Appeal No. 21-124156-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

CITY OF OLATHE, KANSAS
Plaintiff - Appellant/Cross-Appellee

v.

CITY OF SPRING HILL, KANSAS; AND
JAMES HENDERSHOT, CITY ADMINISTRATOR,
CITY OF SPRING HILL, KANSAS
Defendants - Appellees/Cross-Appellants

BRIEF OF *AMICUS CURIAE* BONITA STATION INVESTMENTS, LLC

Appeal from the District Court of Johnson County, Kansas
The Honorable Rhonda K. Mason, Judge
District Court Case No. 21-CV01003

Greg L. Musil, KS #39277
gmusil@rousepc.com
ROUSE FRETS WHITE GOSS
GENTILE RHODES, P.C.
5250 W. 116th Place, Suite 400
Leawood, Kansas 66211
Telephone (913) 387-1600
Facsimile: (913) 928-6739
gmusil@rousepc.com

Attorney for *Amicus Curiae* Bonita Station Investments, LLC

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INTEREST OF *AMICUS CURIAE*

Bonita Station Investments, LLC ("Bonita") is the owner of the 125-acre property underlying this annexation dispute between the City of Olathe, Kansas and City of Spring Hill, Kansas. The 2006 annexation agreement between Olathe and Spring Hill purports to establish "prior jurisdiction" for future annexation of unincorporated lands between the two cities, delineated by a "boundary line." By the agreement, the 2006 Spring Hill City Council agreed that Spring Hill would forever refrain from annexing land north of the boundary; the 2006 Olathe City Council agreed that Olathe would forever refrain from annexing land south of the boundary. Bonita's land is in Olathe's claimed territory under the agreement.

In 2021, Bonita petitioned Spring Hill for annexation to facilitate the planned development of a Carvana storage, maintenance and repair facility on Bonita's property. That drew objection from Olathe, in defense of its claimed "territory" under the annexation agreement, and spawned the current litigation.

Owners of unincorporated lands, such as Bonita, have a statutory right to petition any city in the county for annexation, subject only to the limitations and requirements of the Kansas annexation statutes, K.S.A. 12-519, *et seq.* If enforced, annexation agreements such as that between Olathe and Spring Hill permanently impose one city council's annexation policy decisions on its

successors, forever contract away the city's annexation power, and unilaterally eliminate landowners' rights to seek annexation by their city of choice, regardless of when annexation is sought, why annexation is sought, or which city is better suited for annexation at that time. Bonita urges the Court to affirm the District Court's finding that such an agreement is unenforceable. How this Court resolves this issue will substantially affect the statutory and property rights of every landowner in unincorporated Kansas saddled with annexation agreements between competing cities, predetermining which city may annex the land.

ARGUMENT

I. A city's agreement to refrain from exercising its annexation powers is unenforceable and not binding on subsequent governing bodies because annexation is a legislative function which cannot be contracted away.

In *Jayhawk Racing*, this Court reiterated that "[o]ne city council may not bind a subsequent one to its political decisions involving the exercise of governmental functions." *Jayhawk Racing Properties, LLC v. City of Topeka*, 313 Kan. 149, Syl. ¶ 6, 484 P.3d 250 (2021). This has long been the law in Kansas. *See Gilleland v. Schuyler*, 9 Kan. 569, 580 (1872) ("[I]n deciding what past laws shall stand and what be repealed, each legislature is free and absolute . . . One legislature cannot abridge the powers of a succeeding legislature.") (citations and quotations omitted); *Bd. of Educ. of City of*

Leavenworth v. Phillips, 67 Kan. 549, Syl. ¶ 2, 73 P. 97 (1903) ("One Legislature has no power by the enactment of laws to prohibit a subsequent Legislature from the full performance of its duties in the enactment of such laws as, in its judgment, is demanded for the public safety or general welfare of the public."); *Hall v. City of Wichita*, 115 Kan. 656, 223 P. 1109 (1924) (A municipal council "may not bind either themselves or their successors to forego their legislative functions[.]") (citations and quotations omitted); *State ex rel. Hawks v. City of Topeka*, 176 Kan. 240, 252–53, 270 P.2d 270 (1954) ("Under the authority delegated to a city by the statute, the matter of rebuilding or repairing would be a question to be determined by the then governing body of the city. The present governing body may not bind future bodies with the advisability of rebuilding or repairing such structures."); *Red Dog Saloon v. Board of Sedgwick County Comm'rs*, 29 Kan. App. 2d 928, 931, 33 P.3d 869 (2001) ("It is clear that a legislative body cannot bind its successor to the amendment or repeal of its laws.").

Under *Jayhawk Racing* and more than 100 years of this Court's precedent, enforceability of the 2006 annexation agreement turns on one question: Is a city's agreement to refrain from exercising its annexation powers over certain lands an exercise of "governmental" or "legislative" powers, or is it "proprietary" or "administrative"? If the former, it is unenforceable. *Jayhawk Racing*, 313 Kan. at 161-62; *see also*, 10A McQuillin Mun. Corp. §

29:103 (3d ed.) ("[I]f the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils.").

In reaching its conclusion that the annexation agreement was governmental, rather than administrative, the District Court thoroughly analyzed the four guidelines set forth in *McAlister v. City of Fairway*, 289 Kan. 391, 399, 212 P.3d 184 (2009). Olathe does not challenge the District Court's findings in that regard. Nor could it genuinely do so, because this Court has repeatedly held that the decision to annex (or not annex) land is a legislative function. *See Cedar Creek Properties, Inc. v. Bd. of County Com'rs of Johnson County*, 249 Kan. 149, 153, 815 P.2d 492 (1991) ("traditionally, the annexation of land by a municipal corporation was viewed as a legislative function"); *McDowell v. City of Topeka*, 239 Kan. 263, 263, 718 P.2d 1308 (1986) ("determination to annex real property to a city is a legislative decision"); *Appeal of City of Lenexa to Decision of Bd. of County Com'rs of Johnson County*, 232 Kan. 568, 583, 657 P.2d 47 (1983) (city's decision to annex territory is a "legislative determination"); *City of Lenexa v. City of Olathe*, 228 Kan. 773, 774, 620 P.2d 1153 (1980) ("The annexation of land by municipal corporations has traditionally been regarded as a legislative function."); *Sabatini v. Jayhawk Const. Co., Inc.*, 214 Kan. 408, 413, 520 P.2d 1230 (1974) ("platting and annexation of land by municipal corporations are legislative functions"); *State*

ex rel. Jordan v. City of Overland Park, 215 Kan. 700, 708–09, 527 P.2d 1340 (1974) ("It is unquestionably true that the annexation of territory by a municipality is a pure legislative function granted to municipalities by the legislature of the State").

If a city's determination whether or not to annex specific property is a legislative decision, then unquestionably a decision to forever surrender the city's annexation powers over an entire territory is a political, legislative decision. Here, the 2006 Spring Hill city council apparently determined in one fell swoop and for all time that it would never be in the city's best interest to consider annexation of any property south of the "boundary line." But the 2021 city council may believe otherwise, and that is each city council's decision to make. The 2006 council could not lawfully impose its visions and desires of future growth on its successors by contracting away the city's annexation powers; it could not bind its successors to forego their legislative functions.

Other courts considering this issue have rightly held that such annexation agreements are unenforceable for this very reason. For example, in *City of Safety Harbor v. City of Clearwater*, 330 So. 2d 840, 841 (Fla. Dist. Ct. App. 1976), three cities entered into an annexation agreement which, like that here, delineating the cities' territories for future annexation. One city subsequently annexed land earmarked for another, contrary to the agreement. On the issue of enforceability, the court stated:

> Stripped of various procedural questions . . . the controversy here devolves into a fundamental principle of municipal law. Succinctly stated, that issue is: Can the City of Clearwater contract away the power and authority the Legislature granted its governing body to provide by ordinance for annexation of unincorporated lands? . . . As in the case of other governmental authorities vested in a municipality, this power cannot be contracted away. *Id.* at 841.

The court further explained that, although the annexation agreement evidenced the consensus of the three governing bodies at the time it was created, the "city must not be rendered impotent to exercise governmental functions and, where necessary, to modify or change its policies." *Id.* at 842; *see also, City of Claremore v. Town of Verdigris*, 50 P.3d 208, 214 (Okla. 2001) (any agreement between cities to limit or eliminate power to annex is unenforceable); *City of Ormond Beach v. City of Daytona Beach*, 794 So.2d 660, 664 (Fla. Dist. Ct. App. 2001) (cities' agreement to refrain from annexing certain lands was unenforceable because annexation is a governmental legislative power which cannot be contracted away); *Village of Lisle v. Village of Woodridge*, 548 N.E.2d 1337, 1342 (Ill. App. Ct. 1989) (provision of cities' boundary-line agreement prohibiting annexation was void and unenforceable); *City of Leeds v. Town of Moody*, 319 So.2d 242, 245-46 (Ala. 1975) (agreement requiring city to refrain from accepting future petitions for annexation was null and void); *Rhodes v. City of Aberdeen*, 50 N.W.2d 215, 221 (S.D. 1951) ("The power to annex territory to a municipality is a political power vested in the Legislature and conferred upon a municipality through delegation by the

Legislature . . . It is a power to be exercised by the governing body within its sound discretion in good faith in the manner provided by statute, and to the extent required by the public interest. It is a power which the governing body of a municipality cannot legally contract away or barter off.") (citations omitted).

Bonita's situation offers a prime example of why no city council should ever be allowed to bind its successors to a surrender of the city's annexation powers over specified lands. In September 2020, Bonita entered into an agreement with Carvana, a nationwide used automobile retailer, to develop a storage, maintenance and repair facility on the property, referred to as Project Extract. (R. I, 8-9, ¶ 48). Carvana had immediate need for a facility and was considering multiple sites, including in Missouri. (R. V, 147:21 – 148:3). Although representatives of Bonita and Carvana first approached Olathe to discuss annexation (R. I, 12, ¶ 49), multiple factors led to Spring Hill being the better option. For example, Bonita's property still did not adjoin Olathe's city limits, some 15 years after the annexation agreement was entered. Annexation by Olathe would therefore have required Board of County Commission approval under K.S.A. 12-520c. (R. V, 103:19 – 104:19; 105:25 – 106:2). Conversely, Spring Hill planned to annex two parcels south of Bonita's property, after which Bonita's property would adjoin Spring Hill, thereby avoiding "island" annexation and the need for County Commission approval.

(R. V, 164:5-15). Importantly, Spring Hill had existing sewer lines in close proximity and could quickly provide sewer service to the proposed development, unlike Olathe. (R. V, 148:18 – 149:15). Easements were already in place for the planned expansion of the Spring Hill sewer system to Bonita's property. (*Id.*). The land was located in the Spring Hill School District, not the Olathe School District. (R. V, 150:7-16). It was anticipated that the Carvana facility in Spring Hill would result in up to 600 new jobs for the area, among other tangible benefits. (R. V, 149:16 – 150:2).

By statute, Bonita could petition *either* Spring Hill or Olathe for annexation. K.S.A. 12-520 would permit annexation by Spring Hill once Bonita's property adjoined the city as was planned. K.S.A. 12-520c was the path to annexation by Olathe, requiring "the board of county commissioners of the county, by a ⅔ vote of the members thereof, find and determine that the annexation of the land will not hinder or prevent the proper growth and development of the area or that of any other incorporated city located within the county."

Based on the above considerations and others, Bonita petitioned Spring Hill for annexation and Spring Hill intended to grant the request (and did, in fact, annex the property after the District Court denied Olathe's request for a preliminary injunction). If enforced, the annexation agreement would strip the current Spring Hill city council of its delegated legislative power to determine

whether annexation of Bonita's property was appropriate, in 2021, based on the political decision of a city council seated some 15 years prior. One city council simply cannot decide for its successors that a property should never be annexed, regardless of then-existing circumstances. A brief consideration of circumstances changing between 2006 and 2021 drives homes this point. The 2006 decision preceded the Great Recession and a global pandemic, as well as the growth of Johnson County by an additional nearly 100,000 residents.

As for Bonita, neither it nor its predecessors in title were parties to the annexation agreement or had any control over which city laid claim to the land. If the agreement is enforced, Bonita (and its development goals) are at the mercy of Olathe. Without Olathe's blessing, Bonita would be forever restrained from seeking annexation by Spring Hill, regardless of whether Spring Hill is the more appropriate choice, for development or otherwise. And what if Bonita abides and seeks annexation by Olathe, but Olathe refuses? Or Olathe agrees but the Board of County Commissioners does not approve? In that case, then what? Would Bonita simply remain in unincorporated limbo, hoping either Olathe or the County Commissioners would have a change of legislative heart?

Annexation statutes exist to guard against unilateral city action and protect the rights of landowners. *City of Lenexa v. City of Olathe*, 233 Kan. 159, 164, 660 P.2d 1368 (1983) ("The general purpose of the annexation statutes is to protect the rights of landowners against unilateral action by a

city in annexing their land."). The agreement here does not unilaterally annex land, but it does unilaterally determine which city may annex the land and restrict landowners from petitioning another city for annexation. This Court should not permit city councils to saddle landowners with annexation agreements that, as a practical matter, unilaterally limit statutory and property rights and impose restrictive covenants on the land.

II. Neither K.S.A. 12-2908 nor the Home Rule Amendment authorize a city council to contractually bind its successors to a forbearance of legislative functions.

Impliedly conceding that the annexation agreement is legislative, not administrative, Olathe seeks refuge in K.S.A. 12-2908 or the Home Rule Amendment, Kan. Const. Art. 12, § 5(d). Olathe argues the annexation agreement is valid under either one, and that the common law reiterated in *Jayhawk Racing* does not apply to contracts between municipalities.

As to the latter point, long-standing Kansas law prohibits one governing body from abridging the legislative powers of its successors, or contracting away legislative functions. *See* Section I, *supra*, compiling cases. Although *Jayhawk Racing* concerned a public-private contract, that in no way suggests its holding would not apply equally to a contract between municipalities. No sound reason exists to distinguish the two. The law prohibits one city council from stripping the legislative powers of its successor; the vehicle by which it attempts to do so is irrelevant.

As to K.S.A. 12-2908, it simply authorizes municipalities to contract with one another "to perform any governmental service, activity or undertaking which each contracting municipality is authorized by law to perform." As a preliminary matter, it seems disingenuous to suggest the annexation agreement is a K.S.A. 12-2908 contract in the first instance. Neither city actually "performs" any "service, activity or undertaking" pursuant to the agreement. And, even if "service, activity or undertaking" was construed so broadly as to include the legislative act of annexation—which it should not be—the cities agreed to do the opposite of perform it. Rather, they agreed to refrain from exercising those powers. Moreover, as pointed out by Spring Hill, the agreement expressly references the Interlocal Cooperation Act, K.S.A. 12-2901, *et seq.*, and the contract's provisions track the requirements of K.S.A. 12-2904 (save approval by the attorney general). *See* Spring Hill brief at p. 33-34. It seems apparent that if the contracting parties actually relied on K.S.A. 12-2908, the agreement would have referenced that provision and would not have mirrored the requirements of K.S.A. 12-2904, because agreements under K.S.A. 12-2908 are not considered interlocal agreements at all. K.S.A. 12-2908(c) ("A contract entered into pursuant to this section shall not be regarded as an interlocal agreement under the provisions of K.S.A. 12-2901 et seq., and amendments thereto.").

Be that as it may, while K.S.A. 12-2908 certainly authorizes municipalities to contract with each other to perform services, it does not, as Olathe suggests, "carve out an exception" to the common law prohibition against one legislative body attempting to bind its successor to its policy decisions. No sensible reading of the provision would go that far. "When reviewing a statute, an appellate court first attempts to give effect to the intent of the legislature as expressed . . . The court will not speculate as to legislative intent or read such a statute to add something not readily found in it." *State v. Thompson*, 287 Kan. 238, 243, 200 P.3d 22 (2009). The Court will "presume the Legislature acts with full knowledge and information about the statutory subject matter, prior and existing law, and the judicial decisions interpreting the prior and existing law and legislation. *Ed DeWitte Ins. Agency, Inc. v. Fin. Associates Midwest, Inc.*, 308 Kan. 1065, 1071, 427 P.3d 25 (2018) (citations omitted). "Because of this preexisting knowledge, courts also presume legislatures do not intend to alter or abrogate the common law unless a statute makes clear such an intention." *Id.* "When the legislature intends to abolish a common-law rule, it must do so in an explicit manner. In the absence of such an expression of legislative intent, the common law remains part of our law." *Robinson v. City of Wichita Employees' Ret. Bd. of Trustees*, 291 Kan. 266, 298, 241 P.3d 15 (2010).

Not a word in K.S.A. 12-2908 suggests the legislature intended to upend century-old common law prohibiting a legislative body from binding its successors to its policy decisions or contracting away its legislative powers. By K.S.A. 12-2908 the legislature created a streamlined path for municipalities to contract with each other to perform services; it did not grant permission to do so in a way that abridges or restricts the legislative powers of the next governing body.

Equally, the Home Rule Amendment is not an exception to the restrictions on governing bodies reiterated in *Jayhawk Racing*. Like K.S.A. 12-2908, the Home Rule Amendment does not give life to an otherwise *ultra vires* contract. A city's contractual authority is limited, even under Home Rule. "Multiple municipal corporations contracting with each other cannot bind themselves by contract in manner beyond scope of their powers." *Bd. of Educ. of Unified Sch. Dist. No. 443, Ford County v. Kansas State Bd. of Educ.*, 266 Kan. 75, 966 P.2d 68 (1998). And one such limitation is that a city council cannot contract away its legislative powers, such as the power to annex property.

Indeed, K.S.A. 12-101 specifies that the Home Rule Amendment empowers a city to make contracts "necessary to the exercise of its corporate or administrative powers." That is precisely the dividing line recognized in *Jayhawk Racing* between a contract that may bind a successor, and one that

may not. "In a general sense . . . proprietary or administrative powers are exercised to carry out private corporate purposes[.]" *Jayhawk Racing*, 313 Kan. at 153. The Home Rule Amendment in no way empowers a city council to deprive its successors of their delegated legislative functions.

CONCLUSION

The District Court correctly determined that the annexation agreement is unenforceable under *Jayhawk Racing* because it is a governmental action, not an administrative action, and purports to bind subsequent city councils. It also violates the statutory rights of property owners like Bonita. For all these reasons, Bonita respectfully requests this Court affirm.

Respectfully submitted,

ROUSE FRETS WHITE GOSS
GENTILE RHODES, P.C.

BY: */s/ Greg L. Musil*
Greg L. Musil KS #13398
Brett C. Randol KS #22794
5250 W. 116th Place, Suite 400
Leawood, Kansas 66211
Telephone: (913) 387-1600
Facsimile: (913) 928-6739
gmusil@rousepc.com
brandol@rousepc.com

Attorneys for Bonita Station Investments, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2022, the foregoing was electronically filed with the Court and notice of said filing was sent to the following via electronic mail:

Anthony F. Rupp
Foulston Siefkin, LLP
9225 Indian Creek Parkway, Ste. 600
Overland Park, KS 66210
trupp@foulston.com

Curtis L. Tideman
Lathrop GPM
10851 Mastin Blvd, Ste. 1000
Overland Park, KS 66210
curtis.tideman@lathropgpm.com

/s/ Greg L. Musil
Attorney for Bonita Station Investments, LLC