

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY  
STATE OF MISSOURI

MISSOURI BANKERS ASSOCIATION, INC. )  
and JONESBURG STATE BANK, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
ST. LOUIS COUNTY, MISSOURI, )  
 )  
and )  
 )  
CHARLIE A. DOOLEY, in his official capacity )  
as County Executive, )  
 )  
Defendants. )

Cause No.:

Division:

12SL-CC03659

RECEIVED  
CIRCUIT COURT  
OF  
ST. LOUIS  
COUNTY  
2012 SEP 24 PM 4:12  
DOOLEY, CHARLIE A.  
COUNTY EXECUTIVE

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'**  
**MOTION FOR TEMPORARY RESTRAINING ORDER**

Plaintiffs Missouri Bankers Association, Inc. and Jonesburg State Bank (collectively "Plaintiffs") have filed their Verified Petition for Declaratory Judgment challenging St. Louis County, Missouri's (the "County") August 28, 2012 enactment of Ordinance 25,190 of 2012 (the "Ordinance"). The Ordinance purports to amend Title VII of the Revised St. Louis County Code (the "County Code") by adding Chapter 727 entitled the "Mortgage Foreclosure Intervention Code." For the reasons set forth below, Plaintiffs are entitled to a Temporary Restraining Order enjoining the County, the County's agents, servants, employees and attorneys from attempting to enforce the provisions of the Ordinance on its effective date September 28, 2012.

## **INTRODUCTION**

While the County Council likely had the best interests of the taxpayers of St. Louis County in mind when attempting to address the undisputed foreclosure crisis facing this country, their attempt fails to mitigate the problem. The Ordinance is both bad policy and bad law. From a policy perspective, this legislation, if allowed to stand, will have a chilling effect on the willingness of banks to lend money for mortgages in St. Louis County. In the absence of properly filed Certificates of Compliance, title companies will also be unwilling to insure the subsequent resale of the property at issue. Moreover, regardless of compliance, a homeowner could claim years later they did not receive notice under the Ordinance and use that to cloud title and disrupt valid subsequent purchases. Creating an environment in which it is more difficult to transfer property or obtain a mortgage will only hurt the very people the Ordinance seeks to help.

Because the Ordinance in its entirety conflicts with numerous provisions of the Missouri Constitution, Missouri statutes and even the County's own Charter, it should be declared void. Upon information and belief, the County intends to start implementing the Ordinance on its effective date September 28, 2012. Implementation of the Ordinance, however, will cause immediate and irreparable harm to Plaintiffs. The harm to Plaintiffs if the Ordinance is not enjoined far outweighs any alleged harm to the County if the status quo is maintained until the legality of the Ordinance is determined by this Court. The public interest also dictates that the status quo be maintained pending legal review by this Court.

## **FACTUAL BACKGROUND**

The Ordinance was purportedly enacted by the St. Louis County Council (the "County Council") to address the "national residential property foreclosure crisis" and to reduce its impact on the County's property values, tax base, budget and collection of real property taxes. Verified

Petition for Declaratory Judgment (the "Petition"), Ex. 1, p.1. To accomplish this monumental feat, the Ordinance creates a mandatory mediation process ("Mediation Program") between a lender who has loaned money to an owner of residential property that is secured by a deed of trust (a "Lender") and the defaulting owner of said property (a "Homeowner") prior to the filing of a foreclosure deed. *Id.* at ¶ 7. Only if the Lender complies with the terms of the Mediation Program, will the Lender receive a Certificate of Compliance, which is required to be filed with the St. Louis County Assessor ("Assessor") simultaneously with the filing of a conveyance of the foreclosed property with the St. Louis County Recorder of Deeds ("Recorder"). *Id.* at ¶ 15. While the Recorder cannot refuse to file such a conveyance without a Certificate of Compliance, any Lender choosing to file a conveyance without the Certificate of Compliance will face a fine of up to \$1,000. *Id.* at ¶ 16.

Furthermore, the Ordinance is seriously flawed because it does not address mediation requirements and compliance for a successful bidder other than a lender. Parties other than lenders will be chilled from bidding because they are unclear whether the Mediation Program requirements have been met or whether their purchase can be later challenged. This flaw inhibits competitive and/or higher bids which prejudices both homeowner and lender.

To implement the Mediation Program, the Ordinance requires the County Executive to contract with an individual of his choosing to manage and oversee the Mediation Program (the "Mediation Coordinator") and to appoint mediators to oversee the mediation conferences. *Petition*, ¶ 8.

Under the terms of the Mediation Program, the Lender must provide written notice to a Homeowner of the existence of the Mediation Program and the Homeowner's rights thereunder, including the Homeowner's right within twenty (20) days of notice to request in writing

mediation regarding his or her default (the "Mediation Notice"). Petition, ¶ 9. The Mediation Notice is to be provided to the Homeowner at the same time as the Notice of Foreclosure required by Mo. Rev. Stat. Chapter 443, with a copy and payment of a \$100 fee to the Mediation Coordinator. *Id.* at ¶¶ 9-10.

If the Homeowner decides to proceed with the mediation conference, Section 727.500 of the Ordinance outlines the procedures and timeframes that govern the process. Petition, ¶ 11. Included among these provisions are the requirement that the Mediation Coordinator schedule the mediation conference within sixty (60) days of receiving the Homeowner's notice of intent to participate in the mediation conference. *Id.* at ¶ 11. Upon receiving the Homeowner's notice of intent, the Lender must also submit an additional fee of \$350 to the Mediation Coordinator. *Id.*

If the Lender and Homeowner reach a settlement regarding the Homeowner's default at the mediation conference, the Mediation Coordinator must issue a Certificate of Compliance within five (5) business days after the conference. Petition, ¶ 12. However, if the Lender and Homeowner fail to reach an agreement at the mediation conference, the Lender will be deemed to have satisfied the requirements of the Mediation Program if the Lender makes a "good faith effort" to settle with the Homeowner as determined by the Mediation Coordinator and/or the County Counselor. *Id.* at ¶ 13. In that instance, the Mediation Coordinator must issue a Certificate of Compliance within five (5) business days of the mediation conference so long as the Lender submitted all "necessary" paperwork and fees and was represented at the mediation conference by a person with the "authority to negotiate and modify the loan in question and the ability to review and approve options for the Homeowner's specific type of loan as required by Section 727.500(6)." *Id.*<sup>1</sup>

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<sup>1</sup> It should be noted that the Ordinance does not contain a Section 727.500(6), although it does have a Section 727.500.6.

If the Homeowner decides to forego the mediation conference, the Lender will be deemed to have satisfied the requirements of the Mediation Program and the Mediation Coordinator must issue the Lender a Certificate of Compliance. Petition, ¶ 14. The Ordinance does not specify, however, the timeframe within which the Certificate of Compliance must issue. *Id.*

The Ordinance will take effect on September 28, 2012. Petition, ¶ 17. The Ordinance, however, does not address foreclosures already in process. In order to avoid violating the Ordinance, lenders will be forced to halt all existing foreclosures or start them over resulting in a "foreclosure" holiday.

Plaintiffs participated extensively throughout the Ordinance passing process. On August 14, 2012, the County was put on notice that as a matter of law the Ordinance in its entirety violates the Missouri Constitution and statutes and/or the County Charter. The County nonetheless enacted the Ordinance and upon information and belief County Executive Dooley intends to implement it beginning on its effective date September 28, 2012.

## ARGUMENT

### **I. Standards for Injunctive Relief.**

Pursuant to Missouri Supreme Court Rule 92.02 and Mo. Rev. Stat. § 526.030, injunctive relief is available "to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." Mo. Rev. Stat. §526.030. The Missouri Supreme Court has stated that when considering a motion for injunctive relief "a court should weigh 'the movant's probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest.'" *Mo. v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996), citing *Pottgen v. Missouri*

*State High Sch. Activities Assoc.*, 40 F.3d 926, 928 (8th Cir. 1994); *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). Applying the *Gabbert* factors and the principles set forth herein, Plaintiffs have made a sufficient showing of the need for injunctive relief in this case.

An injunction may be granted upon the showing of a probability of success on the merits of a plaintiff's claim. See *Motor Control Specialities, Inc. v. Labor and Indus. Relations Com'n*, 323 S.W.3d 843, 857 (Mo. App. W.D. 2010) (citing *Gabbert*, 925 S.W.2d at 839). In this case, it is clear that as a matter of law the County Ordinance conflicts with several provisions of the Missouri Constitution, Missouri law and the County Charter and is void.

## **II. Plaintiffs are Likely to Succeed on the Merits of the Case.**

### **A. Ordinance Conflicts with State Statutes.**

Charter counties derive their constitutional grants of power from two specific provisions of the Missouri Constitution:

Article VI, § 18(b). The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of this state.

Article VI, § 18(c). The charter may provide for the vesting and exercise of legislative power pertaining to any and all services and functions of any municipality or political subdivision, except school districts, in the part of the county outside incorporated cities...<sup>2</sup>

Mo. Const. Art. VI, §§ 18(b) and (c).

Article VI, § 18(b) "carries with it an implied grant of such powers as are reasonably necessary to the exercise of the powers granted..." *Information Technologies v. St. Louis County and Regional Justice Information Service*, 14 S.W.3d 60, 63 (Mo. Ct. App. E.D. 1999) (citing

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<sup>2</sup> This excerpt does not reflect Article VI, § 18(c) in its entirety, but only the portions relevant to this discussion.

*Flower Valley Shopping Center, Inc. v. St. Louis County*, 528 S.W.2d 749, 754 (Mo. 1975)).

Under the plain language of this provision, county officers exercising their "powers and duties" remain subject to the "constitution and laws of this state." *See* Article VI, § 18(b).

Article VI, § 18(c), on the other hand, is an express grant of power to charter counties to exercise legislative authority over services and functions of a municipality or political subdivision. *Chesterfield Fire Prot. v. St. Louis County*, 645 S.W.2d 367, 371 (Mo. banc 1983). Powers exercised under this provision are referred to as police powers and include, but are not limited to, public health, police and traffic, building construction, and planning and zoning in such areas. *Casper v. Hetlage*, 359 S.W.2d 781, 789 (Mo. 1962). Article VI, § 18(c) allows for local self-government in the exercise of police powers in order to meet the "peculiar" needs of the county. *Id.* at 790.

Charter counties, like other counties, however, remain legal subdivisions of the state. *State ex inf Dalton v. Gamble*, 280 S.W.2d 656, 659 (Mo. banc 1955). As such, the Constitution "...clearly envisions the laws of the state prescribing the powers and duties of [its] charter county officers" under Article VI, § 18(b). *Jackson County v. State*, 207 S.W.3d 608, 612 (Mo. banc 2006). Simply put, while charter counties have broad authority to deal with local matters, they may not act in such a way as to "invade the province of general legislation involving the public policy of the state as a whole." *Flower Valley Shopping Ctr.*, 528 S.W.2d at 754. Charter counties continue to be "amenable" to state control in matters concerning the general public. *State ex rel St. Louis County v. Campbell*, 498 S.W.2d 833, 836 (Mo. Ct. App. St.L. 1973) (citing *O'Brien v. Roos*, 397 S.W.2d 578, 582 (Mo. 1965)).

It is clear that the County is a charter county. As such, the County has the authority to establish its government, fix the salaries of its officers and deal with local problems unique to St.

Louis County. Regardless of its charter, however, the County is subject to the general laws of the State and must remain "amenable" to State control in matters of public character. By passing the Ordinance, the County has overstepped its authority and has legislated matters reserved for the General Assembly. The Ordinance directly contradicts the language in several statutory provisions.

1. Mo. Rev. Stat. § 362.109

Mo. Rev. Stat. § 362.109 provides that "any ordinance by an political subdivision shall be consistent with and not more restrictive than state law and regulations governing lending or deposit-taking entities regulated by the Division of Finance." The legislature has specifically enumerated its intent to solely regulate this area. By further regulating the method and manner by which Lenders may foreclose upon Homeowners' property, the Ordinance creates greater restrictions than those mandated by statute and violates Mo. Rev. Stat. § 362.109.

2. Mo. Rev. Stat. Chapter 443

Mo. Rev. Stat. Chapter 443 is entitled "Mortgages, Deeds of Trust and Mortgage Brokers" and regulates mortgages, deeds of trust and foreclosure proceedings in the State of Missouri. The provisions of Chapter 443 in no way require mediation prior to foreclosure. Chapter 443 does, however, specify the method for notifying a debtor of a lender's foreclosure and sale and the requirements for said notice (§§ 443.310 – 443.327). Chapter 443 also mandates that a foreclosure shall be stayed only in the event of a debtor. Mo. Rev. Stat. § 443.300. Each of these provisions of Chapter 443 is directly contradicted by the additional, and more restrictive, requirements of the Ordinance.



3. Mo. Rev. Stat. Chapter 408

Mo. Rev. Stat. Chapter 408 codifies the standards for enforcement of security instruments, particularly when a debtor is in default. Pursuant to Mo. Rev. Stat. § 408.555, a lender is entitled to take possession of property subject to a security interest after a 20-day notice period. Mo. Rev. Stat. § 408.554 also specifies the type of notice a lender must give to a defaulting debtor. Each of these provisions is expressly contradicted by the provisions of the Ordinance.

4. Mo. Rev. Stat. § 442.020

Mo. Rev. Stat. § 442.020 provides that "conveyances of lands, or of any estate or interest therein, may be made by deed . . . without any other act or ceremony whatever." The Ordinance violates this provision because it requires Lenders to participate in the Mediation Program before being able to convey the foreclosed property or face monetary penalties. Mo. Rev. Stat. § 442.020 is directly contravened by the Ordinance.

5. Mo. Rev. Stat. Chapter 59

Mo. Rev. Stat. Chapters 53 and 59 outlines the statutory requirements for County Assessors and County Recorders of Deeds. The Ordinance imposes new requirements on the Assessor and Recorder of Deeds related to recording transfer deeds, mortgages, conveyances of deeds of trust in excess of the requirements codified in Chapters 53 and 59.

**B. Ordinance Violates "Hancock Amendment."**

Art. X, § 22(a) of the Missouri Constitution (referred to as the "Hancock Amendment") provides:

Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, . . . when this section is adopted or from increasing the current levy of an existing tax, license or fees . . . without the approval of the

required majority of the qualified voters of that . . . political subdivision voting thereon.

By the plain terms of this provision, the County must present the Ordinance for voter approval because, as explained below, the Ordinance implements a new tax and/or new fees in violation of the Hancock Amendment.<sup>3</sup>

Under this Constitutional provision, "fee increases that are taxes in everything but name" are prohibited, while "fee increases which are general and special revenues but not a tax" are allowed. *Arbor Investment Co., LLC v. City of Hermann*, 341 S.W.3d 673, 679 (Mo. banc 2011) (citing *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301 (Mo. banc 1991)).

In evaluating whether or not a charge is a fee or a tax, courts should consider the five factors first set forth in *Keller*: (1) when the fee is paid, (2) who pays the fee, (3) if the amount of the fee to be paid is affected by the level of goods or services provided to the fee payer, (4) if the government itself is providing a service or good and (5) if the activity has historically and exclusively been provided by the government. *Arbor Investment*, 341 S.W. 3d at 680. While these five factors are considered to be helpful to a court's analysis, "[n]o specific criterion is independently controlling." *Id.* Nor are the five *Keller* factors considered to be exhaustive. *Id.* at 682.

Under the *Keller* factors, the Ordinance constitutes a tax for which voter approval is required. Fees subject to the Hancock Amendment are paid irrespective of the provision of a good or service. *See Arbor Investment*, 341 S.W.3d at 679. Here lenders must pay \$100.00 to

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<sup>3</sup> Any argument by the County that the Ordinance is merely an increase of a license or fee that escapes the Hancock Amendment would be unavailing. First, the County essentially admits this is a new program and new increase by failing to comply with Mo. Rev. Stat. § 67.042. Section 67.042 requires that the program have existed prior to Hancock passage or voted on subsequent thereto. The argument that the foreclosure Mediation Program existed prior to enactment of the Ordinance would be specious at best. Second, if the County wanted to claim an exempt increase, it was required to generate a public statement of costs necessary to maintain current program which indicates the program supported by the increase. It is undisputed that the County has not generated such a statement.

the Mediation Coordinator whether or not any services will ever be provided – in other words, it is a notice tax. Fees for services provided by someone unconnected with the government are subject to the Hancock Amendment. *Id.* at 680. Here the Mediation Coordinator is a contractor not an employee of the County. Finally, the Mediation Program fees are for services not historically and exclusively provided by the governmental entity are subject to the Hancock Amendment. *Id.* Because the mediation fee levied by the Ordinance is subject to the Hancock Amendment and voter approval was not obtained, the Ordinance in its entirety violates Art. X, § 22(a) of the Missouri Constitution and should be declared invalid.

**C. Ordinance Violates Missouri Constitutional Taxation Provisions.**

*1. Mo. Const. Art. X, §25*

Article X, §25 of the Missouri Constitution provides:

the state, counties, and other political subdivisions are hereby prevented from imposing any new tax, including a sales tax, on the sale or transfer of homes or any other real estate.

As discussed above with regard to the Hancock Amendment, the Ordinance constitutes a tax, for which voter approval is required. In imposing the mediation fee on all Lenders, moreover, the Ordinance improperly imposes a tax on Lenders who seek legal transfer of property pursuant to existing, validly recorded, deeds of trust, which convey an interest in real property and right to take possession of that real property upon the happening of an event of default. *See* Ordinance, p. 4, §727.500. The Ordinance therefore violates Art. X, §25 of the Missouri Constitution and should be declared invalid.

*2. Mo. Const. Art. X, §3*

Article X, §3 of the Missouri Constitution provides:

Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.

Under this Constitutional provision, the words "the same class of subjects" refers to the classification of subjects of taxation for the purposes of the tax. *508 Chestnut, Inc. v. St. Louis*, 389 S.W.2d 823, 830 (Mo. 1965). "[When] the subjects are once classified the rate must be uniform upon all subjects of the same class." *Id.* The Ordinance creates an impermissible non-uniform tax for the "class" of properties that are partially located in the County and partially located in another county in that these properties are subject to the full tax imposed by the Ordinance, despite being subject to only a proportional tax for all other purposes. The Ordinance therefore violates Art. X, §3 of the Missouri Constitution and should be declared invalid.

3. *Mo. Const. Art. X, §1 and Art. VI, §18(d)*

Article X, §1 of the Missouri Constitution provides:

The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes.

Similarly, Article VI, §18(d) of the Missouri Constitution provides:

The county shall only impose such taxes as it is authorized to impose by the constitution or by law.

Under these Constitutional provisions, the power to tax is a legislative function and its exercise by a political subdivision, such as a county, must be based on "specific or clearly implied" authority delegated to it by the general assembly. *State ex rel. Goldberg v. Barber & Sons Tobacco, Inc.*, 649 S.W.2d 859, 861 (Mo. 1983). The General Assembly has not authorized counties to impose a tax for the purpose of resolving the national residential property crisis, as described as the explicit purpose for the Ordinance. *See Ordinance*, p.1. Counties are limited in their scope of authority to tax and the stated purpose of the Ordinance far exceeds those

authorized purposes. *See* Mo. Rev. Stat. §137.035 (enumerating purposes for which counties are authorized to tax property); Mo. Rev. Stat. §67.110 (permitting ad valorem property taxes).

The power for a county to impose taxes, moreover, "is not the uncontrolled power to impose any tax except as limited by its charter, or general law. On the contrary, it is only the power to impose such taxes as have been authorized by the General Assembly in a general law, or by the people in its charter -- if not in conflict with the Constitution." *Carter Carburetor Corp. v. St. Louis*, 356 Mo. 646, 655 (Mo. 1947). The Ordinance imposes taxes that the Missouri General Assembly has not authorized for county or municipal purposes and also conflicts with the Missouri Constitution as set forth herein. The Ordinance therefore violates Art. X, §1 and Article VI, §18(d) of the Missouri Constitution and should be declared invalid.

**D. Ordinance Violates Constitutional Restrictions on County Authority.**

*1. Mo. Const. Art. V, §1 and Art. II, §1*

Article V, §1 of the Missouri Constitution provides:

The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts.

Similarly, Article II, §1 of the Missouri Constitution provides:

The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Pursuant to these Constitutional provisions, the legislature "has no authority to create any other tribunal and invest it with judicial power," and cannot turn an administrative agency into a court by granting it power that has been constitutionally reserved to the judiciary. *State Tax Com'n v. Administrative Hearing Com'n*, 641 S.W.2d 69, 76 (Mo. 1982). The Ordinance constitutes a

legislative delegation of judicial authority by vesting adjudicative power in mediation officers appointed by the County Executive separate and apart from the judicial branch of state government. *See* Ordinance, p. 3, §727.300.

In particular, the Mediation Coordinator is granted the power to enter findings in the form of a "Certificate of Compliance" that a Lender has complied with the Ordinance. *See* Ordinance, p. 2, §727.200(9). The Mediation Coordinator is further empowered to make findings that a Lender has appeared for mediation, but did not make a "good faith effort" to resolve the matter during formal mediation proceedings. Ordinance, p. 6, §727.500(10). The Mediation Coordinator is thereby granted the authority to find a violation under the Ordinance by refusing a Certificate of Compliance and, in practice, impose an Ordinance violation fine of \$1,000.00 by virtue of this finding. Ordinance, p. 7, §727.800. The Ordinance therefore grants adjudicative power to a Mediation Coordinator appointed by the County Executive in violation of Art. V, §1 and Art. II, §1 of the Missouri Constitution.

2. *Mo. Const. Art. VI, §23*

Article VI, §23 of the Missouri Constitution provides:

No county, city or other political corporation or subdivision of the state shall... grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution.

By authorizing a fee or contract system for compensation of the contractor mediation officers, the Ordinance grants public funds and valuable services to individuals, namely individual homeowners, in violation of the prohibition against counties granting public money or things of value to, or in aid of, any individual. Pursuant to the Ordinance, the County is granted the authority to contract with mediators to meet County requirements under the Ordinance. *See* Ordinance, p. 3, §727.300. The mediation process, designed entirely to benefit individual

homeowners, will then be funded by County funds, collected from Lenders. The Ordinance therefore violates Art. VI, §23 of the Missouri Constitution and should be declared invalid.

3. Mo. Const. Art. VI, §12

Article VI, §12 of the Missouri Constitution provides:

All public officers in the city of St. Louis and all state and county officers in counties having 100,000 or more inhabitants, excepting public administrators and notaries public, shall be compensated for their services by salaries only.

By authorizing a fee or contract system for compensation of the contractor mediation officers, the Ordinance violates the Constitution's requirement that public officers in counties having a population greater than 100,000 be compensated only by salaries. Specifically, the Ordinance creates a fee-for-service payment system in that County mediators are "compensated solely by the fees established by this Chapter" – namely, the fees required to be paid by Lenders upon issuing a notice of foreclosure. *See* Ordinance, p. 4, §727.500. The Ordinance therefore violates Art. VI, §12 of the Missouri Constitution and should be declared invalid.

**E. Ordinance Violates Missouri Constitutional Rights of Plaintiffs.**

1. The Ordinance is impermissible under Mo. Const. Art. I, § 13, which prohibits retrospective laws.

Article I, §13 states that "no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation . . . can be enacted." Mo. Const. Art. I, §13. There can be no serious argument that the Ordinance procedure impairs the existing contract between the lender and a homeowner. The Mediation Program at worst halts a lender's enforcement of a default under existing security agreements. At best it substantially interferes with and delays a lender's enforcement rights. The Ordinance essentially re-writes the existing terms of the security agreement between homeowner and lender in violation of Article I, § 13.

The Ordinance also violates the retrospective clause of the Article I, § 13. Ex post facto laws are those related to criminal matters while "the term retrospective refers exclusively to laws related to civil rights and remedies." *Missouri Real Estate Comm'n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. W.D. 2010). Although often used interchangeably, "retrospective" and "retroactive" have different meanings. *Id.*

A law is retroactive in its operation when it looks or acts backward from its effective date and is retrospective if it has the same effect as to past transactions or considerations as to future ones. In other words, the constitutional inhibition against laws retrospective in operation does not mean that no statute relating to past transactions can be constitutionally passed, but rather, that none can be allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice of the parties interested.

*Id.* (internal citations omitted).

"A law is retrospective *in operation* if it takes away or impairs vested or substantial rights acquired under existing laws or imposes new obligations, duties or disabilities with respect to past transactions." *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769 (Mo. banc. 2007) (emphasis in original). Application of a procedural law, one that "prescribes a method of enforcing rights or obtaining redress" for its invasion, retrospectively does not run afoul of the constitutional ban. *Id.* However, retrospective application of a substantive law does. *Id.* "The distinction is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit." *Id.* (internal citations omitted). Laws that provide for penalties where none existed before are substantive in nature. *Id.*

To determine whether retrospective application of a law is constitutionally permissible, courts must determine if the law in question "either takes away or impairs a vested or substantial right or imposes a new obligation, duty, or disability with respect to a past transaction."



*Missouri Real Estate Comm'n*, 307 S.W.3d at 690. "A vested right has been described as a right with an independent existence, in the sense that once it vests it is no longer dependent for its assertion upon the common law or statute under which it may have been acquired." *Id.* at 691.

In this case, it is clear that the Ordinance is retrospective in operation and not merely procedural. The Ordinance affects the substantive rights of Plaintiffs to foreclose on the real property serving as collateral for loans previously made to homeowners now in default in St. Louis County. In order to foreclose on said property, Plaintiffs and others similarly situated must now participate in the Mediation Program, a program enacted by the County after Plaintiffs and the homeowners executed the mortgages at issue. Plaintiffs are precluded from exercising their rights to acquire the collateral until the conclusion of the Mediation Program. If Plaintiffs refuse to participate, they will be subject to a fine of up to \$1,000. Because the Ordinance impairs Plaintiffs' substantial rights in the real property at issue, and because the Ordinance imposes new duties and obligations on Plaintiffs that did not exist at the time Plaintiffs contracted with homeowners, the Ordinance violates the Missouri Constitution's prohibition on laws that are retrospective in application and must be declared invalid.

2. *The Mediation Program envisioned by the Ordinance constitutes a partial taking of Plaintiffs' property without just compensation in violation of Mo. Const. Art. I, § 26.*

Article I, § 26 of the Missouri Constitution states that "private property shall not be taken or damaged for public use without just compensation." Mo. Const. Art. I, § 26. In considering whether a taking has occurred, courts will look to "(1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action." *State ex rel. Nixon v. Jewell*, 70 S.W.3d 465, 467 (Mo. App. E.D. 2001).

"A mortgagee with a security interest in real estate may have a right to compensation if the mortgaged property is taken or damaged for public use because the mortgagee's interest in real estate is considered 'property.'" *Barket v. City of St. Louis*, 903 S.W.2d 269, 271 (Mo. App. E.D. 1995) (internal citations omitted). "[T]he mortgagee's right to payment when the mortgaged property is damaged or taken for public use is contingent upon: (1) whether there has been a breach in the mortgage conditions and a default thereon, and (2) whether the mortgagee is able to show the security interest was impaired by reason of such damage or taking." *Id.* "A mortgagee in a deed of trust has a remedy for the taking in whole or in part of the mortgaged property for public use." *Guaranty Savings & Loan Ass'n v. City of Springfield*, 113 S.W.2d 147, 151 (Mo. App. 1938).

In *Jewell*, St. Louis County took ownership of an abandoned cemetery pursuant to the judicial dissolution of the nonprofit corporation holding title to the property. 70 S.W.3d at 466. When title was transferred to St. Louis County by the court, the court extinguished all security interests recorded against the property, including a deed of trust held by Jewell. *Id.* The court found that acquiring the cemetery free and clear of Jewell's lien constituted a taking by St. Louis County. *Id.* at 467.

Here, the County's Mediation Program, if the Ordinance is implemented, will constitute a partial taking of Plaintiffs' property rights in the deeds of trust securing the money lent to defaulting homeowners. Not only does the Ordinance amend the terms of the mortgage lending and security agreements between lenders and borrowers, but the Ordinance essentially takes an interest in the subject property and converts it to public housing for the duration of the Mediation Program. Allowing homeowners in default to remain in the subject properties for months after the lenders' right to foreclose has accrued constitutes a partial taking for which the lender must

be compensated. Because the Ordinance violates Mo. Const. Art. VI, § 26, the Ordinance must be declared void and unenforceable.

**F. Ordinance Violates County Charter.**

The County is a constitutional charter county pursuant to Art. VI, § 18(a) of the Missouri Constitution. The County operates under a charter approved by voters on November 6, 1979. As a charter County, it is granted all power which the legislature is authorized to grant and "possesses all powers which are not limited or denied by the constitution, by statute, or the charter itself." *Yellow Freight Systems, Inc. v. Mayor's Com'n on Human Rights of City of Springfield*, 791 S.W.2d 382, 385 (Mo. 1990). The Ordinance conflicts with the County's own charter and is void.

First, the County's charter does not grant the County Council power to regulate foreclosures on residential property. More broadly, the County Charter does not grant authority to "...enlarge the common law or statutory duty or liability of citizens among themselves." *Id.* That is because "[i]t has been repeatedly ruled in this state that a [county] has no power, by municipal ordinance, to create a civil liability from one citizen to another, nor to relieve one citizen from that liability by imposing it on another." *Id.* (string cite omitted). Because altering the common law and statutory duties between lenders and borrowers would be beyond the powers granted to a charter entity, the Ordinance conflicts with the County's charter and is void.

The Mediation Program which levies mandatory fees from Lenders also violates Article II, section 2.180.4 of the County Charter. Section 2.180.4 of the charter provides the County Council the power to:

Establish and collect fees for licenses, permits, inspections and services performed by county officers and employees; require all fees to be accounted for and paid into the county treasury;

The portion of the Ordinance that requires the Mediation Coordinator services be contracted out by the County Executive violates the above provision which requires that fees collected by ordinance be used for services provided only by county officers and employees. Moreover, this County Charter provision requires that all fees collected by ordinance be deposited in the County treasury. The Ordinance, however, requires the Lender to pay fees directly to the Mediation Coordinator. Thus, provisions relating to the payment for the Mediation program are in violation of the County's charter and therefore null and void. Finally, because the fees mandated by the Ordinance are paid directly to the Mediation Coordinator, the Mediation scheme circumvents the appropriation power of the County Council contained Article II, section 2.180.2 of the County Charter.

**III. Plaintiffs will suffer irreparable harm in the absence of immediate injunctive relief because the Ordinance infringes upon Plaintiffs' rights in real property held as security under the terms of mortgages in default.**

The primary purpose of an injunction is to prevent irreparable injury to the plaintiff pending disposition of the case on the merits. *Walker v. Hanke*, 992 S.W.2d 925, 933 (Mo. App. W.D. 1999). Irreparable harm is established if monetary remedies cannot provide adequate compensation for improper conduct. *Id.* The term "adequate remedy at law" generally means that damages will not adequately compensate the plaintiff for the injury or threatened injury. *Id.* Pursuant to Mo. Rev. Stat. § 526.030, injunctive relief is specifically made available where an "irreparable injury to *real* or personal property is threatened." *Id.* (emphasis added).

In accordance with Mo. Rev. Stat. § 526.030, it has long been established under Missouri law that specific relief is available where a movant's interest in *real property* is threatened,

because all real property is unique and, thus, an injury to a real property interest is generally not compensable by monetary damages. *Wilkinson v. Vaughn*, 419 S.W.2d 1 (Mo. 1967); *Kay v. Vatterott*, 657 S.W.2d 80, 82 (Mo. App. E.D. 1983).

In this case, Plaintiffs' real property interests in the security for mortgages to borrowers now in default, or who will go into default, are threatened. Each of these mortgages is secured by real property. Because Plaintiffs' interests are secured by real property, any harm to Plaintiffs' interests would not be compensable by monetary damages. An injunction should issue.

**IV. The balance of harms strongly favors immediate injunctive relief, as the County will suffer no harm if the Ordinance is found to be invalid.**

If allowed to take effect on September 28, 2012, the Ordinance will place numerous security interests held by Plaintiffs, among others, in turmoil. Foreclosure proceedings already initiated will be affected and delayed, as it is unclear when and how the County plans to implement the Mediation Program especially with regard to foreclosures in process. Plaintiffs will be immediately subject to the provisions of the Ordinance, including monetary sanctions for not following through with the procedures outlined in the Mediation Program. If the County does not have the administrative framework in place to implement the Mediation Program, Plaintiffs will have no choice but to delay exercising their rights for an indefinite period of time possibly start existing foreclosures over again or be subject to sanctions. Given the uncertainty surrounding the implementation of this Ordinance, Plaintiffs will clearly be harmed if the Ordinance is enforced prior to the Court's determination on the merits of this case.

On the other hand, the County will suffer no harm by waiting until after adjudication of Plaintiffs' claims to begin implementation of the Ordinance. Foreclosures in accordance with state law have been occurring in Missouri for numerous decades and satisfy constitutional requirements. Moreover, the County gains no benefit, monetary or otherwise, from the

Mediation Program. The County, therefore, will suffer no harm by waiting until the Court rules on the merits of Plaintiffs' claims to implement its Mediation Program. Injunctive relief simply maintains the long-standing status quo during the pendency of this action.

**V. The public interest strongly favors immediate injunctive relief, as the law favors the enforcement of contractual obligations as intended by the parties.**

It is in the public interest to enforce contractual obligations and to do so as intended by the parties. *See Home Shopping Club, Inc. v. Roberts Broadcasting Co.*, 989 S.W.2d 174, 179 (Mo. App. E.D. 1998). Plaintiffs entered legally binding contracts with individuals borrowing money for the purchase of real property. The borrowers are obligated to repay those loans under the terms set forth in the mortgage contracts or face the consequences of default. Plaintiffs should not be penalized because the borrowers were unable to live up to their bargain. Moreover, as explained above, the Ordinance will chill residential lending, inhibit transfer of property and put an unnecessary cloud on residential property subject to the Ordinance.

The Ordinance sets a dangerous precedent by allowing the government to retrospectively change the terms of contracts between private citizens *to the detriment of one of the parties*. Allowing the County to do so opens the door for government intervention any time elected officials feel that one party made a bad bargain. This precedent flies in the face of long-standing legal principles and undermines the validity of all private contracts. The interests of the public at large are better served by granting the injunction requested by Plaintiffs and prohibiting implementation of the Ordinance.

**CONCLUSION**

For the reasons set forth above, Plaintiffs Missouri Bankers Association, Inc. and Jonesburg State Bank respectfully request this Court enter a Temporary Restraining Order enjoining St. Louis County, Missouri, its agents, servants, employees and attorneys and those

persons in active concert or participation from seeking to enforce the provisions of Ordinance 25,190 of 2012, and for such other and further relief as the Court deems necessary.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was sent via electronic mail and hand delivery this 24<sup>th</sup> day of September, 2012, to:

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