondents have failed to perform duties required under Kansas law, K.S.A. 12-3013.

**RESPONSE:**

**Respondents deny the allegations of paragraph 65 of the Petition.**

66. The judgment in mandamus shall specify with particularity the act or acts which the Respondents are compelled to perform.

**RESPONSE:**

**Respondents deny the allegations of paragraph 66 of the Petition.**

67. The Petitioners' right to require the performance is mandated by K.S.A. 12-3013.

**RESPONSE:**

**Respondents deny the allegations of paragraph 67 of the Petition.**

68. If judgment be given to the Petitioners, the Petitioners may also recover such damages as may have been sustained by reason of the failure of Respondents to perform the specified duty, together with reasonable attorney fees and court costs.

**RESPONSE:**

**Respondents deny the allegations of paragraph 68 of the Petition. Respondents further deny that Petitioners are entitled to relief as claimed following this paragraph.**

69. Petitioners incorporate by reference all of the allegations, statements, averments in paragraphs 1 through 68 as if fully set forth herein.

**RESPONSE:**

**Respondents hereby incorporate their responses to paragraphs 1 through 68 of the Petition as if fully set forth herein.**

70. Article I, Section 10 of the United States Constitution states:

“No State shall...pass any...Law impairing the Obligation of Contracts...”

**RESPONSE:**

**Respondents admit that Article I, ¶ 10 of the United States Constitution has been accurately quoted as abbreviated.**

71. In *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, the Court states that a law that impairs a contract is one that substantially invalidates, releases, or extinguishes the obligations of a contract or that derogates substantial contract rights.

**RESPONSE:**

**Respondents admit that *Home Bldg & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934) addresses the standards for claims under the Contract Clause of the Constitution but assert that Petitioners’ characterization thereof is incomplete and does not accurately describe the governing test.**

72. Derby City Ordinance 1980 in section 5.28.020 “Prohibited Acts” item 8 states that no person shall:

“8. Contract with any person other than the City, for collection and disposal of residential refuse or recyclables;”

**RESPONSE:**

**Respondents admit the allegations of paragraph 72 of the Petition.**

73. On July 31, 2009, Kathleen Sexton, City Manger, wrote a letter to Derby Disposal which is attached and incorporated by reference as “Exhibit G” stating:

“Since your firm was not selected, you should plan to cease collection of residential [sic] refuse and recyclables in Derby by November 30, 2009. It will be illegal for your firm to engage in this business in Derby after that date.”

**RESPONSE:**

**Respondents admit that a document marked “Exhibit G” is attached to Petitioners’ Petition whose contents speak for itself. Respondents admit “Exhibit G” contains such language.**

74. The July 31, 2009 letter from Kathleen Sexton, City Manager, does not acknowledge any existing contracts that are in place between Derby Disposal and its customers. This position of Kathleen Sexton, City Manager, also denies the Petitioners the benefit of their contracts for waste collection and disposal.

**RESPONSE:**

**Respondents deny the allegations of paragraph 74 of the Petition.**

75. Because of Respondents [sic] intent to enforce Ordinance 1980 in a way that terminates all existing residential waste contracts, Petitioners claim the act of cancellation of contracts is a substantial impairment as defined in *Blaisdell* and results in an unconstitutional ordinance and action by Respondents.

**RESPONSE:**

**Respondents admit only that Petitioners so claim but deny that the enforcement of Ordinance 1980 impairs any rights of Petitioners under the Contract Clause. Established law permits local governments to reasonably exercise their police**

**powers to promote the public welfare and does not insulate private contracts from modification or impairment by so acting.**

76. In *Federal Land Bank of Wichita v. Bott*, 240 Kan. 626 [sic] (1987) at 629 the Court States:

“The intent behind the commerce clause was to prohibit states from retroactively interfering with contacts [sic] between the parties.”

**RESPONSE:**

**Respondents deny the accuracy or application of the language purportedly quoted in paragraph 76 of the Petition.**

77. Any existing contracts between customers, such as the Petitioners and a waste collection company, cannot be retroactively terminated by a City Ordinance, since the retroactive act to terminate contracts is unconstitutional.

**RESPONSE:**

**Respondents deny the allegations of paragraph 77 of the Petition.**

78. In *Mizer v. Kansas Bostwick Irrigation District*, 172 Kan 157 the Court states:

“In determining constitutionality of a statute the court’s duty is to uphold the legislation rather than defeat it and if there is any reasonable way to construe the legislation as constitutionally valid that should be done.”

**RESPONSE:**

**Respondents deny the accuracy of the purported quote but admit the validity of the principle regarding constitutionality of legislation discussed in paragraph 78 of the Petition.**

79. Under *Mizer* this Court may construe Ordinance 1980 in a way not to retroactively terminate existing contracts by interpreting Ordinance 1980 to honor any existing contract entered into before the effective date of December 1, 2009.

**RESPONSE:**

**Respondents deny Petitioners' legal conclusions as stated in this paragraph. Respondents further deny that Petitioners are entitled to relief as claimed following this paragraph.**

**OTHER DEFENSES**

80. Except as specifically admitted above, Respondents deny each and every allegation of the Petition.
81. Petitioners lack standing to bring an action in the name of the State of Kansas.
82. Ordinance 1980 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 1980 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.
83. 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 1980 constitutes a reasonable exercise of the police powers held by the City of Derby and violates no rights of Petitioners under the Contract Clause.
84. The Petition fails to state a claim against Respondents.

85. The actions of Respondent Sexton were at all times performed in accordance with her official duties as City Manager and pursuant to authority granted by law and Respondent is immune from any claims for damages herein.

86. The actions of Respondent City of Derby, Kansas were conducted pursuant to legislative authority and Respondent is immune from any claim for damages herein.

WHEREFORE, having answered Petitioners' 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 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,

HINKLE ELKOURI LAW FIRM L.L.C.  
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By 

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**Attorneys for Respondents**

City of Derby, Kansas and Kathleen Sexton

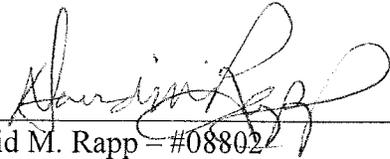
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing **Respondents' Answer To Petition for Declaratory Judgment, Writ of Mandamus, Unconstitutionality of Ordinance and Damages** was forwarded via email and U.S. Mail addressed to:

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

on the 26<sup>th</sup> day of October, 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