STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Ballot Omission Declaratory Judgment

Bruce Clark, Peter Butler, and Ann Dolan,

Petitioners,

v.

City of Saint Paul, Minnesota;

and

Shari Moore, in her official capacity Saint Paul City Clerk;

and

Joseph Mansky, in his official capacity Ramsey County Elections Manager,

Respondents.

Honorable Leonardo Castro

Case No. 62-cv-19-857

RESPONDENTS' RESPONSE TO PETITION FOR CORRECTION OF BALLOT ERROR AND FOR DECLARATORY JUDGMENT

This case arises out of the City of Saint Paul's statutory implementation of organized collection for residential trash collection within the City.

BACKGROUND FACTS

Garbage collection is a complex public health issue governed by interrelated laws and regulations between the State of Minnesota, counties, and cities. Because the City of Saint Paul (the "City") has a population of more than 1,000, Minnesota law states that the

City "shall ensure" that every resident in the city has garbage collection service. Minn. Stat. § 115A.941(a). To accomplish this, the state permits cities to "[o]rganize collection, provide collection, or require by ordinance that every household and business has a contract for collection services." *Id.*

In 2016, the City began exploring the possibility of adopting organized collection for residential dwellings in Saint Paul. Minnesota Statute Section 115A.94 sets out the processes to be followed by the "governing body" of a city in deciding and implementing organized collection. The statute provides that a "local government unit may organize collection as a municipal service or by ordinance, franchise, license, negotiated or bidded contract, or other means…." § 115A.94, subd. 3.

Pursuant to § 115A.94, the Saint Paul City Council ("City Council") notified the public and the licensed garbage collectors in the City and held public hearings on the issue. Because the City had more than one licensed garbage collector within the City, it was required to meet and negotiate exclusively with those collectors. § 115A.94, subd.4d. Under this portion of the statute, licensed collectors and the City negotiated and discussed various priorities and worked to develop a proposal "in which interested licensed collectors, as members of an organization of collectors, collect solid waste from designated sections of the city…." *Id.*[1] The statute further provides that

> The initial organized collection agreement executed under this subdivision must be for a period of three to seven years. Upon execution of an agreement between the participating licensed collectors and city or

[1] During negotiations, the collectors that wanted to continue to provide service in Saint Paul set up a separate legal entity known as "St. Paul Haulers, LLC."

> town, the city or town shall establish organized collection through appropriate local controls…

§ 115A.94, subd. 4d.[2] Eventually, pursuant to this section of the statute, the City entered into a contract with the licensed garbage collectors (referred to as "the Consortium" in the contract) for a term of five years. (The contract is attached as Exhibit "E" to the Petition, Doc. No. 2.)

CONTRACT

The City executed the contract with the Consortium on November 14, 2017. The contract is extensive and covers several aspects of garbage collection in the City. The contract mandates four service levels (small, medium or large cart, collected every other week or weekly), sets the agreed upon rates to be charged for those service levels (Exhibit 4a); requires the Consortium to provide collection services to all residential dwelling units as defined in the contract (2.1.12), states that the Consortium has the sole and exclusive right to provide the garbage services during the term of the contract (§5.2) and sets out detailed terms of billing, invoicing and payment. (Doc. No. 2, Ex. E.)

Pursuant to sections 2.15.5 through 2.15.12, the City and the Consortium agree that the Consortium will invoice and bill customers, but after 90 days of no payment, the City must pay the Consortium for any unpaid invoices. (Doc. No. 2, Ex. E, p. 4, §§ 2.15.7, 2.15.8). Section 3 of the contract states that the rates charges shall be approved by the City Council and adjusted annually beginning on January 1, 2020 and

[2] The statute has since been amended to require an initial contract term of at least seven years. Minn. Stat. § 115A.94, subd. 4d. (2018).

that "Failure by the Council to approve any required price adjustment shall be a breach." (Contract, § 3.1, p. 29). Other sections of the contract cover indemnification (Section 10), insurance obligations (Section 11), events of default and remedies (Section 12), and section 13 contains a standard force majeure clause:

> 13.6 Force Majeure
>
> The City, the Consortium and the Consortium Members shall not be held responsible for performance if its performance is prevented by acts or events beyond the party's reasonable control, including, but not limited to: severe weather and storms, earthquake or other natural occurrences, strikes and other labor unrest, power failures, electrical power surges or current fluctuations, nuclear or other civil military emergencies, or legislative, judicial, or executive acts (each of the foregoing, a "Force Majeure Event"). The time period for the performance in question shall be extended for only the actual amount of time said party is so delayed.

(Doc. No. 2, Ex. E, p. 48.)

ORDINANCE 18-39

Pursuant to § 115A.94, once the contract was executed, the City was required to "establish organized collection through appropriate local controls." § 115A.94, subd. 4d. Due to the requirements of other applicable state statutes, the local control used to establish organized collection took the form of ordinances. Specifically, Minnesota Statute section 443.26 authorizes:

> Any city of the first class[3] in the state of Minnesota, in addition to the powers conferred upon it by its charter or any law of this state, is hereby authorized to establish rates for the removal, collection, and disposal

[3] Saint Paul is a first class city. There are three others in Minnesota: Minneapolis, Duluth and Rochester.

> from public or private property of rubbish, and to collect the same in the manner set forth in sections 443.26 to 443.35.

Minn. Stat. § 443.26. Among other things, additional provisions in Chapter 443 require that ***rates set by the City "together with regulations incident thereto" be set by ordinance*** (§ 443.28); allow the City to assess unpaid garbage bills against the property and collect them as it collects other property taxes (§ 443.29); and proclaim that garbage activity under the statute "shall be considered a public utility and may be merged and operated with any other city operated utility" (§ 443.34).

On September 5, 2018, the City enacted two ordinances (18-39 and 18-40) to implement organized collection. The ordinance at issue in this petition is Ordinance 18-39 which created Chapter 220 of the City Code entitled "Residential Coordinated Collection." Chapter 220 created general regulations related to coordinated collection and established rates, billing and collection procedures. (Doc. No. 1, Ex. A.)

PETITION ON ORDINANCE 18-39

The Saint Paul City Charter provides for city control of certain public utilities, but there are no provisions explicitly referencing garbage collection. The City Charter provisions at issue in this lawsuit are contained in Section 8 of the Charter which is a general provision allowing residents to require ordinances to be submitted to a vote upon submission of a petition. Section 8.05 of the City Charter states that:

> [A]ny ordinance or resolution upon which a petition is filed, other than an emergency ordinance, shall be suspended in its operation as soon as the petition is found sufficient. If the ordinance or resolution is not thereafter entirely repealed, it shall be placed on the ballot at the next

> election, or at a special election called for that purpose, as the council shall determine…..

St. Paul City Charter, § 8.05. Petitioners collected signatures on petitions related to Ordinances 18-39 and 18-40. The petition at issue in this case, seeking a referendum to repeal Ord. 18-39, was received by the City Clerk on October 16, 2018.

Ultimately, the City Council found that the petition was sufficient to satisfy the minimum signature requirements under the City Charter based on the report of the City Clerk (via the Ramsey County Elections Manager). (Res. 18-1922, Doc. No. 1, Ex. D.) Further, based on the legal advice of the City Attorney, the City Council found that "the provision of the City Charter allowing referendum for the subject matter of the Petition is preempted by Minnesota States §§ 443.28 and 115A.94 is an unconstitutional interference with the Agreement between the City and the Consortium, and conflicts with state public policy." As a result the City Council directed the City Clerk not to submit Ordinance 18-39 as a ballot question for the next election. (Res. 18-1922, Doc. No. 1, Ex. D.)

On February 7, 2019, Petitioners commenced the current lawsuit against Respondents City of Saint Paul, Minnesota and the city clerk and county election official. Petitioners ask this Court to "issue an Order pursuant to Minnesota Statute § 204B.44 and Minn. Stat. § 555, that directs the immediate suspension of Ordinance 18-39 pending approval or disapproval by the voters in Saint Paul." (Petition, p. 15.) At the same time, Petitioners seek to have this Court order that the "Respondents either prepare for citywide

election a ballot that includes the Referendum on Ordinance 18-39 or repeal the Ordinance forthwith." (Petition, p. 16.)

Because the referendum on Ordinance 18-39 is in conflict with state law and would work an unconstitutional impairment of the contract between the City and the Consortium, Respondents request this Court dismiss the Petition lawsuit pursuant to the arguments below:

ARGUMENT

A. THE CITY COUNCIL PROPERLY EXERCIZED ITS AUTHORITY IN REFUSING TO HAVE ORDINANCE 18-39 PLACED ON THE BALLOT.

When a proposed local regulation would be unlawful or manifestly unconstitutional, a city council properly refuses to have the matter placed on the ballot. *Bicking v. City of Minneapolis*, 891 N.W.2d 304, 313 (Minn. 2017), *Davies v. City of Minneapolis*, 316 N.W.2d 498, 504 (Minn. 1982), and *Hous. & Redevelopment Auth v. City of Minneapolis*, 198 N.W.2d 531, 536 (1972). This is so because municipalities do not have any inherent powers and can enact regulations only as "expressly conferred by statute or implied as necessary in aid of those powers which have been expressly conferred." *Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 357, 143 N.W.2d 813, 820 (1966).

Under Minnesota Statute section 410.20, the State of Minnesota has authorized home rule charter cities, such as Saint Paul, to include a charter provision allowing a referendum on ordinances. However, there are limits to the referendum power that the state allows to be exercised in home rule charters: the statute permits a charter to allow a

referendum only on ordinances. Minn. Stat. § 410.20 (2018). Other types of municipal action are not subject to referendum or repeal and charters are not permitted to allow for that. *See Hous. & Redevelopment Auth. v. City of Minneapolis*, 198 N.W.2d 531, 536-537 (Minn. 1972) (holding the City properly refused to place proposed charter amendment allowing referendum on "any council action" on the ballot because many actions such as "settlement of lawsuits, entering of contracts, acceptance or rejection of bids, sale of municipal bonds, appointment of city officials, levying of taxes, granting of licenses and permits, and the adoption of budgets" are not done by ordinance and § 410.20 does not grant such sweeping authority; rather it limits referendum to ordinances); *see also Nordmarken v. City of Richfield*, 641 N.W.2d 343, 347 (Minn. Ct. App. 2002) ("The grant to a municipality of the power to govern itself through a home rule charter and to include the right of referendum does not preclude the legislature from preempting charter authority on matters of state concern").

Further, charter provisions must be consistent with state law and state public policy and the provisions of the charter must "always be in harmony with and subject to the constitution and laws of the state." *State ex. rel. Lowell v. Crookston*, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (1958). *Id*. at 83. Although charters may allow a referendum on ordinances, cities cannot enact a local regulation that conflicts with state law. *Bicking*, 891 N.W.2d at 313. For this reason, courts in Minnesota do not require municipalities to place on the ballot a local referendum or amendment that is unlawful because it conflicts with state law. *Id.* Similarly, the Minnesota Supreme Court has held that, when a

proposed local law unconstitutionally impairs a contract previously entered into by the municipality, the city council properly refuses to place the proposed law on the ballot. *Davies v. City of Minneapolis*, 316 N.W.2d 498, 504 (*citing Housing & Redevelopment Auth v. City of Minneapolis*, 198 N.W.2d 531, 536 (1972) (reaffirming that when local regulation "[a]ppears to be manifestly unconstitutional, the City Council must have the authority to avoid what would amount to a futile election and a total waste of taxpayers' money").

Thus, the City Council in this case properly refused to place the repeal of Ordinance 18-39 on the ballot because it conflicts with state law and would work an unconstitutional impairment of the City's contract with the Consortium.

B. THE CITY COUNCIL PROPERLY REFUSED TO DIRECT THE MATTER TO BE PLACED ON THE ON BALLOT BECAUSE ALLOWING THE ELECTORATE TO REPEAL ORDINANCE 18-39 CONFLICTS WITH REQUIREMENTS IN MINNESOTA STATUTE SECTION 115A.94 AND CHAPTER 443.

The Minnesota Supreme Court has recognized three types of state preemption of municipal legislative authority: express preemption, conflict preemption, and field preemption. *Jennissen v. City of Bloomington*, 913 N.W.2d 456, 459 (Minn. 2018) (*citing Bicking*, 891 N.W.2d at 313, n. 8)). The City Council properly refused to put Ordinance 18-39 to referendum on the grounds of conflict preemption.[4] Conflict preemption has been described as follows:

[4] Petitioners rely heavily on the Minnesota Supreme Court decision in *Jennissen v. City of Bloomington*, 913 N.W.2d 456 (2018), which was issued on June 20, 2018 (well after Saint Paul had executed the five-year contract with the Consortium). Importantly, the

> A conflict exists between state law and a municipal regulation when the law and the regulation "contain express or implied terms that are irreconcilable with each other" when "the [regulation] permits what the statute forbids" or when the "[regulation] forbids what the statute permits."

Bicking, 891 N.W.2d at 313 (*quoting Mangold*, 143 N.W.2d at 816). Conflict preemption exists in this case because the referendum allowing repeal of the ordinance contradicts the process mandated in § 115A.94, and will result in local law that is irreconcilable with the process that the statutes (§115a.94 and §443.26 et seq.) expressly permit and require.

Conflict preemption exists under § 115A.94 because it provides express authority for "the governing body" of the city to adopt and implement organized collection via negotiated contract without voter approval. § 115A.94, subd.3, 4c. There is nothing in the express language of § 115A.94 that provides for the City to pass an ordinance and then negotiate with licensed collectors. *Id.* It is important to recognize that the legislature knows how to include language in statutory provisions that would expressly allow voters to approve or reverse a local government's enactment of law. *See e.g.* Minn. Sat. § 340A.413, subd. 3 (permitting cities to issue additional on-sale liquor licenses only "when authorized by the voters of the city at a general or special election") and Minn. Stat. § 205.07, subd. 3 (stating that a petition "requesting a referendum on the ordinance may be filed with the city clerk within 180 days after passage and publication of the

---

court in *Jennissen* only considered the matter of "field preemption." *Id.* at 460. Because the city in that case did not argue conflict preemption, the court determined not to consider the issue. *Id.* at 460, n. 2. In addition, it should be noted that the Minnesota Supreme Court has granted review to both sides on the Minnesota Court of Appeals' decision after remand, including the Court of Appeals' determinations as to whether an unconstitutional impairment occurred in that case.

ordinance" when a city council adopts an ordinance to change the year of a city election). Moreover, the City could not have put the issue to the voters prior to the enactment of an ordinance because "advisory elections" are not permitted in Minnesota. *See Howard v. Holm*, 208 Minn. 589, 593, 296 N.W. 30, 32 (1940) (elections may be held "only under constitutional or statutory authorization"). Section 115A.94 does not expressly provide for the issues to be put to voters, and, while the City Charter allows for referendum on ordinances, it does not allow the Council to put issues to voters prior to enactment of an ordinance.

In addition, it is implicit in the statute as a practical matter that the legislature did not intend for a city's decision as to organized collection to be undone by voters after the contract was executed. *See e.g.* § 115A.94, subd. 4a (providing for a different process to be followed if the City does not negotiate a contract with licensed collectors that must be started "**before** implementing an ordinance, franchise, license, contract, or other means of organizing collection"). Subdivision 4d of Section 115A.94 required the city to negotiate with licensed collectors first, allowed the city to organize collection through the contract negotiated and *then* use local controls (such as an ordinance) to establish organized collection in the city. At the very least, the statute implies that the legislature intended for the "governing body" of the City to make the decision without the voters having a right to undo the process once a contract had been executed. *See Bicking*, 891 N.W.2d at 313 (conflict preemption exists when state law and city regulation contain "express or *implied* terms that are irreconcilable with each other").

Finally, interpreting the statute to allow for voters to undo the process by referendum at this stage would frustrate the purpose of the statute and goes against statutory rules of construction. When interpreting statutes, courts should presume "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable." Minn. Stat. § 645.17. The statute requires exclusive negotiations for at least 60 days. Here, the City negotiated for almost fourteen months. The statute also requires the city to execute a contract that is negotiated under these provisions for a term of three to seven years. The City's contract is for five years. To now allow voters to reject organized collection after the City has negotiated and executed a contract with the licensed collectors (who created a completely new legal entity pursuant to terms of the statute) makes the provisions of the negotiated contract section of the statute (§ 115A.94, subd. 4d) meaningless and is not reasonable.

For similar reasons, allowing a referendum on Ordinance 18-39 is improper because it conflicts with express requirements in sections of Chapter 443. Section 443.26 states that "any city of the first class in the state of Minnesota… is hereby authorized to establish rates for the removal, collection, and disposal." Minn. Stat. § 443.26. Further, the City must establish those rates "together with regulations incident thereto" by ordinance, and may assess unpaid bills as a charge against the property. Minn. Stat. §§443.28, 443.29. The petition for referendum could repeal the ordinance that set those rates, thereby forbidding the City from establishing rates by ordinance as required by section 442.28. *Cf. Bicking*, 891 N.W.2d at 313. Thus, the proposed referendum is

preempted by requirements set forth in Chapter 443 as well.

Allowing the suspension or repeal of Ordinance 18-39 on the basis of the general referendum provision in the City Charter, contradicts the statutory process set forth in § 115A.94 and the requirement that rates and regulations be set forth in an Ordinance under § 443.28. Statutory authority delegated to the governing body of a city without the need for voter approval and requiring the City to use ordinances to execute its authority and establish rates cannot be reconciled with allowing that detailed complex process to proceed and then giving the electorate the option to obliterate those actions. *Bicking*, 891 N.W.2d at 313 (conflict preemption occurs when terms between state law and municipal regulation are irreconcilable). Thus, the City Council properly refused to have the issue placed on the ballot on the grounds of conflict preemption.

C. THE CITY COUNCIL PROPERLY REFUSED TO PLACE THE ISSUE ON THE BALLOT FOR ELECTION BECAUSE REPEAL OF ORDINANCE 18-39 WOULD WORK AN UNCONSTITUTIONAL IMPAIRMENT OF THE CONTRACT BETWEEN THE CITY AND THE CONSORTIUM.

Both the United State Constitution and the Minnesota State Constitution contain a "Contract Clause" which prohibits the passage of laws that impair contracts. U.S. Const. art. I, § 10, cl. 1; Minn. Const. art I, § 11. It has long been established that the legislative authority of a state or local municipality to modify its own contracts is limited by the Contract Clause. *Id.* Moreover, this applies to all types of legislative authority including direct action by the people. *See Ross v. Oregon*, 227 U.S. 150, 163 (1913); *see also Davies*, 316 N.W.2d at 503 (discussing *Stearns v. State of Minnesota*, 179 U.S. 223, 253

(1900), and recognizing that the "[r]ight of the electorate of Minnesota is subject to the contract clause of the United States Constitution").

Petitioners offer little argument against the City's position that repeal of Ordinance 18-39 constitutes an unconstitutional impairment of the contract. Instead, Petitioners make general observations that ordinances often impact contracts and discuss the right to referendum. Petitioners' argument misses the point and ignores the large body of law that directly addresses when a local law (including those instituted by the electorate), affects a contract previously signed by a local government unit.

For example, in *Stearns*, the State of Minnesota and certain railroad companies had executed contracts governing lands owned by the railroad and how they would be taxed. *Stearns*, 179 U.S. at 226-227. The contracts allowed the railroads to be charged income and property taxes, but had certain exemptions for the property taxes. *Id.* Subsequently, an amendment to the Minnesota State Constitution was passed by the voters that confirmed how companies in the state would be taxed, including railroad companies. *Id.* The amendment specifically allowed for referendum by the voters and repeal of property tax exemptions. *Id.* at 228. When a referendum to repeal the exemption occurred thereafter and the railroads sued, the United States Supreme Court refused to enforce the repeal. *Id.* at 253. The Court held that despite the fact that the Minnesota Constitution expressly reserved for the people the right to repeal the provision, the state had unconstitutionally impaired the contractual rights of the railroad companies and it would not enforce the repeal. *Id.* Similarly in our case, the repeal of Ordinance 18-

39 will unconstitutionally impair the contract between the City and the Consortium and the City Council properly refused to place the matter on the ballot.

Petitioners do not set forth any meaningful argument that the contract would not be unconstitutionally impaired. Inexplicably, Petitioners argue that if Ordinance 18-39 is repealed, the Contract "would necessarily be terminated" yet they argue that no unconstitutional impairment occurs in this case. (Petition, p. 13, ¶ 51.) Setting aside for now whether the repeal of Ordinance 18-39 would terminate the contract, it should be recognized that there would be an unconstitutional impairment of the contract even if Ordinance 18-39 is repealed and the contract is not wholly terminated. In this case, the contract sets forth a myriad number of rights and obligations between the City and the Consortium as it pertains to organized collection. The contract requires the Consortium to provide garbage services within the City and grants that the provision of those services is the exclusive right of the Consortium for the five year term of the contract. The contract sets the service levels and prices to be charged to residents and establishes how those prices will be adjusted and collected. In addition, the contract provides that the City must pay the Consortium for unpaid garbage bills after a certain length of time.

Ordinance 18-39 implements many of the rights and obligations of the City that are addressed in the contract. The ordinance sets the service levels and prices for collection and the ordinance allows for the City to assess against properties for unbilled garbage bills. The ordinance establishes who qualifies as a residential dwelling unit and requires those residents to receive garbage service from the garbage collector in their

designated area. Allowing a suspension or repeal of Ordinance 18-39 would impact the City's obligations and performance under the contract, including requiring residential dwelling units to get service from the designated collectors, the establishment of the service levels and garbage rates that have been set, and the ability of the City to pay unpaid charges to the Consortium and assess those unpaid charges against the residents' property. These are just a few examples of the aspects of organized collection covered in the contract and the ordinance; and from these few examples alone, it should be clear that allowing repeal of Ordinance 18-39 would be a substantial impairment of the contract between the City and the Consortium.

Far less has been found to be a substantial impairment by the Minnesota Supreme Court. For example, in *Davies*, the City of Minneapolis entered into an agreement with the Metropolitan Sports Facilities Commission pursuant to a state statute where the city agreed to levy a local tax to assist in debt service for bonds issued to build a sports facility. 316 N.W.2d at 499. The agreement to tax was a precondition to the Metropolitan Council's authority to issue bonds for the construction of the facility. *Id*. The Met Council subsequently sold $55,000,000 in bonds to various entities. In the weeks prior to the bond sale, the petitioners in the case had presented a petition to the Minneapolis City Council proposing a charter amendment that would limit the city's ability to impose local taxes for a sports facility. *Id.*

The city council refused to put the proposed charter amendment on the ballot and its refusal was upheld by the Minnesota Supreme Court. *Id.* In reaching its decision, the

court found that the proposed charter amendment would work an impairment on the bondholders' contracts by eliminating important security provisions as a result of the amendment. *Id.* at 502. The court further recognized that, although a "law impairing the contractual rights of a party contracting with a municipality 'may be constitutional if it is reasonable and necessary to serve an important public purpose'" the petitioners did not suggest that such a purpose existed. *Id.* (*quoting United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977)). Instead, the petitioners argued that no unconstitutional impairment would result in part because the bondholders had notice before the bonds were issued that a petition for charter amendment was going to be filed and that there was no evidence that the bondholders' contract would be materially diminished. *Id.* at 502. The court rejected both of these arguments, finding that neither "the mere possibility that a valid petition" might be presented nor the total elimination of the security provision could excuse the unconstitutional impairment. *Id.* at 502. Thus, the court determined that the proposed charter amendment was manifestly an "unconstitutional impairment" of the contract and the city council was proper in refusing to put the matter to election. *Id.* at 504.

Similar to the petitioners in *Davies*, Petitioners in our case do not argue that an important public purpose is at issue. Instead, Petitioners cite to two sections in the contract (§§ 3.1.4 and 13.6), and vague claims that the City was aware that a change in law may have an impact on the contract terms, to support their argument that there is no unconstitutional impairment in this case. (Petition, p. 13.) Petitioners' arguments fail as

a matter of law for a number of reasons: the provisions do not operate in the manner asserted by Petitioners, the arguments are irrelevant, and, to the extent they are relevant to the situation, they actually establish that an unconstitutional contractual impairment would occur in this case if Ordinance 18-39 is repealed.

Petitioners first argue that repeal of the ordinance will necessarily terminate the contract "by its own terms." (Petition, p. 13.) Petitioners do not explain how the repeal of the ordinance operates to terminate the contract. Additionally, Petitioners imply that the force majeure clause at § 13.6 will excuse performance once the contract is terminated. (*Id.*) However, there is nothing in the Contract's generic, standard force majeure provision (which is a typical contractual provision contained in many types of contracts) that discusses termination. Instead, the language is general, nonspecific and indicates that it applies to temporarily permit non-performance. The force majeure clause does not terminate the contract and excuse performance. If, however, repeal of the ordinance acts as a termination of the contract, as Petitioners' claim, there can be no dispute that a substantial impairment has occurred.

In addition, courts from other jurisdictions have recognized that a substantial impairment in violation of the Contract Clause could occur when a city relies on a force majeure clause in a contract after passing an ordinance that terminates or changes the terms of that contract. *See e.g. Yellow Cab Co. v. City of Chicago*, 3 F. Supp.2d 919, 923 (E.D. Ill. 1998) (*citing Horwitz-Mathews Inc. v. City of Chicago*, 78 F.3d 1248, 1252 (7th Cir. 1996) (recognizing that a force majeure clause in a contract between a governmental

entity and a private party could result in constitutional impairment of the contract when the government "[e]xercises its legislative power in a way that eliminates the availability of a remedy or action for damages by the non-breaching party."

Petitioners next cite to sections 3.1.4 through 3.1.4.2 of the contract as evidence that there is no unconstitutional impairment, claiming that these terms in the contract would excuse performance if Ordinance 18-39 were repealed. These provisions of the contract are related to price adjustments requested by the Consortium due to changes in tax laws and other costs incurred by the Consortium. Section 3.1.4.1 addresses adjustment of prices due to changes in the law, allowing the Consortium to pass on to residents the costs for new or additional government taxes and fees in certain situations. Section 3.1.4.2 allows for the Consortium to seek adjustment of rates in some situations based on permanent increases in costs or expenses incurred by the Consortium due to a change in law. (Doc. No. 2, Ex. E, pp. 30-31.) By their unambiguous language these portions of the contract do not apply to excuse performance if Ordinance 18-39 is repealed because they concern only requests for increases in rates as a result of increased costs to the Consortium under various tax laws or other operational cost increases.

Finally, petitioners argue that there is no unconstitutional impairment because these portions of the contract demonstrate that the City "was well aware of public opposition to the organized collection scheme and that a change in the law was fully anticipated, bargained for, practical reality." (Petition, p. 13, ¶ 52.) These contract provisions do not mention anything about public opposition to organized collection.

They are standard contract terms and do not amount to evidence that the City "anticipated and bargained for" a change in law that would effectively bar organized collection and terminate the contract. Moreover, the mere possibility that local law might change in the future does not establish that there is no unconstitutional impairment. *See e.g. Davies*, 316 N.W.2d at 503 ("if that were the case, a municipality would be able to escape its own contractual obligations with impunity" merely by proposing a local law after the contract was entered into).

At this point, it must be recognized that the Consortium is an indispensable party to this lawsuit. "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Minn. Stat. § 555.11. Petitioners' claim that the contract necessarily terminates as a result of a repeal of the ordinance and all performance is excused implicates the rights of the Consortium under the contract. The Consortium may agree that repeal of the ordinance is a breach of the contract, but they likely will not agree that the contract is terminated, not impaired by the repeal or that the repeal excuses the City's performance. (*See* Respondents' Motion for Joinder, filed separately).

Whether repeal of Ordinance 18-39 would terminate the contract or not, there can be no reasonable dispute that repeal of the ordinance would work an unconstitutional impairment of the contract. Because allowing the electorate to repeal Ordinance 18-39

would result in an unconstitutional impairment of the contract between the Consortium and the City, the City Council properly refused to have the matter placed on the ballot.

D. FURTHER, IMMEDIATE SUSPENSION OF ORDINANCE 18-39 IS NOT WARRANTED BECAUSE IT IS NEITHER AUTHORIZED NOR PROPER IN THIS CASE.

Additionally, one type of relief Petitioners seek is for this Court to "issue an Order pursuant to either Minn. Stat. § 204B.44 or Minn. Stat. § 555, that directs the immediate suspension of Ordinance 18-39." (Petition, p. 15.) There is no authority under either statute to issue such an order. *See* Minn. Stat. § 204B.44 (allowing courts to consider and conduct hearings regarding "an error or omission in the placement or printing of the name or description of any candidate or any question on any official ballot") and Minn. Stat. § 555.01 (giving the courts the "power to declare rights, status, and other legal relations"). Neither of these provisions provides authority for this Court to order immediate suspension of an ordinance.

More importantly, it is not proper in this case given that garbage collection is currently proceeding in the City pursuant to the Contract and Ordinance. All of the arguments discussed in Sections A, B and C above, as to conflict preemption and unconstitutional impairment, support a decision by the Court not to direct immediate suspension of the ordinance. Moreover, there is an additional consideration for this Court to take into account: all of the above assumes that if the matter were placed on the ballot, Ordinance 18-39 would be repealed. However, that is not a forgone conclusion. Even if this Court does not find that the referendum is preempted or that an unconstitutional

impairment of the contract exists and the matter needs to be put on the ballot, it is possible that the Ordinance will be approved at the election and not repealed.

The ordinance cannot be immediately suspended for important practical and public policy concerns. Immediate suspension of the ordinance would create unnecessary uncertainty and chaos in the garbage collection currently happening within the City. To do this for the six or seven intervening months would implicate serious public health concerns in the City. The garbage is currently being picked up by the Consortium members and this needs to be done on a daily basis. No interests are served by suspending the ordinance and upending that process on a possibly temporary basis.

CONCLUSION

For the reasons discussed above, Respondents respectfully request this Court dismiss Petitioner's Petition in its entirety.

Respectfully submitted,

Dated: February 27, 2019

LYNDSEY M. OLSON
SAINT PAUL CITY ATTORNEY

s/ Megan D. Hafner

Megan D. Hafner, # 293751
Assistant City Attorney
Attorneys for Respondents
750 City Hall and Court House
15 West Kellogg Boulevard
Saint Paul, MN 55102
Telephone: (651) 266-87 56
Fax: (651) 266-8787
Email: *megan.hafner@ci.stpaul.mn.us*

MINN. STAT. § 549.211
ACKNOWLEDGMENT

The party or parties on whose behalf the attached document is served acknowledge through their undersigned counsel that sanctions may be imposed pursuant to Minn. Stat. § 549.211.

s/ Megan D. Hafner
MEGAN D. HAFNER, #293751
Assistant City Attorney