In the Missouri Court of Appeals
Eastern District

DIVISION TWO

MISSOURI BANKERS ASSOCIATION, INC., AND JONESBURG STATE BANK, Plaintiffs/Appellants,	)	No. ED99333
	)	Appeal from the Circuit Court of St. Louis County
vs.	)	12SL-CC03659
ST. LOUIS COUNTY, MISSOURI, AND CHARLIE A. DOOLEY, Defendants/Respondents.	)	Honorable Brenda S. Loftin
	)	FILED: October 15, 2013

OPINION

Missouri Bankers Association, Inc., and Jonesburg State Bank (collectively Bankers) appeal from the trial court's grant of summary judgment in favor of St. Louis County and Charlie A. Dooley (collectively County) finding that the County's foreclosure mediation program was a valid exercise of the County's police power and did not conflict with Missouri state law. We dismiss as moot and remand to the trial court to vacate the judgment.

Factual and Procedural History

On August 29, 2012, the County passed and began implementation of the County's "Mortgage Foreclosure Intervention Code" (Ordinance) Ordinance,[1] which required that lenders provide residential borrowers an opportunity to mediate prior to foreclosure on the borrower's home. Upon completion of the mediation process, the Ordinance states that the lender receives a Certificate of Compliance, which is then filed with the St. Louis County Assessor, along with the

[1] The Ordinance was amended on October 10, 2012.

filing of a conveyance of the foreclosed property with the St. Louis County Recorder of Deeds. Failure to comply with the Ordinance can result in a fine up to $1,000.

As part of the mediation process, the lender must provide written notice to a homeowner of the process and of the homeowner's rights to request mediation within twenty-one days. The lender is required to provide a payment of $100 to the mediation coordinator, who is chosen to manage and oversee the mediation program. If the homeowner chooses to proceed with mediation, it must be scheduled within sixty days of receiving the homeowner's notice of intent to participate. At that time, the lender must submit a fee of $350 to the mediation coordinator. If the lender and homeowner are able to resolve the foreclosure prior to mediation and notify the mediation coordinator of the resolution three days prior to the scheduled mediation, the lender is refunded the $350.

If the mediation process results in settlement, the mediation coordinator issues to the lender a Certificate of Compliance within one business day. If there is no settlement, however, the lender is deemed to have satisfied the requirements of the Ordinance so long as the lender makes a "good faith" effort to settle with the homeowner. If the homeowner decides to forego the mediation process altogether, the lender is also deemed to have satisfied the requirements of the Ordinance.

On September 22, 2012, Bankers filed a motion to temporarily restrain enforcement of the Ordinance. The trial court granted the motion and enforcement was stayed pending the parties' motions for summary judgment regarding a permanent injunction. On November 14, 2012, the trial court granted the County's motion for summary judgment and dissolved the temporary restraining order. Bankers appealed.

On January 18, 2013, this Court granted Bankers' motion to enjoin enforcement of the Ordinance pending resolution of this appeal. During the pendency of this appeal, the Missouri legislature passed Section 443.454 RSMo,[2] which was added to the state's mortgage foreclosure laws. This Court requested that the parties provide additional briefs discussing the impact of the new legislation, including the validity of the Ordinance, in light of various statutory provisions pertaining to foreclosures and loans generally. We now consider the issues contained in these new submissions together with those in the original briefs.

Discussion

As a threshold matter, we must determine whether a controversy has been rendered moot prior to undertaking appellate review. Adams v. City of Manchester, 242 S.W.3d 418, 428 (Mo. App. E.D. 2007). "A cause of action is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy." Reynolds v. City of Valley Park, 254 S.W.3d 264, 266 (Mo. App. E.D. 2008) (quoting Precision Invs., L.L.C. v. Cornerstone Propane, L.P., 220 S.W.3d 301, 304 (Mo. banc 2007)). Stated differently, "[w]hen there is an occurrence that makes a court's decision unnecessary or makes granting any relief by the court impossible, then the issue is moot and should not be addressed." State ex rel. Goodman v. St. Louis Bd. of Police Comm'rs, 181 S.W.3d 156, 160 (Mo. App. E.D. 2005). Mootness implicates justiciability, and therefore, we may dismiss a case for mootness *sua sponte*. In re Estate of Washington, 277 S.W.3d 777, 780 (Mo. App. E.D. 2009).

Section 443.454, "Real estate loans secured by security instruments made pursuant to state and federal law only--local laws prohibited from affecting," reads as follows:

[2] Section 443.454 was created by House Bills 446 and 211, 97th General Assembly, 1st Regular Session (Mo. 2013). It was made effective August 28, 2013.

> The enforcement and servicing of real estate loans secured by mortgage or deed of trust or other security instrument shall be pursuant only to state and federal law and no local law or ordinance may add to, change, delay enforcement, or interfere with, any loan agreement, security instrument, mortgage or deed of trust. No local law or ordinance may add, change, or delay any rights or obligations or impose fees or taxes of any kind or require payment of fees to any government contractor related to any real estate loan agreement, mortgage or deed of trust, other security instrument, or affect the enforcement and servicing thereof.

Here, the County has abandoned its enforcement efforts and will not resume them in light of the enactment of Section 443.454. On August 5, 2013, the County filed a supplemental legal brief that stated:

> The General Assembly having expressly prohibited local governments from enforcing the exact type of regulation that had been enacted by St. Louis County, the Mortgage Foreclosure Intervention Code at issue is clearly inconsistent with the newly stated policy of the State and cannot be enforced by St. Louis County. The dispute pending before the Court concerning consistency with other statutes is therefore moot and subject to dismissal, insofar as "[a] case is moot where an event occurs that makes the court's decision unnecessary" and "Missouri courts do not decide moot issues." Carlisle v. Carlisle, 277 S.W.3d 801, 802 (Mo. App. 2009) (citations omitted).
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> "As a general rule, moot cases must be dismissed." Warlick v. Warlick, 294 S.W.3d 128, 130 (Mo. App. 2009) (citations omitted). Although the Court has discretion to decide a case if it so chooses once the case has been argued and submitted, . . . there is no reason to do so herein. The County has abandoned its enforcement efforts and will not resume them in light of the General Assembly's unfortunate decision to affirmatively withdraw this opportunity from Missouri residents. See State ex rel.Glendinning Companies of Connecticut, Inc. v. Letz, 591 S.W.2d 92, 96 (Mo. App. 1979) (suggesting that construction of extant administrative regulation could be moot by virtue of a newly enacted state statute nullifying it, had the regulation at issue in fact been nullified by the statute). Accordingly, the case should be dismissed and remanded to the Circuit Court for vacation of the judgment and dismissal of the lawsuit.

Based on the County's concession, we find it unnecessary to consider this controversy.

Conclusion

Section 443.454 expressly prohibits local governments from enforcing the type of regulation that has been enacted by the County. As a result of this conflict with Section 443.454, the County conceded that it will not enforce the Ordinance and admits that the controversy is

moot. We agree with the County's assessment that Section 443.454 conflicts with the Ordinance. We dismiss the case as moot and remand to the trial court to vacate the underlying judgment.

Mary K. Hoff, Judge

Kathianne Knaup Crane, Senior Judge, concurs.
Lisa S. Van Amburg, Judge, dissents in separate opinion.

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DISSENT

I respectfully dissent. Section 433.454, R.S.Mo. (effective Aug. 28, 2013), is inapplicable to County, because the Mediation Program is a valid exercise of County's broad authority to regulate municipal services and functions under Missouri Constitution article VI, section 18(c). County makes no claim that it will repeal the ordinance, and remains free to resume enforcement at any time. Therefore, this case is not moot.

DISCUSSION

The charter county system of government under article VI, section 18(c), of the Missouri Constitution was created in recognition of the fact that urgent local problems "require effective uniform county solutions, without the delay of obtaining approval from the state legislature." *See* Rex V. Gump, *Local Government—County Home Rule and the*

1970 Missouri Constitutional Amendment, 41 Mo. L. Rev. 49, 49 (1976). The foreclosure epidemic that swept through St. Louis County is just such an urgent local problem. The summary judgment record herein reflects that in 2010, the peak year of the national foreclosure crisis, over 4,500 St. Louis County residents lost their homes to foreclosure. This number was more than a four-fold increase from the historical norm. Many neighborhoods saw in excess of eight foreclosure-related sales for each comparable owner-initiated sale, and foreclosed houses were commonly left abandoned and in poor condition. Property values in St. Louis County were falling, as was tax revenue used to support local government services such as school and fire districts. In response, Saint Louis County created a mediation program in order to encourage mortgage lenders and defaulting homeowners to explore negotiated alternatives to foreclosure.

Section 433.454 does not moot this case, because the Mediation Program falls squarely within County's broad "legislative power pertaining to any and all [municipal] services and functions" as a charter county under article VI, section 18(c), of the Missouri Constitution. The Missouri Supreme Court defines "services and functions" liberally to include "all of the activity appropriate to the nature of political subdivisions or municipalities which combine to produce services, those specific acts performed by political subdivisions or municipalities for the benefit of the general public." *Chesterfield Fire Prot. Dist. v. St. Louis Cnty.*, 645 S.W.2d 367, 371 (Mo. banc 1983). The exercise of the police power is one such appropriate activity.[1] *Barber v. Jackson Cnty. Ethics*

[1] It is of note that the case of *Information Technologies, Inc. v. Saint Louis County*, 14, S.W.3d 60, 64 (Mo. App. E.D. 1999), states that the exercise of police power is a governmental function not possessed by charter counties. *Information Technologies* erroneously relies on a line from *Kansas City v. J.I. Case Threshing Machine Co.*, 87 S.W.2d 195, 202 (Mo. banc 1935), which deals with the powers of charter cities—not

Comm'n, 935 S.W.2d 62, 66 (Mo. App. W.D. 1996). The Mediation Program is a valid exercise of County's police power, as it creates a mechanism by which the County can protect its inhabitants from the scourge of widespread foreclosure, and its attendant ills of reduced property values, falling tax revenue, increased crime, disruption of families, and increased costs for police, fire, and emergency social services. *See Miller v. City of Town & Country*, 62 S.W.3d 431, 437 (Mo. App. E.D. 2001) ("An ordinance is a legitimate exercise of police power if the expressed requirements of the ordinance bear a substantial and rational relationship to the health safety, peace, comfort, and general welfare of the municipality's citizenry."); *see generally* Karen Tokarz, Kim L. Kirn, & Justin Vail, *Foreclosure Mediation Programs: A Crucial and Effective Response by States, Cities, and Courts to the Foreclosure Crisis*, St. Louis B.J., Summer 2013, at 28 (discussing myriad perils local municipalities face during foreclosure epidemic). Likewise, perhaps the "only consistent thread in the whole tangled skein of cases" on charter county power is that charter counties have substantial autonomy to regulate the disposition of real property within their borders. *See State ex rel. St. Louis Cnty. v. Campbell*, 498 S.W.2d 833, 836 (Mo. App. 1973) (explaining that "the power of condemnation is a matter of local concern so that the procedure specified in the charter supersedes the statutes"); *Williams v. White*, 485 S.W.2d 622, 624 (Mo. App. 1972) ("[T]he power of a county under a Home Rule Charter to exercise legislative powers, including the adoption of

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charter counties—under the Missouri Constitution of 1875. Likewise, *J.I. Case Threshing Machine Co.* relies at least in part on a quote from *State ex rel. Hawes v. Mason*, 54 S.W. 524, 529 (Mo. banc 1899), which was actually referring to a charter city's control over the police department, not the concept of "police power." As the Missouri Supreme Court plainly explained in *Casper v. Hetlage*, 359 S.W.2d 781, 789 (Mo. 1962), "the exercise of police power is a governmental function, [a portion of which] . . . has been delegated to St. Louis County by Section 18(c) of Article VI of the Constitution of Missouri."

zoning ordinances, is derived directly from the Constitution[;] . . . when adopted such ordinances supersede statutory zoning provisions."). Just as a county might use its power to enact zoning regulations to shape its real property landscape for the benefit of its residents' health, safety, and economic well-being, so too may that county encourage mediation before foreclosure, so that vast numbers of properties within its borders do not *threaten* its residents' health, safety, and economic well-being. "Little purpose would be served in authorizing the adoption of charters of local self-government in the more populous counties if such counties could not adopt reasonable means and methods of carrying out their governmental functions in such a manner as to meet the peculiar needs of such counties." *Casper*, 359 S.W.2d at 790 (quoting *Hellman v. St. Louis Cnty.*, 302 S.W.2d 911, 916 (Mo. 1957)).

It is true that a charter county ordinance "may not 'invade the province of general legislation involving the public policy of the state as a whole,'" *Flower Valley Shopping Center, Inc. v. Saint Louis County*, 528 S.W.2d 749, 754 (Mo. banc 1975) (quoting *State ex rel. Spink v. Kemp*, 283 S.W.2d 502, 514 (Mo. banc 1955)), and the laws of this state as declared by the legislature are certainly an expression of public policy, *see State ex rel. Equality Savings & Building Association v. Brown*, 68 S.W.2d 55, 59 (Mo. banc 1934).[2]

[2] This pronouncement in *Flower Valley* was quoted from *Kemp*, which dealt with charter *city* powers under Missouri Constitution article VI, section 19, et seq., not charter *county* powers under article VI, section 18, et seq. *See Kemp*, 283 S.W.2d at 514; *see also State ex rel. St. Louis Cnty. v. Edwards*, 589 S.W.2d 283, 286 (Mo. banc 1979) (citing *Kemp*). The constitutional powers of charter counties are much broader than those of charter cities. While section 19(a) grants charter cities all authority "not limited or denied . . .by statute," section 18(c)'s grant to charter counties contains no such limitation. Justice Seiler's concurrence in *Flower Valley* notes this fact, counseling that "county charters are instruments which grant power . . . . [not] instrument[s] to limit power, as is now true of charters for charter cities under the constitutional amendments adopted in 1971 to Art. VI, Secs. 19 and 19(a)." 528 S.W.2d at 754.

But charter counties' powers "are constitutional grants which are not subject to, but take precedence over, the legislative power." *Dalton ex rel. Shepley v. Gamble*, 280 S.W.2d 656, 660 (Mo. banc 1955). If an ordinance is an exercise of a charter county's "legislative power pertaining to any and all [municipal] services and functions" under article VI, section 18(c), of the Missouri Constitution, it cannot be declared otherwise by statute. To say that the advent of section 443.454 could render the mediation program contrary to the "general legislation of the public policy of the state as a whole" would be to make the scope of municipal "services and functions" subject to curtailment by legislative declaration, and state statute the master of the constitution. The ambit of "general legislation involving the public policy of the state as a whole," *Flower Valley*, 528 S.W.2d at 754, must end where charter counties' constitutional authority over municipal "functions and services" begins. Because the mediation program was an exercise of County's authority regarding municipal services and functions, the prohibition of section 443.454 is simply not applicable. Thus, the advent of section 443.454 does not moot this case.

While it is true that County states it will no longer seek to enforce the mediation ordinance, County has given no indication to this Court that the ordinance will be repealed. A cause of action is moot when rendering judgment "would not have any practical effect upon any then existing controversy," *Reynolds v. City of Valley Park*, 254 S.W.3d 264, 266 (Mo. App. E.D. 2008) (quoting *Precision Investments, L.L.C. v. Cornerstone Propane, L.P.*, 220 S.W.3d 301, 304 (Mo. banc 2007)), and our decision would be "disconnected from the granting of actual relief," *id*. (quoting *State ex rel. Chastain v. City of Kansas City*, 968 S.W.2d 232, 237 (Mo. App. W.D. 1998)). As long

as the ordinance remains in effect, County is free to resume enforcement at any time. Bankers request that we invalidate the ordinance, thereby ensuring it will never be resuscitated. By dismissing this case as moot, the majority leaves the ordinance in limbo, and denies Bankers a resolution of the issue over which they brought suit.

Even if, for the sake of argument, this case did become moot on the effective date of section 433.454, which is August 27, 2013, this Court "may consider the appeal if the case becomes moot after it has been argued and submitted." *Friends of San Luis, Inc. v. Archdioceses of St. Louis*, 312 S.W.3d 476, 484 (Mo. App. E.D. 2010). The parties in this case submitted their briefs and argued before this panel prior to the advent of section 433.454, therefore this Court is free to decide the appeal. In light of the major policy implications of this case—including a very real question as to the scope of charter county power under article VI, section 18(c), of the Missouri Constitution—I believe we should reach the merits of this appeal. For the foregoing reasons, I respectfully dissent.

Lisa S. Van Amburg, Judge