

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

STATE EX. REL JANICE BASTON
and R. MATTHEW JOYCE
Plaintiff (s)

VS.

CITY OF DERBY, CITY HALL
611 N. MULBERRY ST. DERBY, KS 67037
Defendant (s)

09CV3598

CASE NO. _____

SUMMONS

PURSUANT TO K.S.A. CHAPTER 60

To the above-named Defendant:

You are hereby summoned and required to serve upon MARK RODLEAU, RODLEAU LAW FIRM, P.A., plaintiff's attorney, whose address is 8735 S. GREENWICH RD, DERBY, KS 67037, a pleading to the petition which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition. Your pleading must also be filed with the court. As provided in subsection (a) of K.S.A. 60-213, and amendments thereto, your answer must state as a counterclaim any related claim which you may have against the plaintiff, or you will thereafter be barred from making such claim in any other action.

REASONABLE ACCOMMODATIONS WILL BE PROVIDED IN ACCORDANCE WITH THE AMERICANS WITH DISABILITIES ACT.

Clerk of the District Court of Sedgwick County, Kansas

SEP 16 2009



Jerry L. Bault

Dated _____

By _____, Deputy

RETURN ON SERVICE OF SUMMONS

I hereby certify that I have served the within summons:

[1] **Personal Service.** By delivering on the _____ day of _____, _____, a copy of the summons and a copy of the petition to each of the within-named defendants _____

[2] **Residence Service.** By leaving on the _____ day of _____, _____, for each of the within-named defendants _____

a copy of the summons and a copy of the petition at the respective dwelling place or usual place of abode of such defendants with some person of suitable age and discretion residing therein.

[3] **Agent Service.** By delivering on the _____ day of _____, _____, a copy of the summons and a copy of the petition to each of the following agents authorized by appointment or by law to receive service of process _____

[4] **Residence Service and Mailing.** By leaving a copy of the summons and a copy of the petition at the dwelling house or usual place of abode and mailing by first-class mail to each of the following defendants a notice that such copy has been so left _____

[5] **Certified Mail Service.** I hereby certify that I have served the within summons: (1) By mailing on the _____ day of _____, _____, a copy of the summons and a copy of the petition in the above action as certified mail return receipt requested to each of the within-named defendants; (2) the name and address on the envelope containing the process mailed as certified mail return receipt requested were as follows: _____

By _____

[6] **Certified Mail Service Refused.** I hereby certify that on the _____ day of _____, _____, I mailed a copy of the summons and petition in the above action by first-class mail, postage prepaid, addressed to _____ at _____

By _____

[7] **No Service.** The following defendants were not found in this county: _____

I declare (verify, certify or state) under penalty of perjury that the foregoing return of service is true and correct.

Executed on _____

SIGNATURE OF LAW ENFORCEMENT OFFICER

2009 SEP 16 PM 1 35

CLERK OF DIST. COURT
JUDICIAL DISTRICT
SEDGWICK COUNTY, KS

**IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS**

BY _____

STATE EX REL. JANICE BASTON,)
and)
R. MATTHEW JOYCE)

Petitioners)

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

Respondents)

09CV3598



**PETITION FOR DECLARATORY JUDGMENT,
WRIT OF MANDAMUS,
UNCONSTITUTIONALITY OF ORDINANCE
AND DAMAGES**

COME NOW Petitioners by and through their attorney, The Rouleau Law Firm, P.A., for their Petition for Declaratory Judgment, Writ of Mandamus, Unconstitutionality of Ordinance, and Damages, state and allege as follows:

ALLEGATIONS COMMON TO ALL COUNTS

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.
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.

3. Petitioner R. Matthew Joyce and Petitioner Janice Baston are hereafter collectively referred to as "Petitioners."
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.
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.
6. Respondent City of Derby and Respondent Kathleen Sexton, City Manager, are hereafter collectively referred to as "Respondents."
7. Jurisdiction and venue are proper in this Court because the causes of action arose in the City of Derby, Sedgwick County, Kansas.
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.
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.
10. K.S.A. 25-3601 also sets forth procedures to follow with regard to an initiative petition.
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.

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

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 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.”

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.

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

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.

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 officer.”

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.

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.

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 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.”

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.
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.
23. K.S.A. 12-3013(e) provides:
 - “(e) The provisions of this section shall not apply to:
 - (1) Administrative ordinances...”
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.”
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.
26. Petitioners maintain that the Petition Ordinance is legislative because City of Derby Ordinance 1980 is legislative.
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.
28. Then 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.

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.
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.
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 must be a legislative ordinance under the first analysis of the *Mcalister* test.
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.
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.
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

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.
36. The City of Derby formed a “Recycling/Trash Advisory Board” comprising of six persons with no specialized training in city affairs, administration, or fiscal matters. In addition, these persons did not have specialized knowledge of waste collection and transportation.
37. The Recycling/Trash 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.
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.
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.
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.
41. Ordinance 1980 is legislative under all four *Mcalister* tests, and should be deemed legislative by this Court.
42. Since Ordinance 1980 is legislative, the repealing Petition Ordinance is also legislative.
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.

COUNT I

DECLARATORY JUDGMENT

44. Petitioners incorporate by reference all of the allegations, statements, averments in paragraphs 1 through 43 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.

46. The Petitioners in 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.

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.”

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 the Court is proper.
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.
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.
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.
52. The Petition Ordinance is a legislative ordinance and therefore is subject to the provisions of K.S.A. 12-3013.
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) if not passed by the 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.
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.

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

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

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.

WHEREFORE, the Petitioners pray for an Order of the Court:

- A. Declaring that since the Respondents did not file any action regarding the validity of the form of the question in the Petition Ordinance, and more than twenty days have past since the Petition Ordinance was filed with the county election officer, that Respondents may not challenge the form of the question of the Petition Ordinance per K.S.A. 25-3601(e), and therefore the form of the question in the Petition Ordinance complies with Kansas Law;
- B. Declaring that since the Petition Ordinance is legal as to the form of the question and the course of conduct of the Respondents through their failure to (a) pass the Petition

Ordinance without alteration by vote of the City Council within twenty days after attachment of the clerk's certificate to the same; or (b) by the unanimous vote of the City Council on September 8, 2009 to not hold a special election within ninety days after the attachment of the clerk's certificate to the Petition Ordinance denies the Electors, including the Petitioners, the ability to vote on the Petition Ordinance and is in violation of K.S.A. 12-3013 and K.S.A. 25-3601;

- C. Declaring that the refusal to adopt the Petition Ordinance has resulted in substantial damages and detriment to the Petitioners, and that the Petitioners have been denied the right to petition the government and were denied the privileges which are intended to extend to the residents and electors of the State of Kansas;
- D. Declaring that since the Petition Ordinance complied with Kansas law, the Respondents have a duty to timely pass the Petition Ordinance without alteration, or call a special election on the same, and have failed and refused to do either with no legal basis for their refusal;
- E. Declaring that the refusal to adopt the Petition Ordinance by City Council resolution and the refusal to allow the electors to vote on whether or not to pass the Petition Ordinance, does not advance any legitimate interest of the Respondents;
- F. Declaring that the actions and course of conduct of the Respondents deprived Petitioners of the right to petition the government secured by K.S.A. 12-3013 injured, damaged and irreparably harmed the Petitioners;
- G. Declaring that since the Respondents may not benefit from their failure to hold the special election within 90 days as required under K.S.A. 12-3013, and that the Petition Ordinance

being a legislative ordinance is now a valid ordinance of the City of Derby resulting in the repeal of City of Derby Ordinance 1980;

- H. Award Petitioners reasonable attorney fees and court costs incurred herein pursuant to K.S.A. 60-1711; and
- I. Such other and further relief as this Court deems just and proper.

COUNT II

WRIT OF MANDAMUS

58. Petitioners incorporate by reference all of the allegations, statements, averments in paragraphs 1 through 57 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.”

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 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.”

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.
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 the City.
63. The City Manager’s duties related to (a) and (b) above.
64. The Respondents have not performed either task required by K.S.A. 12-3103 and has 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.
65. The Respondents have failed to perform duties required under Kansas law, K.S.A. 12-3013.

66. The judgment in mandamus shall specify with particularity the act or acts which the Respondents are compelled to perform.
67. The Petitioners' right to require the performance is mandated by K.S.A. 12-3013.
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.

WHEREFORE, Petitioners pray for an order of the Court:

- A. Applying K.S.A. 60-801 and 60-802, compel the City of Derby and the Derby City Manager to (i) call a special election unless the time allowed under K.S.A. 12-3013 has passed; or in the alternative (ii) enact the Petition Ordinance without alteration;
- B. Take any and all actions necessary or required to comply with Kansas law but not limited to the payment of costs for the special election if held;
- C. Award to the Petitioners damages, court costs, and reasonable attorney fees resulting from the Respondents' failure to perform duties required under law; and
- D. Such other and further relief as this Court deems just and proper in the circumstances.

COUNT III

UNCONSTITUTIONALITY OF ORDINANCE

69. Petitioners incorporate by reference all of the allegations, statements, averments in paragraphs 1 through 68 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...”

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.
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;”
73. On July 31, 2009, Kathleen Sexton, City Manager, 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 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.”
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.
75. Because of Respondents 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.
76. In *Federal Land Bank of Wichita v. Bott*, 240 Kan. 626 (1987) at 629 the Court states:

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

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.

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.”

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.

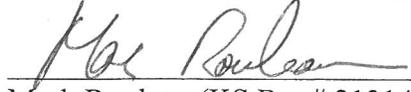
WHEREFORE, Petitioners pray for an order of the Court:

- A. The Court shall declare Ordinance 1980 unconstitutional and of no further force or effect or in the alternative;
- B. All residential waste contracts that are in existence as of November 30, 2009 shall be honored by the City of Derby and,
- C. Ordinance 1980 shall not apply to contracts for residential waste and recyclables collection and disposal entered into before its effective date which is currently December 1, 2009, or any subsequently revised effective date of Ordinance 1980 and,
- D. Award Petitioners reasonable attorney fees and court costs incurred herein pursuant to the

unconstitutional acts of the Respondent and;

E. Whatever further order this Court may deem just and proper.

RESPECTFULLY SUBMITTED,



Mark Rouleau (KS Bar # 21314)

The Rouleau Law Firm, P.A.

P.O. Box 780001

Wichita, Kansas 67278

(316) 640-1304

mark46077@yahoo.com

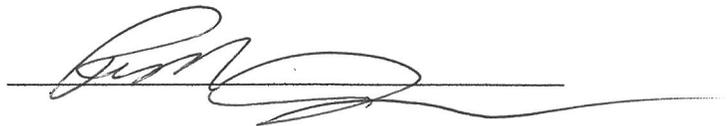
VERIFICATION

I, R. Matthew Joyce, declare as follows:

1. I am an elector of the City of Derby, Kansas.
2. I reside at 218 Mallard, Derby, Kansas.
3. I signed the Petition to enact a City of Derby Ordinance to repeal City of Derby Ordinance 1980.
4. I have read the foregoing Petition for Declaratory Judgment, Writ of Mandamus, Unconstitutionality of Ordinance and Damages and am familiar with its contents.
5. All facts alleged in the foregoing Petition for Declaratory Judgment, Writ of Mandamus, Unconstitutionality of Ordinance and Damages not otherwise supported by citation to record evidence, exhibits, or other documents, are true to the best of my knowledge.

I declare under the penalty of perjury under the laws of the State of Kansas that the foregoing is true and correct.

Executed this 16th day of September, 2009 at Derby, Kansas.

A handwritten signature in black ink, appearing to read "R. Matthew Joyce", is written over a horizontal line. The signature is cursive and extends to the right of the line.

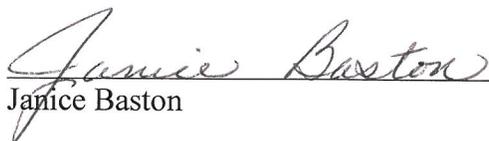
VERIFICATION

I, Janice Baston, declare as follows:

1. I am an elector of the City of Derby, Kansas.
2. I reside at 1614 N. Woodlawn, Derby, Kansas
3. I signed the Petition to enact an City of Derby Ordinance to repeal City of Derby Ordinance 1980.
4. I have read the foregoing Petition for Declaratory Judgment, Writ of Mandamus, Unconstitutionality of Ordinance and Damages and am familiar with its contents.
5. All facts alleged in the foregoing Petition for Declaratory Judgement, Writ of Mandamus, Unconstitutionality of Ordinance and Damages not otherwise supported by citation to record evidence, exhibits, or other documents, are true to the best of my knowledge.

I declare under the penalty or perjury under the laws of the State of Kansas that the foregoing is true and correct.

Executed this 15th day of September, 2009, at Derby, Kansas.



Janice Baston

**IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS**

STATE EX REL. JANICE BASTON,)
 and)
R. MATTHEW JOYCE)
)
 Petitioners)
)
CITY OF DERBY, KANSAS)
a city of the second class, and)
KATHLEEN SEXTON,)
in her capacity as)
Derby City Manager)
)
 Respondents)

09CV3598

SUMMARY OF EXHIBITS

The following is a list of exhibits for the matter in question:

- A. City of Derby Ordinance 1980 (13 pages).
- B. Petition proposing an Ordinance to repeal Ordinance 1980 (1 page).
- C. Certificate of Commissioner of Elections, August 14, 2009 (1 page).
- D. Assistant County Counselor letter dated May 6, 2009 giving a written advisory opinion on the Petition Regarding Initiative Repeal of City of Derby Ordinance No. 1980 (1 page).
- E. Agenda Report for September 8, 2009 Derby City Council meeting prepared by Phil Alexander, Derby City Attorney (2 pages).
- F. Analysis of Law Changes in Ordinance 1980 (2 pages).
- G. Letter to Derby Disposal, LLC from Kathleen Sexton, Derby City Manager dated July 31, 2009 (1 page).

Passed: 3/24/09
Published: 4/1/09

Ordinance No. 1980

AN ORDINANCE AMENDING CHAPTER 5.28 OF THE DERBY MUNICIPAL CODE, REGULATING COLLECTION AND TRANSPORTATION OF SOLID WASTE; PROHIBITING COMMERCIAL COLLECTION OR TRANSPORTATION OF RESIDENTIAL REFUSE AND RECYCLABLES EXCEPT PURSUANT TO A CONTRACT WITH THE CITY OR WHEN OTHERWISE PERMITTED HEREUNDER; ESTABLISHING PENALTIES FOR VIOLATION OF SUCH CHAPTER; AMENDING SECTION 8.04.010 OF THE DERBY MUNICIPAL CODE; AND REPEALING ORIGINAL CHAPTERS 5.28 AND 8.12 AND ORIGINAL SECTIONS 8.08.010, 8.08.020, 8.08.060, AND 8.08.200 OF THE DERBY MUNICIPAL CODE.

WHEREAS, regular, efficient collection, transportation and disposal of refuse generated within the City is essential to maintenance of a healthy environment for all of its residents; and

WHEREAS, the number and size of the vehicles operated on City streets for the purpose of collecting and transporting refuse contributes significantly to the deterioration of such streets and the requirements for maintenance, repair and reconstruction thereof; and

WHEREAS, a comprehensive program to facilitate recycling of waste materials when technically feasible will preserve scarce resources while reducing the cost of disposal to the consumer and the community at large over the long term; and

WHEREAS, the Sedgwick County Commission included in its Solid Waste Management Plan an expectation that all cities in the County have a solid waste collection contract or franchise in place by January 1, 2011, and that such contracts provide for both curbside recycling and volume-based rates; and

WHEREAS, pursuant to K.S.A. 12-2101 *et seq.*, the City is authorized to provide for the collection and disposal of garbage or trash;

WHEREAS, the Governing Body of the City finds that it is in the best interests of the community for the City to assume municipal control over and contract for collection and transportation of residential refuse and recyclables pursuant to K.S.A. 12-2101 *et seq.*, and to enact regulations pertaining thereto; and

WHEREAS, more comprehensive and effective regulation of persons and firms engaged in the collection and transportation of nonresidential refuse and recyclables is also in the best interests of the community; and

NOW THEREFORE, BE IT ORDAINED by the Governing Body of the City of Derby, Kansas:

Section 1. Chapter 5.28 of the Derby Municipal Code shall be amended to read as follows:

Article I. General

Section 5.28.010 Definitions.

Where used in this chapter, the following words shall have the meaning ascribed to them in this section unless the context clearly requires otherwise:

- A. "Commercial" means the carrying on of a business, trade or industrial operation.
- B. "Cart" means a wheeled container provided by the City or a Contractor for accumulation, collection and disposal of refuse or recyclables and, when used with respect to storage or placement of refuse or recyclables for collection, includes throw-away containers.
- C. "City" means the City of Derby, Kansas, and includes any Contractor as defined herein.
- D. "City Manager" means the city manager of the City or his or her authorized designee.
- E. "Contractor" means any person or firm collecting, transporting and disposing of residential refuse and recyclables pursuant to a contract with the City.
- F. "Customer" means a person who has contracted with the City or a Contractor for collection and disposal of residential refuse and recyclables.
- G. "Garbage" means any waste plant or animal material generated by or resulting from processing, preparation, storage, sale, or consumption of food or food products, and includes unclean containers.
- H. "Nonresidential," when used in conjunction with refuse or solid waste, means any premises not used exclusively for residential purposes.
- I. "Nonresidential customer" means by a person who contracts with the City or a Contractor for collection and disposal of refuse from any premises used exclusively for nonresidential purposes.
- J. "Person" means any natural person and any entity, including but not limited to corporations, partnerships and associations, having the legal capacity to sue or be sued.
- K. "Residential," when used in conjunction with refuse, means all refuse that normally originates in a residential environment and all refuse that, while originating in a commercial environment, is of such volume and character that it may be safely accumulated in carts and economically collected and transported by the same vehicles and equipment used for collecting residential refuse; provided, that the term shall not include refuse generated on a single property occupied by three or more residential units.
- L. "Recyclables" means mixed paper, numbers "1" and "2" plastic, metal cans, and any and all other materials identified from time to time by the City as recyclable, if generated in the same manner as residential refuse.
- M. "Refuse" means waste material of any kind or nature whatsoever, but does not include unusual, heavy or hazardous waste or recyclables as defined herein.
- N. "Rollout service" means any collection which requires the collection person to enter upon private property to access a cart for collection.

- O. "Single family dwelling" means a building or portion of a building which is designed for occupancy by one family unit, regardless of actual occupancy, but does not include any portion of a building designed for occupancy by three or more family units.
- P. "Solid waste" means all refuse and unusual, heavy or hazardous waste.
- Q. "Throw-away container" means plastic or water-resistant paper bags, boxes, cartons, cans, crates and baskets which shall be secured in such a manner that the contents thereof will not be blown or scattered about, become frozen to the ground or otherwise become a nuisance to neighbors or the area; provided, that the term shall not include plastic bags weighing, with contents, more than 30 pounds or other containers weighing more than 40 pounds; in any case. No such container shall exceed 36 inches in length or have any sharp, dangerous or noxious surface which may be harmful to a collector or other person.
- R. "Trash" means any refuse other than garbage.
- S. "Unusual, heavy waste or hazardous waste" means any waste which in the judgment of the City Manager cannot be collected by regular collection service because of its dimension, density, weight or potentially harmful nature. Ashes and cinders are hazardous wastes unless the combustion thereof has been completely extinguished, and they have been disposed of in a cart or other approved container.
- T. "Yard waste" means waste materials generated from the maintenance of lawns, which shall include grass clippings, leaves and weeds.

5.28.020 Prohibited acts.

- A. No person shall:
 - 1. Discard, deposit, throw, place or leave any refuse upon public or private property, except in a container which complies with this article or specifications established from time to time by the City Manager pursuant to this article;
 - 2. Remove any or all of the contents of a refuse or recyclables cart not located on or assigned to such person's property;
 - 3. Upset, remove, carry away, damage or destroy any refuse or recyclables cart or the contents thereof;
 - 4. Place or deposit, or cause to be placed or deposited, any solid waste or recyclables in a cart other than one assigned to such person's property; provided, that occupants of multiple family dwellings may use a common refuse container if the owner of such property has agreed with the City to be liable for the entire collection service charge therefor;
 - 5. Cause, permit or allow any material other than refuse or recyclables to be deposited in a cart provided for that purpose;
 - 6. Destroy or deface any cart or other container provided by the City;
 - 7. Place materials weighing more than the maximum allowable weight, as may be established from time to time by the City Manager, in a cart;
 - 8. Contract with any person other than the City, for collection and disposal of residential refuse or recyclables;
 - 9. Other than the City, a Contractor or an authorized employee of either, collect or contract for collection of residential refuse within the City;
 - 10. Throw, deposit or otherwise discard any solid waste, including but not limited to manure, lumber, wooden boxes, broken dishes or glass, tin cans, wire, cast-off machinery, paper,

garbage, rubbish, filth, or dirt in or upon any park, sidewalk, gutter, street, alley, or other City-owned or controlled property; provided, that this subsection shall not apply to persons erecting buildings or placing materials thereon under such regulations as may be established by chapter, and City employees in the performance of their duties; or

11. Place, or cause or permit to be placed, any refuse outside of any building within the City, except in a wind-proof, water-tight container.
- B. Nothing in this chapter shall be construed to apply to collection, transportation or disposal of grass cuttings, leaves and other lawn waste incident to operation of a lawn maintenance or landscaping service.

5.28.030 Requirements for and use of refuse containers.

Each person in possession or control of any premises upon or from which refuse accumulates shall provide or cause to be provided one or more suitable containers for storing and disposing of such refuse. Such containers, when the contents thereof are required by this chapter to be collected by the City, shall be provided by the City directly or by a Contractor.

5.12.040 Waste storage – multifamily dwellings and mobile home parks.

The owner of each multifamily structure or mobile home park shall provide sufficient containers, meeting the requirements of this chapter, to contain all of the residential refuse produced by the occupants of the premises between collection periods and shall ensure that all garbage, refuse and trash generated upon such property is deposited in such containers.

5.28.050 Permit required; exceptions.

- A. Except as otherwise provided in this chapter, it shall be unlawful for any person other than the City to collect or disturb any solid waste, refuse or recyclables, or to transport the same through, over or across the streets and alleys of the City without first securing a permit for each vehicle used for such purpose.
- B. No permit shall be required for operation of a vehicle by a person who is:
 1. Collecting or transporting residential refuse pursuant to a contract with the City;
 2. Collecting or transporting solid waste generated on his or her own residential property; or
 3. Collecting or transporting solid waste produced on premises occupied by such person or his or her employer.
- C. Regardless of whether a vehicle permit is required hereunder, all such persons shall in all respects comply with this chapter when transporting solid waste, refuse or recyclables through, over or across the streets and alleys of the City.

5.28.060 Transportation of garbage over City streets and public property.

Notwithstanding any other provision of this chapter, no person shall transport garbage on, over or across any street, alley or public grounds of the City unless the same is contained in a permitted vehicle or a watertight container secured so as to prevent odor from escaping.

5.28.070 Unusual, heavy or hazardous waste.

Except as expressly provided herein or directed by the City Manager, the City shall neither collect nor dispose of unusual, heavy or hazardous waste.

5.28.080 Violations.

Any person violating any of the provisions of this chapter shall be guilty of a class "C" violation. Each day or any portion thereof during which any such violation occurs or continues shall be deemed to constitute a separate offense.

**Article II. Collection and Transportation of
Residential Refuse and Recyclables.**

5.28.090 Residential refuse and recyclables collection service; general regulations.

Residential refuse and recyclables collection service within the City shall be performed exclusively by the City or by a Contractor upon the following terms and conditions:

A. Curbside collection service:

1. Each single-family dwelling shall have a minimum of one refuse cart and one recyclables cart; provided, that the code enforcement officer may approve sharing of carts by two single-family dwellings located on the same or adjacent properties upon a showing that the refuse and recyclables generated from such dwellings will not exceed the capacity of the carts. All residential refuse shall be collected once each week. Specialized services included but not limited to collection of yard waste and unusual, heavy or hazardous waste shall be performed at such times and for such fees as the City may establish from time to time.
2. Weekly collection.
 - a. Each customer shall make his or her cart or other container available for collection weekly, on a designated collection day. Unless the City has otherwise agreed with the customer, all carts and other containers shall be placed for collection at a point within two (2) feet of the traveled portion of the abutting street, affording easy and unobstructed access for collection. Carts and other containers shall be placed for collection no earlier than 2:00 p.m. on the day preceding the collection day and no later than 6:00 a.m. on the collection day, and shall be removed from such location no later than 9:00 a.m. on the day following the collection day.
 - b. A customer who believes that the refuse generated from his or her property is insufficient to warrant weekly collection may request that the code enforcement officer direct less frequent collection. The City Manager's decision on any such request shall be final and conclusive.
3. Except when placed for collection pursuant to this section, all carts and other containers shall be stored at a location upon the subscriber's property which is behind the applicable building setback line and does not constitute a nuisance in the neighborhood.

B. Rollout collection.

1. Rollout collection service shall, upon request of the customer and when authorized by the City Manager, be available to any customer who:

- a. Is 75 years of age or older and demonstrates to the satisfaction of the City Manager that no other person in the household is able to deliver carts to the normal collection point;
 - b. By reason of a documented disability is determined by the City to be unable to transport carts or other containers to the collection point and demonstrates to the satisfaction of the City Manager that no other person in the household is able to deliver carts thereto; or
 - c. Has agreed to pay an additional charge therefor as established by the City.
2. Customers utilizing rollout collection service shall be provided with one cart for deposit of refuse and one cart for each stream of recyclables.
 3. Such carts may be stored at any location upon the subscriber's property which affords reasonable access for collection purposes and which does not constitute a nuisance in the neighborhood; provided, that no cart assigned to a rollout service customer shall be stored inside a fence or building, or elsewhere when obstacles would make access unreasonable.
- C. Customers shall store refuse pending collection in accordance with the following requirements:
1. Garbage shall be thoroughly drained and wrapped prior to being placed in a cart or other container.
 2. No refuse other than garbage or trash shall be deposited in a cart or other container. Accumulated refuse in excess of the capacity of carts or containers provided by the City shall be placed in throw-away containers. Any customer desiring collection of more than the allowable number of throw-away containers, as established from time to time by the City, may request collection thereof for an additional charge established by the City.
 3. Except as provided herein, unusual, heavy or bulky refuse and hazardous wastes shall not be placed in a cart or throw-away container, or otherwise included with refuse to be collected by the City.
 4. Collection of unusual, heavy or bulky refuse or hazardous wastes by the City:
 - a. Tree limbs up to four (4) inches in diameter and less than four (4) feet in length may be bundled and placed with other residential refuse at the regular collection point for regular weekly collection. Bundles shall not weigh more than 30 lbs; each bundle shall be equivalent to one throw-away container.
 - b. Collection of heavy or bulky items such as furniture and appliances, which can be safely handled by a crew of two persons and a truck, will be made upon request. Fees established by the City shall be charged for any special collection.
 - c. Ashes, cinders, sawdust and similar refuse shall be bagged or otherwise contained before being placed in a cart for collection.
 - d. Dry animal waste shall be bagged or otherwise contained before being placed in a cart.
 - e. All sharp items, including but not limited to syringes and broken glass, shall be enclosed in a hard container such as a can, plastic bottle or box before being placed in a cart.
- D. All customers using carts provided by the City for the purpose of refuse or recyclable collection shall:
1. Keep all such containers reasonably clean;
 2. Exercise reasonable care to avoid damage to containers;

3. Reimburse the City for the reasonable cost of repair or replacement of any cart or other container damaged as a result of the negligent or intentional act of a customer;
4. Except to facilitate collection of refuse, refrain from removing any cart from the premises to which it is assigned;
5. Upon vacating a property to which such cart has been assigned, notify the City or the Contractor at least 3 working days before such vacation so that such cart may be collected and returned to inventory; and
6. Comply with all regulations of the City with respect to use and care of carts and other containers.

5.28.100 Rates and Charges.

All fees and charges made for collection and transportation of residential refuse and recyclables by the City or a Contractor, including any services rendered incident thereto, shall be established from time to time by resolution.

5.28.110 Franchise Fee.

Each 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.

5.28.120 Authority to promulgate additional regulations.

The City Manager may promulgate such additional rules and regulations as he or she deems appropriate to effectuate the purposes of this article. Such regulations shall become effective 30 days following delivery to the governing body unless sooner modified or revoked by the governing body.

Article III. Collection and Transportation of Nonresidential Solid Waste and Recyclables

5.28.130 General.

No person shall collect or dispose of nonresidential solid waste unless licensed to do so by the City. In addition, such persons shall at all times comply with all federal, state, county and city rules, regulations and laws established by governmental entities or agencies having jurisdiction.

5.28.140 Insurance requirements – conditions required generally.

A. The collector shall secure and maintain throughout the duration of any contract with the city, and, in addition, prior to the issuance of any permit and during the permit period and at all other times when using the streets of the city, such insurance as is hereinafter required. The collector shall submit written evidence of insurance with any permit application prior to obtaining a permit. Insurance shall be considered acceptable when provided by one of the following methods:

1. Issuance of an original policy designating the collector and the city, by name, as the insured parties under the provisions of the policy;
 2. Endorsement to an original policy when endorsement shall extend to the city the same coverage and protection stipulated in the paragraph above;
 3. Separate contingent policy providing the required insurance coverage for the protection of the city.
- B. A duplicate of the original of each policy shall be furnished showing specifically the coverage and limits, together with the underwriter thereof, for approval by the city. Regardless of such approval by the city, it shall be responsibility of the collector to maintain adequate insurance coverage at all times, and the failure to do so shall not relieve him of any obligation or responsibility. Failure on the part of the collector to maintain these insurances in full force and effect will, if applicable, be considered as a failure in contract performance, and, in addition, a violation of this chapter and will be treated as such by the city. Satisfactory certificates of insurance filed with the city shall note that fifteen calendar days' written notice will be given to the city before any policy covered thereby is changed or cancelled.

5.28.150 Insurance requirements – workmen’s compensation, automobile and general liability – amounts.

The collector shall provide the insurance required by this section and shall list the city as a beneficiary thereon “as its interest may appear”:

- A. Workmen's Compensation and Employer's Liability. This insurance shall protect the collector against all claims under the Workmen's Compensation law. The collector shall also be protected against claims for injury, disease or death of employees which, for any reason, may not fall within the provisions of a Workmen's Compensation law. The liability limits shall not be less than the following:
 1. Workmen's compensation--Statutory maximum amount;
 2. Employee's liability--One hundred thousand dollars each person.
- B. Automobile Liability. This insurance shall be written in comprehensive form and shall protect the collector against all claims for the operations of all motor vehicles, whether they are owned or non-owned. The liability limits shall not be less than the following:
 1. Bodily injury – one hundred thousand dollars each person;
 2. Bodily injury – three hundred thousand dollars each occurrence;
 3. Property damage--fifty thousand dollars each occurrence. Such policy may be written to allow the first five hundred dollars of liability for damage to property to be deductible.
- C. General Liability. This insurance shall be written in comprehensive form and shall protect the collector against all claims arising from injuries to any person or damage to property of others arising out of any act or omission of the collector; and, in addition, this policy shall specifically provide collector protective liability insurance and contractual liability insurance covering the obligations stipulated herein. The collector shall provide and maintain insurance to protect the city against any and all claims for damages for personal injury, including accidental death, as well as from claims under such contract, whether such operations be by the collector, any of his subcontractors, or by any one directly or indirectly employed by the collector or his subcontractors. The liability limits shall not be less than the following:
 1. Personal injury – one hundred thousand dollars each occurrence; three hundred thousand dollars aggregate or single, limit of three hundred thousand dollars;

2. Property damage – fifty thousand each occurrence, one hundred thousand aggregate.
- D. Such policy may be written to allow the first five hundred dollars or liability for damage to property to be deductible.

5.28.160 Indemnification agreement – conditions.

The collector shall, by virtue of his utilizing the city street, or his contract or agreement with the city, or by his acting on behalf of the city, bind himself to indemnify, defend, punctually pay and save harmless the city and all of its agents, representatives and employees from all suits, claims, demands or actions of every kind or description arising from or relating to any acts, omissions or negligence of the collector, his servants, employees, agents or subcontractors. The collector shall likewise bind himself to punctually pay, defend, indemnify and save harmless the city and all their agents, representatives and employees for and on account of any injury or damages received or sustained by the collector, his servants or his agents or subcontractors on account of any claim or amount recovered for royalty or infringement of patent, trademark, copyright or on account of any claim or amount recovered under the Workmen's Compensation law.

5.28. 170 Work performance conditions – obstructing streets prohibited.

The collector shall not obstruct streets and shall keep passageways open. The collector is granted the privilege of using the streets for the work specified, but he is not granted exclusive use of such streets. The collector shall handle the work in a manner which shall cause the least inconvenience to the public or property owners and shall perform his labors in a courteous, prompt manner.

5.28.180 Permit required prior to license issuance – prerequisites.

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 the issuance of said license. The collector shall deliver to the city clerk copies of certificates of insurance reflecting his compliance with the safety responsibility laws of the state, and, in addition, such insurance as may be required by this chapter prior to the operation of a motor vehicle upon the streets and highways of the city and state. Such insurance shall be kept in full force and effect at all times. In addition, the collector shall deliver to the city clerk written evidence that said collector has complied with the solid waste code for municipalities, and this chapter, and that his vehicle and/or vehicles in all respects comply with the provisions of the solid waste code. In addition, the collector shall deliver to the city clerk the insurance certificates required under the provisions of this chapter, and the make, model and identification or registration number of each vehicle which may be operated on the city streets, and such other information as may be reasonably required to assure the governing body that the terms of this chapter are being and will be complied with. The collector and all employees shall at all times remain licensed to operate a motor vehicle under the laws of the state.

5.28.190 Collector – list of parties contracted with required – updating.

Any collector collecting solid waste in the city of Derby shall deliver to the city clerk a detailed, itemized written list setting forth the names and addresses of any parties with whom he has contracted for the collection of solid waste, and the addresses from which said solid waste is being collected. Said list shall be modified and brought current in writing on the first day of each and every month thereafter. After the original list has been submitted to the city clerk, the collector shall be responsible for delivering to the city clerk any deletions or additions to said list. Any collector contracting with the city shall execute such contract documents as may be consistent with the terms of this chapter.

5.28.200 Contracts and permits revocable when – procedure -- appeals.

Any and all contracts and permits hereunder are subject to revocation for any violation of this chapter, or upon the failure of collector to comply with any of the terms of the contract with the city, or for any work stoppage which interrupts the normal and regular collection of solid waste. In the event any collector fails to comply with any of the provisions of this chapter, the city clerk may, with the consent of the governing body, upon fourteen days' notice to such collector, revoke and cancel any contract which the collector may have with the city. Any collector may appeal such revocation order within ten days to the governing body of the city.

5.28.210 Annual permit fee per licensed vehicle.

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. Said fee shall cover a period of time terminating on the thirty-first day of December of each year. No permit shall be transferred without first obtaining the written consent of the city governing body.

Section 2. Section 8.04.010 of the Derby Municipal Code is amended to read as follows:

8.04.010 Definitions.

Where used in this chapter, the following words shall have the meaning ascribed to them in this section unless the context clearly requires otherwise:

- A. "Abandoned vehicle" means any vehicle the registered owner of which the director of community development or his/her designee is unable to locate within 48 hours after making a reasonable attempt.
- B. "Agriculture" shall have the meaning ascribed to it in Section 202 of the zoning regulations.
- C. "Bulky waste" means items whose large size or shape precludes or complicates the handling of normal collection and includes but is not limited to household appliances, furniture, plumbing fixtures, playground equipment, yard appliances and equipment and similar materials but does not include hazardous waste or tree waste.
- D. "City" means the city of Derby, Kansas.
- E. "City clerk" means the city clerk for the city or his or her designee.
- F. "City manager" means the city manager for the city or his or her designee.
- G. "Code enforcement officer" means the code enforcement officer for the city, or his or her designee.

- H. "Commercial waste" means solid waste normally generated by nonresidential occupancies, but does not include demolition and construction waste, hazardous waste, bulky waste or industrial waste.
- I. "Composting" means a controlled process of degrading organic matter by microorganisms into a usable soil conditioner.
- J. "Containerized unit" means a solid waste storage container of one cubic yard capacity or larger that is flytight, watertight and rodentproof and which is emptied into the collection vehicle by mechanical means or is attached to or loaded onto the collection vehicle for transportation to the disposal site.
- K. "Control measures" means any chemical, structural or physical procedures or processes designed to eradicate, minimize, prevent or otherwise limit the reproduction and/or infestation of insects, rodents or other animal populations detrimental to public health.
- L. "Dead animals" means those that died in the normal course of community activity, excluding condemned animals at slaughterhouses or any other animals normally considered industrial refuse.
- M. "Demolition and construction wastes" means waste lumber, masonry, concrete, and other building materials and resultant mixture with soil or other solid waste resulting from construction, remodeling, repair or demolition of buildings, structures, pavements, bridges, and similar projects.
- N. "Dwelling unit" means one or more rooms in a residential building or residential portion of a building which are arranged, designed, used, or intended for use by one family, and which includes cooking space and lawful sanitary facilities reserved for the occupants thereof.
- O. "Fairway" means the closely mown area of a golf course that runs between the tee box and green of a golf hole.
- P. "Fire chief" means the fire chief for the city, or his or her designee.
- Q. "Garbage" means any waste plant or animal material generated by or resulting from processing, preparation, storage, sale, or consumption of food or food products, and includes unclean containers.
- R. "Golf course" shall have the meaning ascribed to it in the City's zoning regulations.
- S. "Hazardous wastes" means solid and liquid wastes which require special handling and/or disposal to avoid illness or injury to persons or damage to property and to protect and conserve the environment and shall include but not be limited to pesticides, acids, caustics, other dangerous chemicals, pathological wastes, flammable or explosive materials that are significantly contaminated with one or more of the above-enumerated wastes and shall also include containers and materials that have been contaminated with hazardous wastes.
- T. "Industrial waste" means the solid wastes resulting from industrial processes.
- U. "Inoperable vehicle" means any vehicle which is unable to perform the functions for which it was originally manufactured or :
1. Lacks a current registration plate;
 2. Any part of which is supported by jacks, blocks, chains or other supports;
 3. Lacks one or more parts of the vehicle necessary for the lawful operation of the vehicle on the streets and highways.
- V. "Insects" means the following classes of *arthropoda*:
1. Insects; and
 2. *Arachnida*, including flies, mosquitoes, fleas, lice, cockroaches, bedbugs, plant bugs, and mites, ticks, spiders and scorpions.

- W. "Manure" means the body discharges of all animals except humans.
- X. "Mobile home park" means a parcel or tract of land used or intended to be used by one or more occupied mobile homes.
- Y. A mobile home park containing only one mobile home shall be considered a single-family dwelling. A mobile home park containing two, three or four occupied mobile homes shall be considered a multifamily dwelling and a mobile home park containing five or more occupied mobile homes shall be considered to be a mobile home park in relation to the requirements for mobile home parks in this chapter.
- Z. "Multifamily" means a structure or premises containing three or more dwelling units including condominiums and similar facilities; provided that occupants who are owners of an individual dwelling unit within a multi-unit structure where there is not a central management or home association may be handled as a single-family dwelling.
- AA. "Nuisance" means anything which:
1. Is injurious to health, or is offensive to the senses or is an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property; or
 2. Adversely affects an entire community or neighborhood, or any substantial number of persons even though the extent of the annoyance or damage inflicted upon individuals may be unequal; and
 3. Is caused by or is the result of the handling or disposal of solid waste.
- BB. "Person" means any natural person and any entity, including but not limited to corporations, partnerships, and associations, having the legal capacity to sue or be sued.
- CC. "Premises" means a lot, plot or parcel of land, including the dwellings and structures, if any, located thereon.
- DD. "Riparian buffer" means a vegetated, primarily forested area near a watercourse, which helps to shade and partially protect the watercourse from the impact of adjacent land uses.
- EE. "Rodents" means the so-called domestic rats, *rattus norvegicus*, *rattus rattus alexandrines* and *rattus rattus rattus*, domestic mice, *mus musculus* and other wild native rodents associated with the transmission of diseases affecting man or other animals.
- FF. "Rough" means the areas of a golf course located outside of fairways.
- GG. "Salvage material" means solid waste material that can be reused.
- HH. "Salvage yard" means any premises used for:
1. The sale and resale of used merchandise;
 2. The disassembling of wrecked or used automobiles and sale of auto parts; and
 3. The collection, sorting, storage and/or resale of various kinds of metal and/or used building materials.
- II. "Salvaging" means the controlled removal of reusable materials.
- JJ. "Sanitary sewer" means a pipe which carries sewage and to which storm, surface and ground waters are not intentionally admitted.
- KK. "Sewage" means a combination of the water-carried wastes from residences; business buildings; and institutions and industrial establishments; together with such ground, surface and storm waters as may be present.
- LL. "Sidestrip" means that portion of the public right-of-way between the improved roadway line and the property line of abutting private property.
- MM. "Single-family dwelling" means a structure containing one dwelling unit.
- NN. "Solid waste" means useless, unwanted or discarded solid or liquid (including sewage) material relating to or produced by agricultural, commercial, domestic, or industrial

activities, including but not limited to garbage, paper, rock, cans, bottles and other containers, packing material, household wares, yard waste, ashes, lumber, masonry, concrete and other building materials, appliances and furniture, pesticides, chemicals, pathological materials, radioactive, flammable and explosive material, oils and solvents, manure implements and machinery, street sweepings and mud trap accumulations, provided that the term solid waste does not include any uncontaminated earth stone or minerals.

- OO. "Solid waste collector" means any governmental agency or any person collecting, transporting, and disposing of solid waste, subject to regulation pursuant to this chapter.
- PP. "Tree waste" means all tree or shrub waste including trimmings and stumps; but does not include tree trimmings or branches that have been tied in bundles not more than four feet in length and placed beside the solid waste storage containers for the purpose of collection, vegetation prunings or wood chips placed in such collection container, fireplace wood or other wood fuel.
- QQ. "Undeveloped parcel" means a parcel which does not contain actively utilized buildings as defined in Section 202 of the zoning regulations.
- RR. "Wildlife refuge" means a geographic area, as designated as such by the Kansas Department of Wildlife and Parks.
- SS. "Yard waste" means leaves, grass clippings, vegetation prunings, bagged manure from dogs, cats, or similar animals, and tree trimmings, branches or stumps.

Section 3. Original chapters 5.28 and 8.12, and original sections 8.04.010, 8.08.010, 8.08.020, 8.08.060, and 8.08.200 of the Derby Municipal Code are hereby repealed.

Section 4. This ordinance shall be published once in the official City newspaper.

Section 5. This ordinance shall take effect and be in force from and after July 1, 2009.

ADOPTED BY THE GOVERNING BODY this 24th day of March, 2009.



Dion P. Avello, Mayor

ATTEST:



Jean Epperson, City Clerk

Approved as to form only:



Philip H. Alexander, City Attorney

SHALL THE FOLLOWING ORDINANCE BECOME EFFECTIVE?

We, the undersigned electors of the City of Derby, Kansas, do by this petition request that the Derby City Council, as the governing body of the City of Derby, Kansas repeal the following Ordinance or submit the same to a vote of the electors of said city for adoption or rejection, as provided under K.S.A. 12-3013, said Ordinance being as follows, to wit:

Shall the following be adopted?

An Ordinance repealing Ordinance No. 1980, entitled AN ORDINANCE AMENDING CHAPTER 5.28 OF THE DERBY MUNICIPAL CODE, REGULATING COLLECTION AND TRANSPORTATION OF SOLID WASTE; PROHIBITING COMMERCIAL COLLECTION OR TRANSPORTATION OF RESIDENTIAL REFUSE AND RECYCLABLES EXCEPT PURSUANT TO A CONTRACT WITH THE CITY OR WHEN OTHERWISE PERMITTED HEREUNDER; ESTABLISHING PENALTIES FOR VIOLATION OF SUCH CHAPTER; AMENDING SECTION 8.04.010 OF THE DERBY MUNICIPAL CODE; AND REPEALING ORIGINAL CHAPTERS 5.28 AND 8.12 AND ORIGINAL SECTIONS 8.08.010, 8.08.020, 8.08.060, AND 8.08.200 OF THE DERBY MUNICIPAL CODE. Be it ordained by the governing body of the City of Derby.

Section 1. Ordinance No. 1980 is hereby repealed.

Section 2. The Derby City Council shall as provided by K.S.A. 12-3013 ... either (a) pass such ordinance without alteration within 20 days after the attachment of the clerk's certificate to the accompanying petition; 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 ordinance, without alteration, to the vote of the electors of the city.

I have personally signed this petition. I am a registered elector of the state of Kansas and of the City of Derby and my residence address is correctly written after my name.

Signature of Signer	Printed Name of Signer	Street Address	City of Residence	Date
			Derby	



Historic Courthouse • 510 North Main, Suite 101 • Wichita, Kansas 67203
Telephone 316-660-7100 • Fax 316-660-7125 • www.sedgwickcounty.org/elections

Certificate of Commissioner of Elections

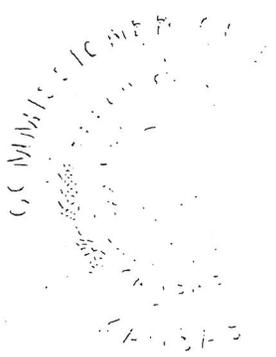
I, Bill Gale, Commissioner of Elections of Sedgwick County, Kansas, do hereby certify that I have reviewed the petition signature pages received by me from the Derby City Clerk on August 13, 2009 petitioning for an ordinance to repeal Ordinance No. 1980:

- The petition pages contain the signatures of 436 qualified electors of the City of Derby.
- The petition pages may contain the signatures of more qualified electors of the City of Derby, but determination of the same cannot be made from the information contained in the petition signature pages.

Witness my hand and official seal this 14th day of August, 2009.



Bill Gale
Commissioner of Elections
Sedgwick County, Kansas





SEDGWICK COUNTY, KANSAS
OFFICE OF THE COUNTY COUNSELOR

ROBERT W. PARNACOTT
Assistant County Counselor

COUNTY COURTHOUSE • 525 N. MAIN, SUITE 359 • WICHITA, KS 67203-3790
PHONE (316) 660-9352 • FAX (316) 383-7007

May 6, 2009

Mark Rouleau
The Rouleau Law Firm, PA
PO Box 780001
Wichita, KS 67278

Re: Written Advisory Opinion on Petition Regarding Initiative Repeal of City of Derby
Ordinance No. 1980

Dear Mr. Rouleau:

Pursuant to K.S.A. 25-3601, *et seq.*, a petition regarding an initiative repeal of City of Derby Ordinance No. 1980 was hand-delivered to the office of the County Counselor for Sedgwick County on May 6, 2009. As required by the act, this office has reviewed the sufficiency of the petition and the legality of the form of the question set out in the petition. The question complies with the requirements of K.S.A. 25-3601, *et seq.*

This opinion is only required to address the legality of the form of the question. K.S.A. 2008 Supp. 25-3601(a). The issuance of the opinion creates a rebuttable presumption that the form of the question complies with K.S.A. 25-3601, *et seq.*

Sincerely,

Robert W. Parnacott
Assistant County Counselor

"Sedgwick County...working for you"

Exhibit D

CITY COUNCIL AGENDA REPORT

To: Mayor and City Council
From: Phil Alexander, City Attorney
Subject: Review of Petition Concerning Collection of Refuse

Agenda Date: September 8, 2009

Guests: None anticipated

Background:

- In late March 2009, the Council passed ordinance #1980 which, among other things, authorized the City to collect or contract for collection of residential refuse and recyclables.
- When ordinance #1980 was adopted, four firms were collecting residential refuse in Derby.
- Simultaneously with consideration of ordinance #1980, the City solicited proposals for city-wide collection of residential refuse and recyclables by a single firm.
- Multiple proposals were received and evaluated. Each firm submitting a proposal was interviewed by the Recycling/Trash Advisory Board ("Board").
- On April 14, 2009, after thorough analysis of the several proposals, the Board recommended selection of Waste Connections of Kansas, Inc.
- On April 28, the Council selected Waste Connections and directed preparation of a contract.
- After extensive negotiations, a contract was presented to and approved by the Council on July 28.
- On August 13, a petition was submitted to the city clerk.
 - The petition itself is ambiguous but public comment by supporters indicates it is intended to request repeal of ordinance #1980 or, in the alternative, submission of a repealer ordinance to the electorate.
 - The petition purports to have been submitted pursuant to K.S.A. 12-3013, a state law that authorizes initiative and referendum in some circumstances.
 - The petition was forwarded to the Sedgwick County Election Commissioner, who has determined that the number of valid signatures exceeds that which is required by K.S.A 12-3013.
- After analyzing the petition carefully, staff has concluded that the petition is not valid under K.S.A. 12-3013 and that the Council is not required to take action based on it.

Financial/Sustainability Considerations:

- Waste Connections, having entered into an exclusive contract with the City for exclusive collection of residential refuse and recyclables, is purchasing equipment and making other preparations to undertake performance on December 1, 2009. It will incur substantial expense in so doing.
- The City's contract with Waste Connections provides for payment of a franchise fee equal to 5% of gross revenue derived from the contract. This anticipated revenue has been incorporated into the 2010 budget.

- The contract with Waste Connections, which includes collection of recyclables as well as refuse, establishes rates below those currently paid by most city residents and only slightly higher than the lowest reported rates enjoyed by one neighborhood.

Legal Considerations:

- State law expressly authorizes the City's governing body to provide for refuse collection through City forces or by contract, and to prohibit collection by firms not under contract with the City.
- If a valid initiative petition is submitted, the City must either adopt the proposed ordinance or put it on the ballot a city-wide election ("referendum").
- The initiative and referendum procedure is available for ordinances that are legislative in nature but may not be used for ordinances that are primarily administrative.
- Thorough analysis of the proposed ordinance, relevant precedents and other authorities leads 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.

Policy Considerations:

- Ordinance #1980 and the exclusive contract for collection of residential refuse and recyclables include several features that will significantly improve solid waste management within the City:
 - Lower – for the large majority of customers – rates that are uniform throughout the City.
 - Single-stream, curbside recycling is available at no additional cost, and customers may earn RecycleBank points as an incentive to participate.
 - Contractually established sanctions provide incentives for the contractor to maintain and improve customer service.
 - Wear and tear on City streets will be significantly reduced by having only one collection vehicle, rather than four or more, on each residential street. In terms of the stress place on pavement, one truck is the equivalent of at least 5,000 automobiles.
- Because of the efficiencies derived from higher customer density, the Sedgwick County Solid Waste Management Plan Update (dated June 10, 2008) expressly encourages all cities in the County to franchise or contract for refuse collection, including provision for a program of curbside recycling and volume-based trash rates.

Recommendation:

- Receive and file report and take no further action with respect to the petition submitted August 13, 2009.

ANALYSIS OF LAW CHANGES IN ORDINANCE 1980

NEW LAWS

Ordinance 1980

Prior Ordinances

1.	5.28.020 Prohibited Acts "No person shall:" regulates customers and collectors for acts not previously illegal	No matching prior ordinance.
2.	5.28.100 Rates and Charges - Gives City complete authority to set rates and charges.	No matching prior ordinance.
3.	5.28.110 Franchise Fee - creates franchise fee income to City	No matching prior ordinance.
4.	5.28.060 Transportation of garbage over City streets	No matching prior ordinance.
5.	5.28.070 Unusual, heavy or hazardous waste	No matching prior ordinance.
6.	5.28.010 Definitions	Not in old chapter 5.28
7.	5.28.090 Residential refuse and recyclables collection services - GREATLY EXPANDS section setting times, rollout service, more requirements on storage and cart maintenance with criminal penalties	8.08.020 Residential waste collection 1X per week

SIMILAR LAWS

Ordinance 1980

Prior Ordinances

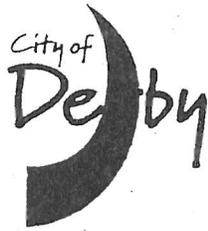
8.	5.28.130 General - Requires License from City to collect waste	5.28.130 General requirements for license to collect waste
9.	5.28.140 Insurance requirements general	5.28.050 Insurance requirements for collector
10.	5.28.150 Insurance requirements Work Comp, Auto, Gen Lia	5.28.060 Work Comp, Auto Gen Lia insurance
11.	5.28.160 Indemnification agreement	5.28.070 Indemnification agreement

SIMILAR LAWS (CON'T)

Ordinance 1980

Prior Ordinances

12.	5.28.170 Work performance, obstructing streets prohibited	5.28.080 Work performance, obstruction streets prohibited
13.	5.28.050 & 5.28.180 Permit required	5.28.090 Permit required
14.	5.28.190 Collector - list of parties contracted with required - updating	5.28.100 List of parties contracted with
15.	5.28.200 Contracts and permits revocable	5.28.110 Contracts and permits revocable
16.	5.28.210 Annual permit fee	5.28.120 Annual permit fee
17.	5.28.080 Violation - Class "C" violation \$500 and/or 30 days imprisonment	5.28.130 Violation - Class "C" violation \$500 and/or 30 days imprisonment
18.	8.04.010 Definitions - deletes definition of Residential Waste	8.04.010 Definitions
19.	5.28.130 General - license required	8.12.010 License required
20.	5.28.030 Use of refuse containers 5.12.040 Waste storage multi-family	8.08.010 Residential waste storage by occupant, allows wheeled containers with lids, no container at front of dwelling
21.	5.28.030 Use of Refuse Containers	8.08.060 Commercial waste storage and collection, 1X per week



Kathleen B. Sexton
City Manager

July 31, 2009

Mr. Everett Reese
Derby Disposal
P.O. Box 791
Derby, KS 67037

RE: Residential refuse/recyclables collection franchise
requirement
City of Derby Ordinance no. 1980

Dear Mr. Reese:

On March 24, 2009, the City Council adopted ordinance no. 1980, prohibiting collection of residential refuse and recyclables except pursuant to a contract with the City. This ordinance was intended to become effective July 1, 2009. On July 28, the City Council deferred the effective date of Ordinance no. 1980 to December 1, 2009.

Coincident with adoption of Ordinance no. 1980, the City solicited proposals from firms interested in contracting with the City to provide residential refuse/recyclables collection services. After careful evaluation of the proposals received, the City selected Waste Connections of Kansas, Inc., as its contractor. Since your firm was not selected, you should plan to cease collection of residential 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. You may, however, continue to service non-residential customers.

Please let me know if you have any questions.

Sincerely,

Kathleen B. Sexton
City Manager

City of Derby
City Manager's Office

611 N. Mulberry · Derby, Ks 67037-3533 · 316/788-3132 · Fax 316/788-6067
Homepage: www.derbyweb.com E-mail: kathysexton@derbyweb.com

Exhibit G