STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Ballot Omission Declaratory Judgment

Honorable Leonardo Castro

Case No. 62-cv-19-857

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.

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

I. INTRODUCTION

At the outset, it is important to understand the unique and complex circumstances that led to the current situation facing the City of Saint Paul and this Court. It is important not to ignore the context of how organized collection was done in Saint Paul, when, why and how the organized collection contract was executed and the impact of the *Jennissen v. City of Bloomington*, 913 N.W.2d 456, 459 (Minn. 2018) case, which was issued after important decisions had been made and the contract was already executed in this case.

Garbage service and organized collection

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 meet this statutory obligation, 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.*

Organized collection had been discussed in Saint Paul for many years. Over time, various entities had presented to the City Council and suggested that organized collection should be considered by the City. (See "Recycle it Forward," and "Taking Out the Trash," Exs. A and B, Hafner Aff.) 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. (emphasis added). In addition, § 115A.94 requires the City ***first*** negotiate with all licensed garbage haulers in the city to create a proposal and negotiate a contract for organized collection. *Id.*

In 2016, pursuant to § 115A.94, the City Council passed a resolution authorizing the City's Public Works Department to solicit input from residents and various stakeholders concerning organized collection which it did. (Resolution 16-337, Ex. C, Hafner Aff.) In June 2016, the City Council held a public hearing and the Public Works Department presented a report to the City Council addressing many issues of organized

collection. (Res. 16-174 and "Organized Trash Collection in Saint Paul: Report on Community Input and Draft Goal Objectives, Exs. D and E, Hafner Aff.)

Pursuant to § 115A.94, the City negotiated, pursuant to important priorities identified in the community and stakeholder outreach, with all licensed haulers in the city (the Consortium) in sixteen meetings over the course of several months. (See Res.16-1300, Ex. F, Hafner Aff.) On July 26, 2017, the City Council held another public hearing, received a significant number of public comments and authorized staff to pursue final negotiations with the Consortium on the basis of the seventh proposal from Consortium. (RES 17-203, Ex. G, Hafner Aff.)

Contract and Ordinance

Ultimately, in November 2017, the City and the Consortium executed a five-year contract for organized collection within the City. The contract is extensive and covers all aspects garbage collection in the City. Among other things the contract mandates four service levels, provides that the Consortium has the sole and exclusive right to provide the garbage services during the required contract term, and requires the City to pay the Consortium for invoices that residents do not pay after 90 days. (See Doc. 2., Contract, §§ §§ 2.1.12, 2.15.7, 2.15.8 and §5.2.)

In negotiating and executing the contract with the Consortium, the City relied on its legal authority, pursuant to Minnesota Statute Chapter 443 to assess property owners for unpaid garbage bills that the City pays on their behalf. The ability of the City to assess was an important aspect of organized collection deeply imbedded in the terms of the

contract. (See Exhibit 9 to the Contract, billing timeline illustrating that payments made to the Consortium members are based on timing and assessments sent to the Ramsey County auditor to be placed on tax bills, Ex. I, Hafner Aff.)

To comply with § 115A.94 which required the City to use "appropriate local controls" to implement organized collection once a contract was negotiated and §§ 434.26 and 434.28 which required rates and City's assessments of unpaid bills to be done via ordinance, the City adopted Ordinance 18-39 on September 5, 2018. Ordinance 18-39 created general regulations related to organized collection and established rates, billing and collection procedures, and provided for the City's right to assess for unpaid garbage bills. (See Ordinance, codified at Saint Paul Legislative Code §§ 220.03, 220.05, 220.06, Ex. J, Hafner Aff.)

Jennissen case

More than six months after the contract had been executed between the City and the Consortium, the Minnesota Supreme Court issued a decision in *Jennissen v. City of Bloomington*, 913 N.W.2d 456, 459 (Minn. 2018). In *Jennissen*, a group of voters had proposed a charter amendment which specifically discussed solid waste collection:

> Unless first approved by a majority of voters in a state general election, the City shall not replace the competitive market in solid waste collection with a system in which solid waste services are provided by government-chosen collectors or in government-designated districts.

Id. at 458.

The City of Bloomington argued that § 115A.94 preempted the charter amendment on the basis of field preemption by fully occupying the field regulating the process of

organized collection. *Id.* at 459. The district court and the court of appeals agreed with the City of Bloomington, however, the Minnesota Supreme Court reversed based solely on its analysis of the four factors which determine whether there has been field preemption. *Id.* at 460, n. 2. The court found that while "§ 115A.94 is the process a city must follow before it can organize collection," the statute does not require that organized collection be implemented, and it "expressly leaves room for any municipal action that is authorized *under a city charter or other law relating to organized collection or the governance of solid waste collection*." *Id.* at 462. (emphasis added).

Unlike the proposed charter amendment at issue in *Jennissen*, Saint Paul's City Charter does not specifically refer to garbage collection and does not require the City to put organized collection to a vote prior to organizing collection. In the current matter before this Court, the Petitioners did not bring a petition to amend the charter to include language specifically about organized collection; instead they seek to repeal Ordinance 18-39 pursuant to the general referendum provision in the City Charter. This conflicts with the implied provisions which designate the "governing body" of the City to make the decision without the voters having a right to undo the process once a contract has been executed.

In addition, this direct action by the voters is legislative action subsequent to the formation of a contract. As discussed below, because this subsequent legislative action (repeal of Ordinance 18-39) constitutes an unconstitutional impairment of the contract, the City Council properly refused to place the matter on the ballot.

II. ARGUMENT

A. ALLOWING REFERENDUM AND REPEAL OF ORDINANCE 18-39 CONFLICTS WITH MINNESOTA CHAPTERS 115A AND 434.

Petitioners claim that the City's preemption argument "rests on the fallacy that the legislature wants cities to organize collection, or at least expresses some preference for it." (Petitioners' Reply Brief, p. 17.) This is not accurate. The City is not asserting that § 115A.94 expresses a preference for the City to adopt organized collection. The City's conflict preemption argument asserts that § 115A.94 grants authority for the decision to the City Council without requiring voter approval and to the extent the general referendum right in the City Charter conflicts with this, it is preempted by the terms of the statute. (See Initial Response to Petition, pp. 9-13.)

The City's preemption argument involves who is tasked with making the decision as to organize collection. Minn. Stat. § 115A.94 delegates this authority to the "local government unit" or "legislative body" (i.e. the City Council) without subjecting the decision to voter approval. Moreover, § 115A.94 does not expressly require the City to submit the decision to organize collection or the details of implementation to a vote of the resident.

Petitioners assert there is no conflict and that the general referendum provision pertaining to ordinances allows them to subject Ordinance 18-39 to a vote after the contract has already been executed. Petitioners base their argument on the *Jennissen,* which found, in the context of a field preemption analysis only, that language in a proposed charter

amendment specifically requiring voter approval prior to adoption of organized collection might be permitted under §115A.94. *Id.* at 462.[1] The facts and analysis in *Jennissen* are distinguishable from this case. There is no express language in Saint Paul's City Charter addressing organized collection. Instead, the referendum provision at issue in the Charter applies to ordinances in general and makes no reference to organized collection.

Neither the statutes nor *Jennissen* support a finding that the electorate can after the facts approve or negotiate contract terms for organized collection. In addition, in this case, the decision to organize collection cannot be separated from terms of the contract between the City and the Consortium. The ordinance covers the details of how organized collection will run in the City. Pursuant to § 115A.94, the City Council organized collection via negotiated contract with the Consortium. As required by § 115A.94 and Chapter 443, Ordinance 18-39 implements organized collection and the terms of the contract. At most, *Jennissen* says that a charter could require additional steps for a City to follow when deciding and implemented organized collection. It does not say that residents can require a vote on organized collection after the decision has been made and the contract entered into, nor does it provide that voters have a right to put specific terms of the contract for organized collection to a vote after the contract has been entered. To the extent Petitioners claim that the general referendum in Saint Paul's City charter would allow voters to do

[1] The court did not decide whether the proposed charter amendment was proper in the *Jennissen* case. The only issue was the application of the field preemption doctrine. As this Court is aware, the *Jennissen* case continues to be litigated and is currently pending at the Minnesota Supreme Court on other issues, including unconstitutional impairment.

this, it is in conflict with and preempted by Minn. Stat. § 115A.94 and Chapter 443. For this reason, this Court should find that the City Council properly refused to place the matter on the ballot on the basis of conflict preemption.

In addition, the City Council properly refused to place the matter on the ballot because allowing referendum and repeal of Ordinance 18-39 would work an unconstitutional impairment on the contract between the City and the Consortium.

B. ALLOWING REFERENDUM AND REPEAL OF ORDINANCE 18-39 CONSTITUTES AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT NOT A SIMPLE BREACH OF THE CONTRACT.

The issues in this case require the Court to determine the impact of the referendum and repeal of Ordinance 18-39 on the contract between the City and the Consortium. The City argues that repealing the ordinance would work an unconstitutional impairment of the contract. Petitioners argue that repeal of the ordinance "would constitute a simple breach if passed." (Petitioners' Reply Brief, p. 3.)

The decision in *Davies v. City of Minneapolis*, 316 N.W.2d 498 (Minn. 1982) supports a finding that repeal of the ordinance is an unconstitutional impairment not a breach of contract. In *Davies*, the City of Minneapolis had a contract to provide security for bonds associated with building a stadium. *Id.* at 499. When a group of voters proposed a charter amendment that would eliminate the City's security obligation, the city council refused to put the proposed charter amendment on the ballot because, if approved, it would unconstitutionally impair the contract. *Id.* at 500. This refusal was upheld by the Minnesota Supreme Court. *Id.* at 501. 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.

In addition, Justice Yetka's dissenting opinion in Davies helps illustrate why our case involves an unconstitutional impairment and not a breach of contract. *Id.* at 505-508. Justice Yetka's dissent focused on the fact that the proposed charter amendment explicitly provided for recovery of damages from the city's general fund and there was no indication that the city was unwilling or unable to pay damages "or that the damage remedy is otherwise a sterile right." *Id.* at 507. Thus, according to Yetka, although the proposed charter amendment constituted a breach of the city's contract with the bondholders, the case involved a breach of contract not an unconstitutional impairment, because the proposed amendment did not "preclude a damage remedy--instead it provide[d] for one." *Id.*

The *Davies* majority, however, found that an unconstitutional impairment would occur if the Charter Amendment was approved. *Id.* at 504. Moreover, the court specifically found that where the proposed municipal charter amendment states that an agreement "is terminated" and says that a city may provide damages from a general fund, but "does not ***require*** the City to pay damages," there is unconstitutional contractual impairment. *Id.* at 504, n. 7. (emphasis in original).

In this case, repeal of the ordinance is an unconstitutional impairment of the contract between the City and the Consortium. In contrast to the situation described by Justice Yetka, there is nothing in the referendum and appeal of the ordinance that provides for

recovery of damages from the city's general fund for a claim for breach. Similarly there is no indication that the City is willing and able to provide a remedy or pay damages for a breach of contract claim that likely would be substantial given the contract is for collection of residential garbage throughout the entire City for five years.

In another factually similar case from Ohio, the Ohio Supreme Court considered whether an initiative ordinance[2] passed by a city's voters unconstitutionally impaired the city's contractual obligations in a road improvement project for which it had executed a contract. *City of Middletown v. Ferguson*, 495 N.E.2d 380, 384 (Ohio 1986). While different, initiative and referendum can be used in similar ways, as was done in *Middletown*, where the voters' initiative ordinance sought to repeal an existing ordinance. *Middletown,* 495 N.W.2d at 386; *see also St. Paul Citizens for Human Rights*, 289 N.W.2d at 404-405 (permitting voters to use initiative right to propose an ordinance to repeal an existing ordinance even though had missed time for referendum).

The city had passed a resolution and ordinances concerning a road improvement project. The city held public hearings about the project (where voters opposed the project), passed resolutions and entered into a contract with the Ohio Department of Transportation to perform the work. The city planned to finance most of its share of the costs for the

[2] Initiative rights allow a small percentage of voters to propose ordinances that will become law if passed while referendum rights allow a small percentage of voters to compel officials to submit existing ordinances to the voters for approval or rejection. *St. Paul Citizens for Human Rights v. City Council of City of St. Paul*, 289 N.W.2d 402, 404, n. 2 (Minn. 1979). In *Middletown*, the voters could not use a referendum, but instead were forced to use an initiative ordinance because the City had used "emergency" resolutions and ordinances which were not subject to referendum. *Id.* at 381.

project by special assessments on the benefiting properties abutting the road project. *Id.* at 381.

A significant number of citizens opposed the project and sought to stop it by using the reserved power of initiative. *Id.* While the project was in the midst of construction pursuant to contracts signed by the city, the voters submitted an initiative ordinance which sought to repeal further legislation on the project and any and all commitments of the city to the project. The city argued that the initiative ordinance would constitute an unconstitutional impairment of the contract between the city and the Ohio Department of Transportation. *Id.* at 384-385. The voters argued that the ordinance did not impair the contract, it "merely operated as repudiation of the contract and no constitutional claim was stated." *Id.* at 385. The court disagreed and found that "once the contract had been executed and performance had begun, the voters of the city… were not free to impair the city's contractual obligations on the contract…." *Id.*

The *Middletown* court determined that unconstitutional impairment occurs when a city uses its legislative authority (in this case direct action by the people) to impair a contract:

> In this case, the voters of Middletown used their reserved power to pass legislation in an attempt to prevent the city from fulfilling its contract. Here, a *law* was used to impair contractual rights. This initiative ordinance went beyond a mere breach of contract because its passage precluded any remedy in damages. Instead, had it been given effect, the ordinance would have brought about an impairment of the obligations of the contract between the city and [Ohio Department of transportation].

Id. at 385. (*emphasis in original*). The court found that the elected officials had carefully considered and diligently planned the project when they held open meetings, passed resolutions and relied on existing laws to commence the project. *Id.* at 383. The court further found that if the voters' ordinance, which aimed to stop construction while it was in progress, had been given effect, the express terms of the city's contract "would obviously been impaired because the bargained-for completion of the project would have been impossible." *Id.* at 387.

Similar to *Middletown*, Petitioners in this case are voters using a law (the referendum and repeal of the ordinance) in an attempt to prevent the City from fulfilling its contract. Allowing referendum pursuant to the City Charter and repeal of Ordinance 18-39 would be an unconstitutional impairment of the contract because the City has organized collection within the city for five years. Under the terms of the contract, the City has the obligation to provide the exclusive right to the Consortium to provide garbage service within specified areas for a period of five years and the Consortium has an obligation to provide residential garbage services in the city for five years. Allowing referendum and repeal of Ordinance 18-39 would impair the express terms of the contract, and providing for organized collection throughout the City, would be impossible.

Furthermore, Petitioners argue for two reasons that this case involves a "simple breach" by the City, not an unconstitutional impairment. On the one hand, Petitioners claim that repeal of the ordinance constitutes a simple breach because the repeal will terminate the contract and the referendum will provide a "valid defense" to a claim for

breach by the Consortium. (Petitioners' Reply Brief, pp. 3-4.) In direct contradiction to this, Petitioners claim on the other hand that this case involves a simple breach by the City, not an impairment, because the referendum will not "[l]imit any remedy the Haulers could seek" for breach. (*Id*.) First, it is not possible for the referendum to provide a valid defense to a breach of contract claim by the Consortium ***and*** also to not limit any right to recovery by the Consortium for its breach of contract claim.

Second, Petitioners argument fails because courts have found that when a city could rely on a subsequently enacted municipal law as a defense to a breach of contract claim, this would be an unconstitutional impairment of the contract, not simply a breach. *E&E Hauling, Inc. v. Forest Preserve Dist. Of Du Page County, Ill.,* 613 F.2d 675, 678 (7th Cir. 1980) ("Mere refusal to perform a contract by a state does not raise a constitutional issue, but when a state uses its *legislative authority* to impair a contract a constitutional claim is stated") (emphasis in original).

In *E&E*, the plaintiff and a district of the City of DuPage, Illinois ("District") entered into a contract that gave the plaintiff the exclusive right to operate and maintain a landfill with no restrictions on what could be deposited in the landfill. *Id.* at 677. Thereafter the District passed two ordinances barring dumping of liquids or sludge at the landfill. *Id.* The plaintiff claimed that the passage of the ordinance prevented it from performing under the contract or enforcing its right under the contract. The District argued that this may have stated a claim for breach of contract but not an unconstitutional impairment. *Id.* Ultimately, the court found that the plaintiff had stated a claim for unconstitutional

impairment of the contract because it could use its passage of law as a complete defense to a breach of contract claim. *Id*. at 680. As the Court explained:

> If a state or its subdivision passes a law and through enforcement of it prevents another party from fulfilling its obligations under the contract because the use of the ordinance precludes a damage remedy, the non-breaching party cannot be made whole. Instead, the law has impaired the obligation of the contract. Use of law normally will preclude a recovery of damages because the law will be a defense to a suit seeking damages.

E&E, 613 F.2d at 679;

The court found that there was no evidence that the ordinance was merely an indication that the District was breaching the contract while not precluding a remedy, thus the circumstances stated a claim for unconstitutional impairment. *Id.* at 680-681. Similarly, in *Horwitz-Mathews Inc. v. City of Chicago*, 78 F.3d 1248, 1252 (7th Cir. 1996), the court found that the situation involved a breach of contract, not unconstitutional impairment, because the city had agreed on the record that it would not use the repeal of the ordinance as a defense to a suit for breach of contract. *Cf. Davies*, 316 N.W.2d at 507 (in the dissent, Justice Yetka considered the possibility of the case involving a breach rather than unconstitutional impairment only because there was no indication the proposed charter would be used as a defense to a claim for breach and the proposed charter amendment affirmatively provided the City would pay damages). In our case, if the City is sued by the Consortium for breach of contract and uses the referendum as a defense to a breach of contract suit by the Consortium (as Petitioners allege it could do), the cases establish that this would be an unconstitutional impairment of the contract, not simply a breach of the contract with an agreement to pay damages.

Pursuant to Minnesota Statute section § 115A.94, the City organized collection via negotiated contract. Repeal of Ordinance 18-39 would not allow City to meet its obligations under the contract. In addition, repeal of the ordinance would prohibit performance by the Consortium, in that its members could not collect all garbage from designated areas and bill customers for garbage service. The City is not agreeing to breach the contract and pay damages to the Consortium. If, as Petitioners allege, the City relies on the referendum as a "valid defense" to a breach of contract claim, this would be an unconstitutional impairment. For all of these reasons, allowing referendum and repeal of Ordinance 18-39 constitutes an unconstitutional impairment, not a simple breach of contract.

C. THERE IS NO PUBLIC PURPOSE EXCEPTION JUSTIFYING IMPAIRMENT IN THIS CASE.

Petitioners argue that if there is an impairment in this case, it is justified because the impairment is not substantial, and there is a legitimate public purpose that serves the entire City of Saint Paul. When deciding if impairment is unconstitutional, the threshold issue is whether the impairment was substantial. *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244–45 (1978); *U.S. Trust. Co. of New York v. New Jersey*, 431 U.S., 1, 17 (1977). Total destruction of contractual expectations qualifies as substantial impairment, but is not required. *Energy Reserves*, 459 U.S. at 411(citing *U. S. Trust Co.,* 431 U.S., at 26–27)). The severity of the impairment of the contract, "increases the level of scrutiny to which the subsequent legislation will be subjected." *Allied Structural Steel Co.,* 438 U.S. at 245. In

addition, more scrutiny is applied to a situation where a governmental entity is affecting its own contract. *Midwest Family Mut. Ins. Co. v. Bleick*, 486 N.W.2d 435, 439 (Minn. Ct. App. 1992) (citing *Christensen v. Minneapolis Mun. Employees Retirement Bd.,* 331 N.W.2d 740, 750–51 (Minn.1983).

There should be little doubt that the contractual impairment in this case would be substantial. As discussed above, if Ordinance 18-39 is repealed the City could not meet its obligation of providing organized collection within the City and the Consortium would be prevented from being the exclusive provider of services within the City for the next five years. The contract bargained for would become impossible to achieve and there would be a total destruction of contractual expectations. *Middletown*, 495 N.E.2d at 386; *U.S. Trust*., 431 U.S at 25.

Furthermore, in *Middletown*, the court found that passage of the ordinance which repealed the legislation necessary for the city to levy assessments was a substantial impairment. The court found that the city relied on its ability to assess when it undertook its contractual obligations and the assessments were an integral part of the project. 495 N.E.2d at 386. The court found that repeal of the ordinance would entirely frustrate the Middletown's reasonable expectations and amounted to substantial impairment. *Id.* Similarly in this case, the ability to assess was an integral part of the contract with the Consortium and the City relied on its authority to assess when it entered into the contract. Repealing Ordinance 18-39 would repeal the City's ability to assess for unpaid garbage bills. Thus, the impairment in this case would be substantial.

Once substantial impairment has been established, courts consider the second and third parts of the analysis. The second part of the analysis addresses whether the substantial impairment is "reasonable and necessary to serve an important public purpose." *U. S. Trust Co.*, 431 U.S. at 25; *Midwest Family*, 486 N.W.2d at 439 (finding that law may be upheld if it has a significant and legitimate purpose behind the legislation). This is an extremely high standard, rarely found to exist in most cases. The public purpose must be very important and broadly benefiting society as a whole. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445 (1934) (impairment may be permitted only in situations where the "legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society"); *Middletown*, 495 N.E.2d at 387-388 (quoting Allied Structural Steel Co., 438 U.S. at 250) (even given the importance of the reserved power of initiative, there was not sufficient public policy justification for the ordinance where the ordinance "'did not effect simply a temporary alteration of contractual relationships… but worked a severe, permanent and immediate change in those relationships – irrevocably and retroactively'"). Finally, the third part of the analysis involves whether "the legislation must be reasonably and appropriately tailored to accomplish the asserted public purpose." *Id.* (citing Jacobsen v. Anheuser-Busch, Inc. 392 N.W.2d 868, 872 (Minn. 1986). Petitioners characterize this third part of the analysis as a balancing test. (Petitioners Reply Brief, p. 14.)

In their Reply Brief, Petitioners allege that the referendum "is drafted to address a broad public concern to benefit the entire city of Saint Paul." The statements offered in

support of this argument fail to prove that the legislation is reasonably and appropriately tailored to an important public purpose or public concern benefiting the entire City. Petitioners merely identify the reason why a small number of voters may have signed the petition on the referendum and repeal of Ordinance 18-39 certainly would not benefit the entire city of Saint Paul. Allowing a small group of residents to force the City to breach a contract and possibly subject itself to a claim for damages is not an important public purpose and does not benefit the entire City. In addition doing this on a possibly temporary basis would be detrimental to the entire City. Similarly, obliterating the City's ability to assess for unpaid garbage bills garbage and transfer that to all taxpayers within the City via a damages claim against the general fund operates to the advantage of a small number of particular individuals, not a benefit for society as a whole or the entire City of Saint Paul.

Second, it is important to recognize that although Petitioners cite to criticisms of "organized collection" as the basis for their policy argument and allege that the issues in this case involve a "binary choice – up or down," this does not accurately reflect the issues in this case. (Petitioners Reply Brief, pp. 10, 12.) Ordinance 18-39 implements the organized collection that was done via negotiated contract and addresses the details of organized collection in the City. Although Petitioners characterize this as a binary "yes" or "no" on organized collection and the "purest mechanism possible," as a practical a simple up or done vote solely on that issue likely cannot occur in this case. As mentioned above, the decision to organize collection cannot be separated from terms of the contract between the City and the Consortium. In fact, the petition in this case states as follows:

> We, being registered voters residing in the City of Saint Paul, Minnesota, petition the Saint Paul City Council to hold a referendum on Ordinance 18-39, creating Saint Paul Legislative Code Chapter 220, entitled "Residential Coordinated Collection," to regulate coordinated collection of certain residential trash, including service levels, billing rates and the duties of property owners.

(Ex. K, Hafner Aff.) It is possible people signed the petition, not on the grounds of never allowing organized collection in the city, but rather due to specific issues with billing rates, service levels or other duties of property owners.

Furthermore, determining whether a legitimate and necessary public purpose exists in this case is not limited to consideration of only the right to referendum in general. The right to referendum is very important, however, the right to referendum is not without limits. Because the City allows referendum on ordinances does not mean that all city contracts are subject to voter approval via referendum. Actually, contracts typically are not subject to referendum because they are often not done by ordinance. *See Oakman v. City of Eveleth*, 163 Minn. 100, 107, 203 N.W. 514, 517 (1925); *Hous. & Redevelopment Auth. v. City of Minneapolis*, 198 N.W.2d 531 (Minn. 1972).

Many decisions made by a city council are not subject to the right of referendum and allowing a referendum on those matters "could create a chaotic situation in city government." *Hous. & Redevelopment Auth.,* 198 N.W.2d at 536-537 (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). Allowing a group of voters who oppose organize collection under any scenario to repeal Ordinance 18-39 and force a breach of contract claim against the City does not serve a legitimate and important public purpose and does not benefit the entire City of Saint Paul as a whole.

Finally any balancing done by the Court would favor the City Council's refusal to place the matter on the ballot. Petitioners claim that the City ignored voter authority and proceed with organized collection, however, this is not what occurred in Saint Paul.

The City Council complied with Minn. Stat. § 115A.94 and followed all of the steps for deciding and implementing organized collection. The City had authority under § 115A.94 to enter the contract with the Consortium. There is nothing in § 115A.94 or the City Charter that required the City Council to get voter approval prior to deciding to organize collection or prior to the execution of the contract.

In addition, there is no claim that the City Council did not follow the extensive and detailed process contained within §115A.94. The City conducted several public hearings and information sessions, received extensive public comment and ultimately decided to organize collection for residential garbage service within the City for important public policy concerns such as "consistency of service and pricing, to reduce truck traffic, and to reduce pollution." (See Doc. No. 2, Contract, p. 1.) The City negotiated with the Consortium for more than a year and ultimately executed a contract that implemented

organized collection. Organized collection is currently in place in the City and the Consortium is performing garbage services under the contract.

All of this was done and started ***before*** any referendum petition by the voters of Saint Paul. Allowing repeal of Ordinance 18-39 would create chaos and upend garbage collection services in the City. Residents need garbage service and Minnesota law provides that the City "must ensure" that all residents have garbage collection. Minn. Stat. § 115A.941. If Ordinance 18-39 is repealed, garbage still needs to be picked up on a daily basis and that service needs to be paid for. It is not a matter of "just going back" to how things were before. The entire process of organizing collection took over two years, haulers have merged into a Consortium, and all prior garbage contracts were terminated as of October 1, 2018. (See § 220.03, Ex. J, Hafner Aff.)

Finally, Petitioners also allege that no direct financial obligations are at stake and that the City has failed to show some material harm will flow from termination of the contract. As discussed above, significant financial harm is at stake if the contract is terminated and the City is forced to subject itself to a claim for breach. If Ordinance 18-39 is repealed, the city's ability to require people to use designated haulers, pay for garbage service and assess those who do not pay is abrogated, there is significant material harm to the City.

Moreover, it is clear the Consortium would suffer harm as well as the City would be unable to guarantee them exclusive right to collect garbage in designated areas an all of the other aspects of organized collection. Petitioners claim that there is no evidence that

the Consortium would "actually be harmed by termination of organized collection generally or of the Contract specifically." (Petitioners' Reply Brief, p. 13.) Petitioners point to the fact that the Consortium did not intervene in this lawsuit as evidence that it would not actually be harmed. While it does not make sense to say that the Consortium will not be harmed if Ordinance 18-39 is repealed in this case (it has signed a five-year contract for the exclusive right and obligation to collect residential garbage throughout the entire City), it would also be improper for this Court to read anything into the Consortium's failure to intervene in this lawsuit as suggested by Petitioners. (Petitioners' Reply Brief, p. 13.) There are any number of reasons that the Consortium may not have intervened, including a desire not to be involved in litigation and incur attorney fees and expenses, and more importantly, a desire not to be bound by a finding that they would not be harmed by termination of the contract, that the City's performance under the contract is excused, or that the referendum can be used as defense to the contract.

The right to referendum of an ordinance is certainly important, but it must be considered in light of the interplay between the Charter and state laws and regulations concerning important city public health concerns surrounding garbage collection. Allowing a group of voters who oppose organized collection in any form to end organized collection and force a complete repeal of Ordinance 18-39 after the City diligently followed the statute, executed the contract prior to any petition or voter-initiated change, does not serve an important public purpose for all of Saint Paul. The City and the Consortium have expended significant time and money implementing organized collection. Although

Petitioners oppose this decision (or portions of the contract related to this decision) on various grounds, they have not sufficiently alleged that impairment of the Contract would be "reasonable and necessary to serve an important public purpose." *United States Trust Co.*, 431 U.S. at 25. Because repeal of Ordinance 18-39 would work an unconstitutional impairment of the contract between the City and the Consortium, the City Council properly refused to place the matter on the ballot.

Respectfully submitted,

Dated: May 6, 2019

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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
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Assistant City Attorney