No. 21-124156-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

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

vs.

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

BRIEF OF APPELLANT/CROSS-APPELLEE

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

Anthony F. Rupp, #11590
Foulston Siefkin, LLP
32 Corporate Woods, Suite 600
9225 Indian Creek Parkway
Overland Park, KS 66210
(913) 498-2100
(913) 498-2101 FAX
trupp@foulston.com
Attorney for the Appellant

Oral Argument: 15 minutes

TABLE OF CONTENTS

STATEMENT OF THE CASE

The City of Olathe ("Olathe") filed a Verified Petition for declaratory judgment, mandamus, and injunctive relief to enforce the terms of an Annexation Contract ("Contract") entered between Olathe and the City of Spring Hill ("Spring Hill") in 2006. (R. I, 4). The Contract drew a boundary line between the two cities. Olathe agreed not to annex land south of the boundary line, and Spring Hill agreed not to annex land north of it. (R. I, 26-28).

In March 2021, Spring Hill notified Olathe of its intent to annex land north of the agreed boundary line in violation of the Contract. (R. I, 11). Olathe filed suit, and the Johnson County District Court granted a temporary restraining order ("TRO") in favor of Olathe. (R. III, 18). On June 14, 2021, after an evidentiary hearing, the district court denied Olathe's request for temporary injunction. (R. III, 105). Immediately, Spring Hill adopted ordinances annexing land north of the boundary line, including land designated as "Project Extract," a commercial site development. (R. IV, 2).

Thereafter, on July 30, 2021, the district court stayed its ruling denying a temporary injunction and entered an injunction prohibiting annexation activity in violation of the Contract during the pendency of appeal, including activity to annex, approve, develop, or issue permits for Project Extract (R. IV, 4). The district court issued a written order dismissing the case with prejudice on August 4, 2021. (R. III, 127).

The Court of Appeals entered its own stay and injunction during the pendency of appeal on the same terms as the district court on September 2, 2021. (9-2-2021 Order).

Olathe appeals the district court's dismissal of the case and the denial of its request for a temporary injunction and effective denial of its request for permanent injunction. On September 23, 2021, this Court granted Olathe's motion to transfer this appeal. (9-23-2021 Order).

STATEMENT OF ISSUES ON APPEAL

I. K.S.A. 12-2908 authorizes municipalities to contract with each other "to perform any governmental service, activity or undertaking," and the Home Rule Amendment, Kan. Const. Art. 12, § 5, liberally empowers cities to manage their local affairs. The plain language of K.S.A. 12-2908 and the Home Rule Amendment authorize the Annexation Contract between Olathe and Spring Hill because it performs a government service, activity, or undertaking for the public good. Did the district court err when it dismissed Olathe's lawsuit on the ground that the common law ruling in *Jayhawk Racing Properties, LLC v. City of Topeka*, 313 Kan. 149, 484 P. 3d 250 (2021) ("*Jayhawk Racing*") rendered the statutorily and constitutionally authorized Contract unenforceable?

II. Did the district court err when it denied Olathe's request for temporary injunction to prevent Spring Hill's annexation in breach of the Contract, on the same legal ground that *Jayhawk Racing* rendered the statutorily and constitutionally authorized Contract unenforceable?

STATEMENT OF FACTS

I. Olathe and Spring Hill executed the Annexation Contract to promote the public interest and relied on it for 15 years.

On March 23, 2006, Olathe and Spring Hill voluntarily executed the Contract that established a boundary line between them ("Boundary Line") and contained reciprocal promises about future annexation. (R. I, 22-33). See Appendix, Ex. 1 (Annexation Contract). Spring Hill promised not to annex land north of the Boundary Line (in Olathe's growth area), and Olathe promised not to annex land south of it (in Spring Hill's growth area). (R. I, 28). The Contract was approved by the city councils and mayors of both cities and has not been terminated. (R. I, 6 and 30; R.V, 146:6-12). Both cities were represented by counsel. (R. V, 109:23-25).

The primary purpose of the Contract is "to designate and delineate a boundary for future annexations of the parties in order to avoid annexation disputes and to further and encourage planning, construction of public improvements, and the provision of municipal services to landowners in the areas affected hereby." (R. I, 25-26). It also prevents premature annexations and gives property owners certainty about future land use and services. (R. I, 22-23). Olathe and Spring Hill expressly acknowledged that "failure to address these issues may result in irregular and illogical boundary lines which inhibit sound land use planning, as well as the provision of services, the

implementation of plans, and the scheduling and provision of public improvements necessary to support anticipated growth and development[.]" (R. I, 23-24).

Cooperation is a core tenet of the Contract. The parties committed to cooperate "to avoid disputes concerning future annexations"; "to avoid duplication of planning efforts, capital improvements programming and provision of extraterritorial services"; and "to address and resolve issues of mutual concern." (R. I, 22-23). To this end, the parties agreed to "meet periodically to discuss comprehensive planning and provision of municipal services along the annexation borders[.]" (R. I, 28).

For 15 years, until March 2021, both Olathe and Spring Hill did just that, relying on the Contract to develop their comprehensive plans for future development and provision of services. (R. VII, Ex. 9, Ex. 35 at 31 (Olathe); R. VII, Ex. 24 § 1.3, Ex. 38 (Spring Hill)). Long-term planning is crucial because "development doesn't occur overnight." (R. V, 88:14). A typical comprehensive plan requires at least "a 20 year, even sometimes a 25, 30-year horizon" to ensure the orderly growth and full buildout of a city. (R. V, 88:19-21). In fact, Olathe's current build-out model relies on the Contract to plan future land use and services (such as water, sewer, and solid waste) through 2068. (R. V, 87:1-7, 91:8-16; Ex. 29-30). In sum, Olathe and Spring Hill rely on the Contract to engage in long-term planning, and rural landowners rely on it for certainty

about future land use. (R. V, 69:18-70:1; 148:20-24).

II. Spring Hill threatened to breach the Contract by annexing land in Olathe's growth area, which would cause irreparable harm to Olathe.

On March 1, 2021, Spring Hill notified Olathe it intended to annex land north of the Boundary Line in violation of the Contract to pursue a commercial site development called "Project Extract," which would include a car repair facility. (R. I, 11-12). There is no dispute that the land designated for Project Extract is located north of the Boundary Line and in Olathe's growth area, as established by the Contract. (R. V, 50:14-16; R. VII, Ex. 27 (Project Extract Location Map)).

Spring Hill continued to pursue annexation for Project Extract over Olathe's objection. In fact, the Spring Hill City Council scheduled a meeting for March 11, 2021 to adopt annexation ordinances for the project, forcing Olathe to file suit and seek injunctive relief to protect its rights. (R. VII, Ex. 14 at 2 (action items 6-11); R. I at 12). On March 9, 2021, Olathe filed a verified petition that requested relief by TRO, temporary injunction, declaratory judgment, and writ of mandamus. (R. I, at 16-20; R. III, at 1-17).

On March 10, 2021, the Johnson County District Court held a hearing attended by both parties and entered a TRO prohibiting Spring Hill from taking any steps to annex land north of the Boundary Line, including land for Project Extract, to protect Olathe from irreparable harm. (R. V, 1-24; R. III, 18-

23). The court found that Olathe "show[ed] a substantial likelihood of prevailing on the merits of its claims that Defendants have breached the Annexation contract by accepting annexation petitions for land north of the Boundary Line and planning to breach the Contract by annexing land north of the Boundary Line." (R. III, 20). The court also found:

> Olathe has shown that it will suffer imminent irreparable harm unless a temporary restraining order is entered to prohibit Defendants from moving forward with the annexation of land north of the Boundary Line. Olathe has further shown that it has no adequate remedy at law for the loss of land north of the Boundary Line to annexation by Spring Hill.

(R. III, 20).

Spring Hill moved to dismiss Olathe's petition, claiming the Contract was void because it was not approved by the Attorney General under K.S.A. 12-2904 and was not binding on successive governing bodies under common law recently pronounced in *Jayhawk Racing*. (R. III, 24). Olathe argued the Contract is enforceable under K.S.A. 12-2908, which does not require Attorney General approval, and is binding on successive governing bodies under K.S.A. 12-2908 and the Home Rule Amendment. (R. III, 62).

On May 19, 2021, the district court held a combined hearing on Olathe's request for temporary injunction and Spring Hill's motion to dismiss. (R. V, 25). Olathe submitted 36 exhibits into evidence and presented the testimony of four witnesses, who explained the Contract's vital role in comprehensive

planning and the harm that would result if the Contract was deemed unenforceable. (R. V, 27).

Aimee Nassif, Olathe's Chief Planning and Development Officer, testified about the crucial role of annexation contracts in long-term planning and provision of government services, stating:

> [A]nnexation and the agreements we have with the surrounding jurisdictions and municipalities helps us. It defines what our community boundaries will be. So that enables us to be able to then do our comprehensive planning where we know where our community boundaries are. Then we can establish and start working on what that orderly growth looks like and what those services needs would be and be able to have that outreach with the property owners and residents to guide them.

(R. V, 68:1-9). Ms. Nassif explained that all of Olathe's long-term plans rely on the Contract and are interdependent with one another. (R. V, 68:1-15). The foundation of Olathe's long-term development planning is the Comprehensive Plan, which guides capital improvements and the extension of services and road networks to future residents. (R. V, 68:14-69:6; R. VII, Ex. 9 and 35). Olathe's Street Improvement Plan and Build Out Model are, in turn, dependent on the Comprehensive Plan. (R. V, 68:21-25; R. VII, Ex. 10-11 and Ex. 30). The Build Out Model provides guidance on the extension of water, sewer, storm water, waste, and other services as the Comprehensive Plan is implemented. (R. V, 87:1-7; R. VII, Ex. 30).

James Hendershot, Spring Hill's City Administrator, testified that

Spring Hill also engages in long-term planning through its Comprehensive Plan, which recognizes the Contract with Olathe. (R. V, 148:3-13; R. VII, Ex. 12 (Future Land Use Map), Ex. 24 § 1.3). As Section 4.3 of Spring Hill's Comprehensive Plan states, "It is important to define general growth boundaries to help guide proposed developments and to plan for long-term infrastructure needs of the community." (R. VII, Ex. 24 § 4.3; R. V, 154:7-13). Spring Hill's Annexation Policy requires conformance with its Comprehensive Plan. (R. VII, Ex. 26 at 1).

Mr. Hendershot agreed that the Contract serves valuable public policy interests because it enables Spring Hill to engage in long-term planning for development and the provision of services, to save litigation costs, and to provide reliability for rural landowners. (R. V, 147:2-25; 148:1-6). He also agreed that Spring Hill hopes to obtain annexation contracts with the cities of Gardner and Overland Park because of the value such contracts provide. (R. V, 148:14-19).

Multiple witnesses described the consequences if the Contract is deemed unenforceable. Michael Wilkes, Olathe's City Manager for the last 22 years, testified that the Contract affects the provision of basic community services, including police services, fire services, trash removal, and storm water management. (R. V, 170:2-14). Indeed, loss of the Contract would destroy certainty for landowners regarding these services and the development of their

property. (R. V, 169:10-170:3). Moreover, Mr. Wilkes explained that, without the Contract, "we go back to the 70s, 80s, and 90s, where we're all in annexation wars and we're just all trying to stab each other in the back and go out and get whatever land that we can get from where we can get it." (R. V, 168:22-169:2).

Tom Glinstra (misspelled as "Glenstra" in the transcript), Olathe's former City Attorney who helped draft the Contract, explained that in the late 20th Century, Johnson County was the "wild west" of annexations, fraught with land grabs and expensive litigation. (R. V, 109:1-9; 116:5-120:14, 121:25). These annexation wars resulted in costly annexation disputes, which often spent several years moving through the State's appellate courts. (R. V, 116:5-120:14). See, e.g., *City of Lenexa v. City of Olathe*, 228 Kan. 773, 620 P.2d 1153 (1980) (*Lenexa I*), *rev'd by* 229 Kan. 391, 625 P.2d 423 (1981) (*Lenexa II*); *City of Lenexa v. City of Olathe*, 233 Kan. 159, 660 P.2d 1368 (1983) (*Lenexa III*). To prevent costly disputes and to promote orderly development, cities in Johnson County executed annexation contracts with neighboring cities establishing boundary lines between them and designating their future growth areas. (R. I, 22-24; R. VII, Ex. 36 at 152). Olathe executed annexation contracts with its surrounding jurisdictions, Spring Hill, Desoto, Gardner, Lenexa, and Overland Park, which remain in force today. (R. V, 78:8-23, 118:11-119:20; R. VII, Ex.16-20). Mr. Glinstra explained these annexation contracts prevent "a hodgepodge

of development" so that residential areas do not develop prematurely. (R. V, 122:7-23).

Finally, Ms. Nassif described the irreparable harm of the loss of Olathe's growth area and the disruption of its long-term development plans. (R. I, 8-11; R. V, 90:2-93:5). Ms. Nassif explained that losing the Contract would disrupt Olathe's plans with the Kansas Department of Transportation to construct road improvements at a critical interchange; upend Olathe's Comprehensive Plan, Transportation Master Plan, Buildout Model, and its capital improvement plans; and destroy landowners' settled expectations about the use and development of their property. (R. I, 8-10, 13-15; R. V, 90:2-91:16). Additionally, Olathe would "lose any ability for coordinated efforts and coordinated growth" which could result in "incompatible land uses" and "breaks in services." (R. V, 90:7-10). She noted that revising Olathe's key planning documents would also be a "very large, very expensive several year undertaking." (R. V, 92:8-16).

III. The district court denied Olathe's request for temporary injunction and issued findings of fact and conclusions of law.

On June 14, 2021, the district court issued its findings of fact and conclusions of law from the prior hearing. (R. III, 96-106). The court found that the parties voluntarily executed the Contract to promote the public interest by:

a. Cooperating to avoid disputes concerning future annexations and zoning of certain properties identified in the Annexation Contract;

b. Avoiding illogical or premature annexations or unwanted development that would not be in the best interests of the parties;

c. Avoiding duplicative planning efforts, capital improvements, programing, and provision of extraterritorial services;

d. Engaging in joint planning with respect to long-term land use, development, and provision of services;

e. Providing property owners with definite and reliable indications of future city plans for annexation, provision of services, and comprehensive development plans;

f. Balancing the needs and resources of the cities as well as the needs of landowners to increase coordination in comprehensive planning and capital improvement planning; and

g. Establishing future boundaries.

(R. III, 98-99; R. IV, 2). The court also determined that the Contract is authorized by K.S.A. 12-2908, which does not require Attorney General approval. (R. III, 104-105).

Although the district court ruled that the Contract is authorized by statute and promotes the public interest, the court denied Olathe's request for a temporary injunction, holding that the Contract is unenforceable on successive governing bodies under *Jayhawk Racing*. (R. III, 105). The court later granted Spring Hill's motion to dismiss on the same legal ground. (R. III, 127).

IV. Spring Hill annexed land in violation of the Contract, causing irreparable harm to Olathe.

Within hours of the district court's ruling denying temporary injunction, Spring Hill adopted ordinances annexing the land for Project Extract. (R. IV, 2 at ¶4). Thus, Spring Hill adopted the ordinances before the district court had issued final judgment in the case or resolved any post-judgment motions and before final resolution of the dispute on appeal.

On June 16, 2021, Olathe filed its notice of appeal and a motion to stay the judgment dissolving the TRO or to grant an injunction during the pendency of its appeal. (R. III, 107; R. IV, 2). See K.S.A. 60-262(c). To protect Olathe from irreparable harm, the district court granted Olathe's request to stay the judgment and enjoined Spring Hill "from taking any further steps to annex, approve, develop, or issue permits for the land designated as Project Extract ... during the pendency of the appeal." (R. IV, 3). The district court further prohibited other actions in violation of the Contract by either city during the pendency of the appeal. (R. IV, 4).

The district court found that the stay and injunction "will serve the public interest, protect the rights of the parties, and prevent irreparable harm to Olathe." (R. IV, 3). The court also found that, if Spring Hill was not restrained, Olathe could lose more of its future growth area and incur the following harms:

a. Olathe's comprehensive plan and Future Land Use Map would be rendered unusable for Olathe and property owners in the area;

b. Olathe would be unable to provide certainty to property owners regarding compatible land uses and development opportunities;

c. Olathe would be unable to execute its vision for community growth and orderly development in its growth area;

d. Olathe would be required to update its comprehensive plan, Future Land Use Map, Transportation Master Plan, and any other long-range planning studies and documents for its growth area, which will require expending considerable staff time and other resources; and

e. Without knowing Spring Hill's vision and future land use plans for parcels north of the Boundary line, Olathe cannot engage in effective land use planning for its growth area.

(R. IV, 2).

The Court of Appeals later entered its own stay and injunction during the pendency of appeal on the same terms as the district court. (9-2-2021 Order).

ARGUMENTS AND AUTHORITIES

Jayhawk Racing does not render unenforceable contracts between municipalities that are authorized by statute and the Home Rule Amendment of the Kansas Constitution. As the district court correctly declared, this Contract is authorized by K.S.A. 12-2908. (R. III, 105). The government function doctrine applied in *Jayhawk Racing*—which is a creature of common law—does not override the statutory authorization of K.S.A. 12-2908, which permits municipalities to contract with each other "to perform any governmental service, activity or undertaking," or the Home Rule Amendment, which liberally empowers cities to manage their local affairs. Statutory law and the Constitution prevail over the common law pronounced in *Jayhawk Racing* and authorize the Contract. As a result, the district court erred in denying Olathe's request for temporary injunction and dismissing the lawsuit based on *Jayhawk Racing*.

I. The district court erred when it dismissed Olathe's lawsuit on the ground that the common law ruling in *Jayhawk Racing* rendered the statutorily and constitutionally authorized Contract unenforceable.

Standard of Review

The district court's decision to grant Spring Hill's motion to dismiss is reviewed de novo under the familiar rubric:

> Dismissal is proper only when the allegations in the petition clearly demonstrate that the plaintiff does not have a claim....

> Likewise, appellate courts reviewing a district court's decision to grant a motion to dismiss will assume as true the well-pled facts and any inferences reasonably drawn from them. If those facts and inferences state *any* claim upon which relief can be granted, dismissal is improper.

Steckline Commc'ns, Inc. v. J. Broad. Grp. of Kansas, Inc., 305 Kan. 761, 768, 388 P.3d 84 (2017). (Emphasis in original).

The district court denied Olathe's request for temporary injunction and granted Spring Hill's motion to dismiss on the same narrow legal ground, holding the Contract is unenforceable under *Jayhawk Racing*. Questions of law are reviewed de novo. *Apodaca v. Willmore*, 306 Kan. 103, 106, 392 P.3d 529 (2017). Indeed, the underlying issues of statutory, contract, constitutional, and common law interpretation are subject to de novo review. See *State ex rel. Schmidt v. Kelly*, 309 Kan. 887, 894, 441 P.3d 67 (2019) (statute); *Waste Connections of Kan., Inc. v. Ritchie Corp.*, 296 Kan. 943, 963, 298 P.3d 250 (2013) (contract); *Dwagfys Mfg., Inc. v. City of Topeka*, 309 Kan. 1336, 1340, 443 P.3d 1052, 1057 (2019) (constitution); *Apodaca*, 306 Kan. at 106 (common law).

A. Jayhawk Racing *is not applicable to contracts between municipalities.*

The sole basis for the district court's dismissal and denial of the injunction was its erroneous interpretation of *Jayhawk Racing*. (R. III, 105). *Jayhawk Racing* was published shortly before the temporary injunction

hearing in this case and involved a decision to render a private-public contract to purchase a speedway unenforceable under common law. Here, the Contract is enforceable because it is authorized under K.S.A. 12-2908 and the Home Rule Amendment, and this Court's decision in *Jayhawk Racing* does not preclude enforcing the Contract.

Jayhawk Racing is readily distinguishable. In *Jayhawk Racing*, this Court considered whether a Memorandum of Understanding (MOU) between the City of Topeka and Jayhawk Racing Properties, LLC, to purchase a $2.4 million reversionary interest in a motor speedway was binding on successive governing bodies. 313 Kan. at 151. The Court held the MOU, not subject to K.S.A. 12-2908, between the city and a private entity was not enforceable against successive governing bodies because it served a "governmental function" under common law. 313 Kan. at 152-53.

Importantly, *Jayhawk Racing* did not involve an annexation contract between two municipalities, did not address the applicability of K.S.A. 12-2908 or the Home Rule Amendment, and did not set out a blanket rule that one city council cannot bind a subsequent one to a contract between municipalities when a "governmental function" is at issue. Rather, the *Jayhawk Racing* holding was tailored to the specific facts and arguments at issue in the case and did not purport to suggest that statutorily authorized contracts between municipalities, like the Contract here, are unenforceable.

Thus, understood within its proper scope and context, *Jayhawk Racing* is not applicable to annexation contracts between municipalities, which are enforceable under K.S.A. 12-2908 and the Home Rule Amendment and necessary to promote the public interest. Put simply, *Jayhawk Racing* did not render unenforceable contracts between municipalities that are authorized by statutory and constitutional law.

B. The Contract is enforceable under K.S.A. 12-2908.

Upon reviewing the Contract and hearing the evidence, the district court correctly ruled that the Contract is authorized by K.S.A. 12-2908, which does not require Attorney General approval, as fully briefed and argued by Olathe. (R. III, 65-69, 104-105; R. V, 40-41). Having correctly found that the Contract was statutorily authorized by K.S.A. 12-2908, the district court erred in enforcing its view of common law instead of relying on the express authority granted to municipalities to enter such contracts under statutory law. In the end, the Contract is enforceable as a contract between municipalities under the plain language of K.S.A. 12-2908 because it concerns the performance of a government service, activity, or undertaking.

When interpreting statutes, this Court should "give effect to the intent expressed by the plain language of the text," giving common words their ordinary meanings. *Cent. Kansas Med. Ctr. v. Hatesohl*, 308 Kan. 992, 1002, 425 P.3d 1253 (2018). "It is only when the statute's language is unclear or

ambiguous that the court employs the canons of statutory construction, consults legislative history, or considers other background information to ascertain its meaning." *Kelly*, 309 Kan. at 894. Statutory provisions are construed *in pari materia*, "with a view of reconciling and bringing them into workable harmony if possible." *State ex rel. Morrison v. Oshman Sporting Goods Co. Kan.*, 275 Kan. 763, 768, 69 P.3d 1087 (2003).

Additionally, courts presume the Legislature enacts statutes with knowledge of existing caselaw, and the common law remains in force unless modified by constitution, statute, or judicial decision. *Hatesohl*, 308 Kan. at 1006. In 1982, the Legislature enacted K.S.A. 12-2908 with knowledge of Kansas caselaw applying the governmental function doctrine to cities. L. 1982, ch. 58, § 1; see, e.g., *Brown-Crummer Inv. Co. v. Arkansas City*, 125 Kan. 768, 266 P. 60, 63 (1928) ("The matter of delivery and disposition of the bonds lies outside of the public and governmental function and has been said to be an executive and administrative act."). With this knowledge, the Legislature carved out an exception in K.S.A. 12-2908 for contracts between municipalities to "perform any governmental service, activity or undertaking."

The Contract falls within the plain language of K.S.A. 12-2908 (b), which provides:

> Any municipality may contract with any municipality to perform *any governmental service, activity or undertaking* which each contracting municipality is authorized by law to perform. The

> contract shall be authorized by the governing body of the municipality and shall state the purpose of the contract and the powers and duties of the parties thereunder.

K.S.A. 12-2908(b). (Emphasis added).

To qualify as a contract between municipalities under K.S.A. 12-2908, the Contract need only: (1) involve the performance of any governmental service, activity, or undertaking that each city is authorized by law to perform; (2) be approved by the governing body of each city; and (3) state the purpose of the contract and the related powers and duties of the parties. The plain language of K.S.A. 12-2908 is broad to permit local governments to cooperate to provide local solutions to local problems. It covers a wide range of government actions, including traditional services (like police coverage and trash removal) and other tasks or activities, like annexation. See Merriam-Webster Dictionary (online ed. 2021) (defining "undertaking" as "an important or difficult task or project" or "a promise or agreement to do or not do something").[1]

The Contract between Olathe and Spring Hill satisfies each requirement of K.S.A. 12-2908(b). First, it concerns the performance of a governmental service, activity, or undertaking. The parties created the Boundary line and

[1] Accessible at: https://www.merriam-webster.com/dictionary/undertaking (last visited January 5, 2022).

agreed to refrain from annexing land in the other's growth area in order "to encourage . . . the provision of municipal services to landowners in the areas affected hereby." (R. I, 26). (Emphasis added). Undisputed testimony established that the Contract is critical to, and inseparable from, the performance of government services. The Contract prevents a "hodgepodge of development" in which rural residential areas develop without proper roads, sewers, and waterlines. (R. V, 122:14-19). And it enables both cities to develop comprehensive plans for the expansion of infrastructure and essential services, which is authorized and encouraged by statute. (R. VII, Ex. 24 and Ex. 35). See K.S.A. 12-747 (authorizing a city governing body to adopt a comprehensive plan "for the development of such city and any unincorporated territory lying outside of the city but within the same county in which such city is located"). Olathe's Build-Out Model relies on the Contract to plan for the expansion of government services—such as water, sewer, and waste services—into its growth areas through 2068. (R. V, 87:1-7, 91:8-16; Ex. 29-30).

Thus, the Contract involves the performance of governmental services because it enables Olathe to plan and provide for the government services of today and tomorrow. (R. V, 70:9-13, 170:2-14). More broadly speaking, the Contract concerns annexation and development of the cities' respective growth areas, which also qualify as governmental activities and undertakings. Under either construction, the cities were authorized to enter this Contract and

perform the resulting services pursuant to their respective charter ordinances, K.S.A. 12-101, and the Home Rule Amendment. See Olathe City Charter Ordinance 76 Section 2.3 ("It shall be the duty of the Governing Body … to pass all ordinances, resolutions and contracts needful for the welfare of the City[.]"); see also Section 1-105 of the Spring Hill Municipal Code ("All powers conferred upon cities of the second class by the laws of the State of Kansas shall be exercised by the governing body subject to such limitations as may be prescribed by law. All executive and administrative authority granted or limited by law shall be vested in the mayor and council of the City of Spring Hill, as the governing body of the city. (K.S.A. 12-103)")[2]; K.S.A. 12-101 (stating that the Home Rule Amendment empowers cities to "[m]ake all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers."); see also Subsection C below (Home Rule Amendment).

Second, the governing body of each city approved the Contract and the mayor of each city executed it, as attested to by the respective city clerks. (R. I, 6, 30; R.V, 146:6-12).

Third, the Contract clearly states its purpose "to designate and delineate a boundary for future annexations of the parties in order to avoid annexation

[2] Accessible at: https://springhillks.gov/DocumentCenter/View/112/CHAPTER-01-?bidId= (last visited January 5, 2022).

disputes and to further and encourage planning, construction of public improvements, and the provision of municipal services to landowners in the areas affected hereby." (R. I, 25-26). It also sets forth the powers and duties of the parties to honor the Boundary Line, administer the Contract, enforce its terms, and cooperate in mutual comprehensive planning. (R. I, 25-26, 28-29). All told, the Contract complies with each requirement of K.S.A. 12-2908.

Notably, the Legislature imposed no duration requirements on contracts between municipalities under K.S.A. 12-2908. The Legislature even clarified that the special requirements of K.S.A. 12-2904—including its duration requirement—do not apply to K.S.A. 12-2908 contracts. Compare K.S.A. 12-2908(c) with K.S.A. 12-2904(d). Instead, the Legislature omitted time constraints for contracts between cities to empower them to contract to promote their mutual, long-term welfare in accordance with their home rule authority. See 10 McQuillin Mun. Corp. § 29:10 (3d ed). ("Statutes and charters sometimes authorize municipal boards to make contracts which will extend beyond their own official term, and the power of the legislature in this respect is well settled.").

The plain purpose of K.S.A. 12-2908 is to empower cities to contract with each other to perform "any governmental service, activity or undertaking" without the burdens of K.S.A. 12-2904. Uniquely, K.S.A. 12-2908 empowers cities to contract regarding matters of long-term development for their mutual

benefit without Attorney General approval. Indeed, legislative history shows that K.S.A. 12-2908 was meant to "expedite procedures" for Contracts Between Municipalities so that "[t]hey wouldn't have to go through the Attorney General's office" under K.S.A. 12-2904. 02-11-1992 Minutes of Senate Committee on Local Government (Statement of. Jim Kaup, League of Kansas Municipalities regarding SB 564) See Appendix, Ex. 2 (Senate Committee Minutes).

Applying *Jayhawk Racing* to annexation contracts between cities under K.S.A. 12-2908 would also produce absurd results. See *N. Nat. Gas Co. v. ONEOK Field Servs. Co.,* 296 Kan. 906, 918, 296 P.3d 1106 (2013) ("[W]e must construe statutes to avoid unreasonable or absurd results, and we presume the legislature does not intend to enact useless or meaningless legislation."). The basic purpose of the Contract—to promote the public good through long-term cooperation and planning—would be thwarted if the Contract is not binding on successive governing bodies, which can change composition every few years. (R. V, 88:3-6). In Spring Hill's view, no city contract involving urban planning and development could survive from one political term to the next. This result would be absurd, preventing mutually beneficial planning between cities, promoting costly competition at the expense of the public welfare, and thwarting the clear purpose of K.S.A. 12-2908.

C. The Contract is enforceable under the Home Rule Amendment.

Olathe argued in district court that the Contract is also valid and enforceable pursuant to the Home Rule Amendment. (R. III, 69-71; R. V, 41:20-42:11). The district court ultimately declined to rule on this issue. (R. III, 99-105). The interests of justice and judicial economy support the exercise of this Court's discretion to resolve the important question of whether the Contract, and others like it, are independently authorized by the Home Rule Amendment. Moreover, the Court's consideration of this question will not be hampered by the lack of ruling below because it is a legal question subject to de novo review. See *State v. Morales*, 306 Kan. 1100, 1104, 401 P.3d 155 (2017) (reviewing constitutional preemption question because the dispositive issue was one of law and justice required a decision on the merits), *rev'd and remanded on other grounds sub nom. Kansas v. Garcia*, 140 S. Ct. 791 (2020).

A city's home rule authority is derived from the Home Rule Amendment located in Article 12, § 5 of the Kansas Constitution, which grants cities power "to determine their local affairs and government[.]" The Home Rule Amendment is to "be liberally construed for the purpose of giving to cities the largest measure of self-government," Kan. Const. Art. 12, § 5(d), and the exercise of home rule authority is afforded a presumption of validity, *Exec. Aircraft Consulting, Inc. v. City of Newton*, 252 Kan. 421, 424, 845 P.2d 57,

(1993). The Amendment broadly empowers a city to "[m]ake all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers." K.S.A. 12-101.

"Since home rule, cities have power granted directly from the people through the constitution without statutory authorization." *Claflin v. Walsh*, 212 Kan. 1, 6, 509 P.2d 1130 (1973); see also *Dwagfys*, 309 Kan. at 1339-40, ("Following the amendment, cities no longer had to rely on the Legislature to specifically authorize the exercise of a particular power or action via statute."). In other words, under home rule a city does not need statutory blessing to manage its local affairs. See *Dillon Stores, a Div. of Dillon Companies, Inc. v. Lovelady*, 253 Kan. 274, 278, 855 P.2d 487 (1993) ("The approach taken by the 1974 home rule amendments is clearly contrary to the 'need a statute' view[.]").

A city's exercise of home rule power is valid unless it conflicts with a state law uniformly applicable to all cities that governs the subject. See *Dwagfys*, 309 Kan. at 1340. Here, the parties' home rule authority to execute the Contract—which contains reciprocal promises to *refrain from annexation*—is valid because it does not conflict with any uniformly applicable state law. Section 5(a) of the Home Rule Amendment states that the Legislature shall "provide by general law, applicable to all cities for … the methods by which city boundaries may be altered[.]" Kan. Const. Art. 12, § 5(a). This Court has interpreted section 5(a) to hold that "the power of a municipality *to alter its*

boundaries by annexation is vested absolutely and exclusively in the legislature, and this power is therefore completely controlled by statute, *i.e.,* K.S.A. 12-519 *et seq.*" *Crumbaker v. Hunt Midwest Min., Inc.*, 275 Kan. 872, 884, 69 P.3d 601 (2003). (Emphasis added). But importantly, the Legislature has not exerted any control over a city's decision *not to annex* certain property, because it has not adopted any statutes governing the same. Thus, a contract between two cities to refrain from annexation falls squarely outside K.S.A. 12-519 *et seq.* and within the wide purview of home rule.

At the core, the Home Rule Amendment "'recognizes the desirability of local initiative in solving local problems created by the proliferation of municipal services.'" *State ex rel. Schneider v. City of Kansas City*, 228 Kan. 25, 29, 612 P.2d 578 (1980) (quoting Clark, State Control of Local Government in Kansas: Special Legislation and Home Rule, 20 Kan. L. Rev. 631, 654 (1972)). Thus, the Amendment provides an independent basis for cities to contract with one another to address local issues, like planning for development and expansion of services through annexation contracts. See Parnacott, Annexation in Kansas, J. Kan. B. Ass'n, Nov./Dec. 2001, at 39 (noting that "cities retain their home rule to enter into other agreements with landowners or other cities regarding annexations"); see Heim, at 14-2 ("[C]ities and counties have home rule powers which can be used as a legal basis for interlocal cooperation or interlocal contracting."). Indeed, the Attorney

General's Office has long recognized that contracts between cities are independently authorized under home rule authority. See Op. Att'y Gen. 80 (1974) (concluding that that contracts between cities are authorized under home rule authority, independent of and in addition to statutory authority).[3]

In sum, the Contract falls within the purview of the Home Rule Amendment because it solves local problems with local solutions that are not already governed by state law. The Contract's reciprocal promises to refrain from annexation enable Olathe and Spring Hill to engage in long-term planning and provision of government services for the public good. (R. V, 68:1-9, 148:20-24). Moreover, it prevents expensive litigation and premature development, in which rural residential areas develop without proper roads, sewers, and waterlines. (R. V, 118:6-7; 122:14-19). Thus, the Contract is a clear exercise of the parties' respective powers to, in the absence of uniform state law to the contrary, engage in self-government and determine their local affairs for the benefit of their communities.

D. The Contract is enforceable under the Simmons rule.

In district court, Olathe argued that the Contract is also enforceable under the "Simmons rule," a common law exception to prohibition against contractually binding successive governing bodies. (R. III, 74-75). See

[3] Accessible at: http://ksag.washburnlaw.edu/opinions/1974/1974-080.pdf (last visited on January 5, 2022).

Leavenworth Cty. Bd. of Cty. Commissioners v. Copeland, No. 120,616, 2020 WL 4379132 at * 3 (Kan. Ct. App. 2020) (unpublished opinion) (coining the term) (quoting *Bd. of Comm'rs of Edwards Cty. v. Simmons*, 159 Kan. 41, 151 P.2d 960 (1944)); see also Appendix, Ex. 3. The district court disagreed, holding that the Simmons rule applies only to contracts that serve an administrative function and that the Contract serves a governmental function. (R. III, 104). This holding is an error of law. The court misconstrued the Simmons rule, which extends to contracts concerning government services that are, as here, necessary to protect the public interest.

Jayhawk Racing did not disturb the Simmons rule, a longstanding exception to the bar against binding successive governing bodies. Under the Simmons rule,

> the test generally applied is whether the contract at issue, extending beyond the term, is an attempt to bind successors in matters incident to their own administration and responsibilities or whether it is a commitment of a sort reasonably necessary to protection of the public property, interests or affairs being administered. In the former case the contract is generally held to be invalid, and in the latter case valid.

Simmons, 159 Kan. at 969. Thus, a contract may bind a successive governing body if it is reasonably necessary to protect the public interests being administered (or managed). See also Merriam-Webster Dictionary (online ed. 2021) (defining "administer" as "to manage or supervise the execution, use, or

conduct of").[4]

The district court erred when it held that the Simmons rule applies only to contracts that serve an "administrative policy." (R. III, 104). On the contrary, courts have applied the Simmons rule to enforce contracts concerning government services, which could qualify as "government functions" under the *Jayhawk Racing* rubric. See *Jayhawk Racing*, 313 Kan. at 156 ("Governmental functions are those that are performed for the general public with respect to the common welfare for which no compensation or particular benefit is received[.]"). According to *Jayhawk Racing*, "the development, introduction, or improvement of services are, by and large, considered governmental." 313 Kan. at 158.

For example, in *Zerr v. Tilton*, 224 Kan. 394, 581 P.2d 364 (1978), this Court held that a county's contract for the collection of solid waste, which exceeded the term of the governing body, was valid under the Simmons rule because "[s]olid waste disposal is an ongoing problem vitally concerned with the public health and welfare" and "such a contract is reasonably necessary to the protection of a public interest rather than an incident of a single administration." 224 Kan. at 400. Similarly, in *Verdigris River Drainage Dist. No. 1, in Montgomery Cty. v. State Highway Comm'n*, 155 Kan. 323, 125 P.2d

[4] Accessible at: https://www.merriam-webster.com/dictionary/administer (last visited January 5, 2022).

387 (1942), the Court upheld a contract requiring a county to maintain a floodgate during the existence of a certain levee. 155 Kan. at 392. The Court observed that, if such a contract could not extend beyond the current commissioners' terms, then "no comprehensive program of road building could ever be carried out." 155 Kan. at 392. Notably, the contracts at issue in *Zerr* and *Verdigris* both concerned critical government services, as the Contract does here.

The Contract falls within the Simmons rule exception because it is reasonably necessary to protect the public interest, and as a result, it is binding against successive governing bodies at common law. At the evidentiary hearing, undisputed testimony established that the Contract plays an indispensable role in Olathe's long-term planning for orderly development and the provision of government services. (R. V, 68:1-9). The Contract impacts the provision of basic community services and prevents rural residential areas from developing prematurely without proper roads, sewers, and water lines. (R. V, 122:14-23, 170:2-14). Moreover, the district court found that the Contract promotes the public interest by preventing future annexation disputes, premature development, and duplicative planning efforts; providing landowners with certainty about future plans for annexation, development, and the provision of services; and balancing the needs and resources of the cities to increase coordination in comprehensive planning. (R. III, 98-99). These

public interests cannot be achieved with agreements confined to an election cycle.

II. The district court erred when it denied Olathe's request for temporary injunction on the ground that *Jayhawk Racing* rendered the statutorily and constitutionally authorized Contract unenforceable.

Standard of Review

The denial of a temporary injunction is generally reviewed for abuse of discretion. *State Bd. of Nursing v. Ruebke*, 259 Kan. 599, 611, 913 P.2d 142, 152 (1996). "Abuse of discretion occurs when judicial action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact." *Kaelter v. Sokol*, 301 Kan. 247, 250, 340 P.3d 1210 (2015). However, this Court reviews the district court's fact-findings under the under the deferential substantial competent evidence standard and then determines de novo whether those findings support the district court's legal conclusions. See *Ruebke*, 259 Kan. at 611; see also *Johnson Cty. Auto Credit, Inc. v. Green*, 277 Kan. 148, 159, 83 P.3d 152, 160 (2004) (calling the Court's review for substantial competent evidence a "deferential standard").

Analysis

If this Court reverses the dismissal of Olathe's lawsuit, then it should also reverse the ruling denying temporary injunction, because the district court based both rulings on the same error of law, that *Jayhawk Racing* renders the

Contract unenforceable. (R. III, 105, 127). Olathe fully briefed its request for temporary injunction and submitted extensive evidence establishing each element at the evidentiary hearing. (R. III, 6; R. V, 27). Thus, this Court's mandate should reverse, remand, and order the district court to enter the temporary injunction based on the evidence Olathe previously presented.

However, in the absence of an such an order, Olathe asks this Court to enter an order preserving the status quo under K.S.A. 60-262(f) to prevent Spring Hill from annexing additional land north of the Boundary Line after the Court of Appeals' stay pending appeal expires and until the district court rules on the requested temporary injunction. See K.S.A. 60-262(f) (recognizing an appellate court's power "to issue an order to preserve the status quo"). Here, preserving the status quo means keeping the parties at a standstill, so that neither can annex or develop property beyond their side of the Boundary Line. Such an order is necessary to protect Olathe from irreparable harm, for the reasons listed below.

Though Kansas appellate courts have not specified the factors to consider for K.S.A. 60-262(f) orders, the traditional factors for temporary injunctions may serve as a guide:

> (1) a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability of suffering irreparable future injury; (3) the lack of obtaining an adequate remedy at law; (4) the threat of suffering injury outweighs whatever damage the proposed injunction may cause the opposing party; (5) and the impact of

issuing the injunction will not be adverse to the public interest. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012); see *Idbeis v. Wichita Surgical Specialists*, P.A., 285 Kan. 485, 491, 173 P.3d 642 (2007) (applying the same factors to TROs and preliminary injunctions). Since the first factor, a substantial likelihood of success on the merits, has been addressed in the preceding argument, this section will only address the remaining factors.

The district court heard extensive evidence and made detailed findings about the irreparable harm Olathe will sustain if Spring Hill continues to breach the Contract. The court found that Olathe will lose its growth area, its Comprehensive Plan will be rendered unusable, and it will not be able to engage in effective land use planning or provide certainty to property owners about compatible land uses and development opportunities. (R. IV, 2). See p. 15 above. These findings are entitled to deference under the substantial competent evidence standard. See *Ruebke*, 259 Kan. at 611.

Overwhelming evidence at the preliminary hearing established that Olathe will sustain irreparable harm by the loss of its growth area and the disruption of its long-term development plans. (R. I, 8-11; R. V, 90:2-93:5). Ms. Nassif, Olathe's Chief Planning and Development Officer, explained that if the Contract is not enforced, Olathe's long-term development plans would be thwarted, landowners' settled expectations about the use of their property

would be destroyed, incompatible land uses could arise, and landowners could experience breaks in services. (R. I, 8-10, 13-15; R. V, 90:7-92:16). Mr. Wilkes, Olathe's City Manager, testified that the Contract affects the provision of basic community services, and without it, landowners' expectations will be destroyed, and the chaos of the previous annexation wars will resume. (R. V, 168:10-169:2, 170:2-14).

Furthermore, Spring Hill has demonstrated that it will harm Olathe by swiftly annexing land north of the Boundary line if left unrestrained. Once such land is annexed, there is no adequate remedy at law for Olathe or calculable damages that can make Olathe whole for the loss of its future growth area. In contrast, maintaining the status quo of the Boundary Line on appeal—which the parties had respected, relied upon, and benefitted from for 15 years—preserves stability and prevents Spring Hill from inflicting more damage to Olathe. Monetary damages are not reasonably calculable, and ultimately cannot make Olathe whole, for the loss of its future growth area. Put simply, there is no adequate substitute for the loss of Olathe's growth area.

Finally, granting a temporary injunction would promote the public interest. As the district court found, the Contract serves the public interest by preventing annexation disputes, preventing premature annexation, fostering joint planning with respect to development and provision of services, and giving property owners certainty about land use and future development. (R.

III, 98-99). See p. 14 above.

CONCLUSION

The Contract is valid, enforceable, and binding against successive governing bodies because it is authorized by K.S.A. 12-2908 and the Home Rule Amendment and is reasonably necessary for the protection of the public interest. For these reasons, Olathe asks this Court to reverse the dismissal of Olathe's lawsuit, to reverse the order denying the temporary injunction, to enter an injunction under K.S.A. 60-262(f), and to remand to the district court for remedies consistent with this Court's Order.

APPENDIX

1. Annexation Contract
2. 02-11-1992 Senate Committee Minutes
3. *Leavenworth Cty. Bd. of Cty. Commissioners v. Copeland*, No. 120,616, 2020 WL 4379132 at * 3 (Kan. Ct. App. 2020) (unpublished opinion).

/s/ Anthony F. Rupp
Anthony F. Rupp, #11590
Matthew D. Stromberg, #23710
Sarah E. Stula, #27156
Foulston Siefkin, LP
32 Corporate Woods, Suite 600
9225 Indian Creek Parkway
Overland Park, KS 66210
(913) 498-2100
(913) 498-2101 FAX
Email: trupp@foulston.com
Email: mstromberg@foulston.com
Email: sstula@foulston.com

and

Christopher M. Grunewald, # 23216
City of Olathe
100 E. Santa Fe
Olathe, KS 66051
Email: cmgrunewald@olatheks.org

ATTORNEYS FOR PLAINTIFF - APPELLANT/CROSS-APPELLEE

EXHIBIT
1

AGREEMENT BETWEEN THE CITIES OF SPRING HILL AND OLATHE, KANSAS RELATING TO FUTURE ANNEXATIONS

THIS AGREEMENT is made and entered into this 25th day of March, 2002, by and between the CITY OF SPRING HILL, KANSAS (hereinafter "Spring Hill") and the CITY OF OLATHE, KANSAS (hereinafter "Olathe"), each party having been organized and now existing under the laws of the State of Kansas.

WHEREAS, certain lands in the vicinity of the Spring Hill Township and Olathe Township boundaries are projected for future urbanization by comprehensive plans of the parties hereto; and

WHEREAS, such lands are adjacent and proximate to the boundaries of the parties and it is expected that pressure will be exerted on the parties to expand their borders so as to accommodate this grown in a sound, rational manner; and

WHEREAS, it is the intent of the parties to cooperate so as to avoid disputes concerning future annexations and zoning of such lands; and

WHEREAS, public policy in general and K.S.A. 12-2901, et seq., and amendments thereto, entitled the "Interlocal Cooperation Act" in particular, authorize and encourage cities to cooperate to address and resolve issues of mutual concern,

including regional problems; and

WHEREAS, the parties mutually desire to avoid annexation and zoning disputes between the parties which may result in illogical or premature annexations or unwanted development which would not be in the best interests of the parties hereto; and

WHEREAS, the parties mutually desire to avoid a duplication of planning efforts, capital improvements programming and provision of extraterritorial services, and desire instead to coordinate in such efforts; and

WHEREAS, the parties desire to engage in joint planning with respect to land use, development and provision of services; and

WHEREAS, property owners in this area should have a definite and certain indication of future city plans for annexation, provision of services, and comprehensive development plans; and

WHEREAS, the County has encouraged the parties to resolve annexation issues by establishing, for each city, areas having a community of interest with each city; and

WHEREAS, failure to address these issues may result in irregular and illogical boundary lines which inhibit sound land use planning, as well as the provision of services, the

implementation of plans, and the scheduling and provision of public improvements necessary to support anticipated growth and development; and

WHEREAS, the governing bodies of said cities have established a logical demarcation line for future annexation which balances the needs and resources of the cities as well as those of the landowners in the area so as to increase coordination in comprehensive planning and capital improvements programming; and

WHEREAS, the governing bodies of said cities have deemed it necessary and advisable to enter into this Agreement to establish their future boundaries; and

WHEREAS, the Governing Body of the City of Spring Hill, Kansas, did approve and authorize its Mayor to execute this Agreement by official vote of said body on the 23rd day of March, 2006; and

WHEREAS, the Governing Body of the City of Olathe, Kansas, did approve and authorize its Mayor to execute this Agreement by official vote of said body on the ____ day of _____, 20____.

NOW, THEREFORE, in consideration of the above recitals, the mutual covenants and agreements herein contained, and for other

good and valuable considerations, the parties agree as follows:

1. Duration of Agreement: This Agreement shall be and remain in effect until terminated. Termination shall occur only upon mutual consent of the parties as evidenced by a resolution adopted by official vote of each governing body.

2. No Legal Entity Created: This Agreement creates no separate or independent legal entity.

3. Administration of Agreement: This Agreement shall be administered by the Governing Body of the City of Spring Hill, Kansas, acting by and through its City Administrator, by the Governing Body of the City of Olathe, Kansas, acting by and through its City Manager, which officials are hereby designated to administer said Agreement and empowered to do all things reasonably necessary to enforce its terms.

4. No Separate Budget or Jointly Held Property: There will no separate budget established or maintained pursuant to this Agreement and, the cost, if any, of financing this Agreement shall be borne by the parties through their normal budgeting processes. No property, real or personal, shall be jointly acquired or held by the parties.

5. Purpose of the Agreement: The purpose of this Agreement is to designate and delineate a boundary for future

annexations of the parties in order to avoid annexation disputes and to further and encourage planning, construction of public improvements, and the provision of municipal services to landowners in the areas affected hereby.

6. Delineation of Future Annexation Areas:

a. The boundary line between the two cities is described as follows:

> Beginning at the Northwest corner of the East ½ Section 28, Township 14 South, Range 23 East, Johnson County, Kansas; thence South along the West line of the East ½ said Section 28 and along the West line of the East ½ Section 33, Township 14 South, Range 23 East, to the Southwest corner of the East ½ said Section 33; thence East along the South line of said Section 33 and along the South line of Section 34, Township 14 South, Range 23 East, to the Southwest corner of the East ½ of the Southeast ¼ of said Section 34; thence North along the West line of the East ½ of the Southeast ¼ of said Section 34 to the Northwest corner of the East ½ of the Southeast ¼ of said Section 34; thence East along the North line of the East ½ of the Southeast ¼ of said Section 34 to the Northeast corner of the Southeast ¼ of said Section 34, said point also being on the West line of Section 35, Township 14 South, Range 23 East; thence North along the West line of said Section

35 to the Northwest corner of the South ½ of the Northwest ¼ of said Section 35; thence East
along the North line of the South ½ of the Northwest ¼ of said Section 35 and along its prolongation to its intersection with the existing East right-of-way line of U.S. Highway 169;
thence North along said East right-of-way line to its intersection with the North line of said
Section 35; thence East along the North line of said Section 35 and along the North line of
Section 36, Township 14 South, Range 23 East to the Northwest corner of the Northeast ¼ of said
Section 36; thence South along the West line of the Northeast ¼ of said Section 36 to the
Southwest corner of the Northeast ¼ of said Section 36; thence East along the South line of the
Northeast ¼ of said Section 36 to the Northeast corner of the West ½ of the Southeast ¼ of said
Section 36; thence South along the East line of the West ½ of the Southeast ¼ of said Section 36
to the Southeast corner of the West ½ of the Southeast ¼ of said Section 36; thence East along the
South line of the Southeast ¼ of said Section 36 to the Southeast corner of said Section 36, said
point also being the Northwest corner of Section 6, Township 15 South, Range 24 East; thence
South along the West line of said Section 6 to the Northwest corner of the Southwest ¼ of said
Section 6; thence East along the East-West centerline of said Section 6 and along the East-West

centerline of Section 5, Township 15 South, Range 24 East, to the Northeast corner of the
Southeast ¼ of said Section 5.

b. The parties mutually agree that Spring Hill shall not initiate annexation proceedings or accept annexation petitions under K.S.A. 12-520 or 12-521, or any successor annexation statutes, with respect to lands located North of the solid dark line (labeled Spring Hill on the legend) as shown on the Map attached hereto and incorporated herein by reference as Exhibit A.

c. The parties mutually agree that Olathe shall not initiate annexation proceedings or accept annexation petitions under K.S.A. 12-520 or 12-521, or any successor annexation statutes, with respect to lands located south of the solid dark line (labeled Spring Hill on the legend) as shown on the Map attached hereto and incorporated herein by reference as Exhibit A.

7. Mutual Comprehensive Planning: The parties agree to meet periodically to discuss comprehensive planning and provision of municipal services along the annexation borders established in Exhibit A. Such meetings may be either

informally between the professional planning staffs or formally between the Planning Commissions and/or Governing Bodies.

Either party shall notify the other parties whenever a zoning request is received within one quarter (1/4) of a mile from the annexation borders established in Exhibit A. The parties so notified shall be given an opportunity to comment upon the proposed zoning application prior to, or at, the required Planning Commission public hearing. Such comments shall be considered in rendering the zoning decision.

8. Irrevocable and Binding Nature of Agreement: This Agreement shall be binding on the parties hereto as continuing political and jurisdictional bodies organized under and authorized by the State of Kansas to enter such Agreement.

9. Rights of Third Parties: The parties specifically agree that it is not the intent of this Agreement to institute annexation proceedings nor to affect the rights of third parties in that regard, the intent of the Agreement being merely to establish, by agreement, the prior jurisdiction of the respective parties to proceed with and accomplish future annexations in the designated areas.

IN WITNESS WHEREFORE, four (4) copies of the above and foregoing Agreement have been executed by each of the parties on

the day and year first above written.

CITY OF SPRING HILL, KANSAS

By: _____
Mayor

Attest:

_____
City Clerk

(SEAL)

Approved:

_____
City Attorney

CITY OF OLATHE, KANSAS

By: _____
Mayor

Attest:

_____

City Clerk

(SEAL)

Approved:

City Attorney

EXHIBIT A

EXHIBIT A
PROPOSED ANNEXATION BOUNDARY
SPRING HILL/OLATHE
ANNEXATION BOUNDARY
CLARE RD
HEDGE LN
LONE ELM RD
175TH ST
183RD ST
191ST ST
195TH ST
207TH ST
WOODLAND RD
ROSEWAY RD
RENNER RD
LACKMAN RD
WEBSTER
FRANK
PIERCE RD

EXHIBIT 2

Approved February 20, 1992
Date

MINUTES OF THE SENATE COMMITTEE ON LOCAL GOVERNMENT.

The meeting was called to order by Senator Audrey Langworthy at
Chairperson

9:10 a.m./~~p.~~m. on Tuesday, February 11, 1992 in room 531-N of the Capitol.

All members were present except: Senator Gaines

Committee staff present: Theresa Kiernan, Revisor of Statutes
Mike Heim, Legislative Research
Elizabeth Carlson, Committee Secretary

Conferees appearing before the committee:

Jim Kaup, League of Kansas Municipalities

SB 563 - concerning municipalities; relating to the consolidation of services

Jim Kaup, League of Kansas Municipalities presented testimony as a proponent for **SB 563.** These bills requested by the League of Kansas Municipalitie have come about from a two year study by the League. There will be mor bills requested when the study is completed. The amendment of consolidatic of functions is just language to head off problems. The present statute on the books are rather vague. In lines 23-28, the proposition put befor the petitioners should be expressed only in general terms. Then if th proposition is approved, it is the duty of the governing bodies to develop and implement language for that specific consolidation. He also stated there is no provision for a time line but governing bodies would need to act in a timely fashion. Consolidation in the smaller rural areas may not take such a long time as the urban areas.

SB 564 - concerning municipalities; relating to certain contracts

Jim Kaup, League of Kansas Municipalities, stated this was a proposed study for the interim committee. Under this bill, the several thousand townships would be able to contract with cities. The principal beneficiaries of this bill will be the townships which may want to cut back personnel or contract for services. The principal works of the townships are roads, parks, cemeteries and some fire protection. This will allow the townships to contract out with the cities or counties or with another township for these services. It would be a consolidation of function by contract.

Senator Frahm asked if in the contract would the finances be worked out. Mr. Kaup stated this could be worked out. However, the finance problems are not addressed in this bill.

Senator Montgomery asked what can be accomplished with this that can't be accomplished already. Mr. Kaup said it would expedite procedures. They wouldn't have to go through the Attorney General's office. He said he could see the cities using this law more often and sees some opportunity for cities to join townships in services.

Mr. Kaup stated the League urges support of these bills.

The meeting was adjourned at 9:25 a.m.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Date: February 11, 1992

GUEST REGISTER

SENATE

LOCAL GOVERNMENT

NAME	ORGANIZATION	ADDRESS
George Barbee	KS Consulting Engrs	Topeka
Cathy Holdeman	City of Wichita	Wichita
Anne Smith	Ks. Assoc. of Counties	Topeka
Carol McDonell	Kansas City	Topeka

EXHIBIT 3

467 P.3d 540 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

LEAVENWORTH COUNTY BOARD OF COUNTY COMMISSIONERS, Appellee,

v.

Tamara COPELAND, Appellant.

No. 120,616
|
Opinion filed July 31, 2020

Appeal from Leavenworth District Court; Edward E. Bouker, judge.

Attorneys and Law Firms

Gregory C. Robinson, of Law Office of Gregory C. Robinson, of Lansing, for appellant.

David A. Hoffman, of Hoffman Law, LLC, of Overland Park, and R. Scott Ryburn, of Anderson & Byrd, of Ottawa, for appellee.

Before Buser, P.J., Atcheson, J., and Walker, S.J.

MEMORANDUM OPINION

Atcheson, J.:

***1** In 2016, the Leavenworth County Board of Commissioners approved a five-year employment contract with Tamara Copeland, who then served as the county's human resources director. After a change in commissioners, the board filed an action in the Leavenworth County District Court to have the contract declared void. The board later terminated Copeland, and she counterclaimed to enforce the contract's exceptionally generous severance package. The district court found the contract to be unenforceable as a legally impermissible attempt by one elected composition of the board to bind a later composition of that board. Copeland has appealed. The district court correctly applied settled Kansas law to undisputed material facts in granting the board's motion for summary judgment. We, therefore, affirm the decision.

Factual History, Procedural Progression, and Standard of Review

Given the controlling issue and the governing law, much of the convoluted factual history leading up to this litigation and the progression of the legal battle itself fade into the background. We dispense with what have become extraneous details to provide a focused overview, recognizing the parties are familiar with what we have omitted from this narrative. Because the standards for granting and reviewing summary judgment shape how we must view the relevant facts, we begin there.

A party seeking summary judgment has the obligation to show the district court, based on appropriate evidentiary materials, there are no disputed issues of material fact and judgment could, therefore, be entered in that party's favor as a matter of law. *Trear v. Chamberlain*, 308 Kan. 932, 935-36, 425 P.3d 297 (2018); *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009). In essence, the party submits there is nothing for a jury or a district court judge sitting as fact-finder to decide that would make any difference. Conversely, the party opposing summary judgment must point to record evidence calling into question a material factual representation made in support of the motion. *Trear*, 308 Kan. at 935-36; *Shamberg*, 289 Kan. at 900. When a party has identified disputed material facts, the motion should be denied in favor of a trial to permit a judge or jury to resolve those disputes after hearing witnesses testify and reviewing any relevant documentary evidence.

In ruling on a motion for summary judgment, the district court must view the evidence most favorably to the party opposing the motion, here Copeland, and give that party the benefit of every reasonable inference that might be drawn from the evidentiary record. *Trear*, 308 Kan. at 935-36; *Shamberg*, 289 Kan. at 900. An appellate court applies the same standards in reviewing the entry of a summary judgment. Because a summary judgment presents a question of law—it entails the application of legal principles to uncontroverted facts—an appellate court owes no deference to the district court's decision to grant the motion, and review is unlimited. See *Adams v. Board of Sedgwick County Comm'rs*, 289 Kan. 577, 584, 214 P.3d 1173 (2009). In making that review here, we consider the factual record to Copeland's best advantage as the party that opposed summary judgment.[1]

***2** [1]The district court judges regularly sitting in the First Judicial District, which includes Leavenworth County, recused themselves from this case. Senior Judge Edward E. Bouker, who sat in the Twenty-Third Judicial District before his retirement, was assigned to hear this case.

Factual Background and Procedural History

The board hired Copeland as the human resources director in late May 2015 with a one-year contract that included severance pay for six months if she were terminated other than for reasons that did not amount to good cause. She and the board agreed to a three-month extension of the contract while they negotiated a new employment agreement. As the record indicates, the human resources director is hired and fired by and reports directly to the three-member board of commissioners. During the contract negotiation in 2016, the commissioners were Robert Holland, Clyde Graeber, and Dennis Bixby.

The new contract came before the board at its September 1, 2016 meeting, for public consideration. By then, Bixby had been defeated in the primary election and had to go off the board in January 2017. As negotiated, the contract recited a five-year term. But other provisions of the agreement indicated a term beginning on September 1, 2016, and ending on December 31, 2021. The discrepancy is irrelevant here. The agreement outlined Copeland's job duties, salary, and fringe benefits, provisions that also do not bear directly on this legal dispute. The contract included a severance clause requiring the county to pay Copeland the balance of her salary for the remainder of the five year period, so long as she was "willing and able" to perform her work and had not been convicted of a felony or fraud "directly relating to her [job] duties."

According to the minutes of the September 1, 2016 board meeting, Holland offered remarks lauding what Copeland had achieved during her first year as human resources director as a justification for the new contract. But Holland also said "high level officials" he did not identify had tried to impugn Copeland's abilities and character because they opposed the changes; he described the contract as insulating her from continued attacks "in the next several years." The board approved the contract with Copeland on a 2-1 vote, with Graeber voting against the agreement. The minutes reflect Graeber saying he would have "no problem" extending Copeland's contract for a year but could not support the five-year contract and "the liability" some of the provisions created for the county.

Doug Smith, who defeated Bixby in the August primary and won the general election in November, joined the board in January 2017. Six months later, the board filed this action asking the district court to declare Copeland's contract unenforceable and to enter an order rescinding it. Copeland duly responded and asserted counterclaims for breach of the agreement and for tortious interference with a contract.[2]

[2]The board's petition sought similar relief against three subordinates of Copeland who also had individual employment contracts with the county. The claims involving those employees were resolved in some fashion during the district court proceedings. Those employees were dismissed as parties by agreement before the district court issued any substantive rulings on the merits of the contracts. The board and Copeland are the only parties to this appeal.

***3** In mid-September 2017, Graeber announced his resignation from the board effective September 28. Louis Kemp replaced him on October 12. Over the next three weeks, the board disbanded the human resources department, transferring those functions to the county clerk's office and later to the county administrator; placed Copeland on administrative leave and required the department employees to return their office keys and county credentials; and fired Copeland on October 30. The board took all of those actions on 2-1 votes over Holland's objection.

As the docket entries in the district court suggest, the parties vigorously litigated this case. In July 2018, the district court issued a detailed written decision finding the severance provision of Copeland's contract to be unenforceable as a legally improper restraint by one board on a successor board given the duration of the contract. The district court, however, requested additional submissions from the parties on several issues, including Copeland's counterclaim for tortious interference and the efficacy of the remainder of the employment contract. With that briefing, the district court issued a final summary judgment in December in another written decision that denied Copeland's counterclaim and found the entire employment contract to be unenforceable. Copeland has appealed the district court's rulings on the employment contract itself but not the denial of her counterclaim for tortious interference.

Legal Analysis

A. Limitation on Length of Municipal Contracts: The Simmons *Rule*

The Kansas appellate courts have long recognized that the elected members of a municipality's legislative body, such as a county commission, generally cannot enter into contracts that obligate the body beyond its current term. See *Edwards County Comm'rs v. Simmons*, 159 Kan. 41, 53-54, 151 P.2d 960 (1944); *Fisk v. Board of Managers*, 134 Kan. 394, 398, 5 P.2d 799 (1931). A municipal legislative body, thus, lacks the authority to make " 'a contract longer than [its] life' " where " 'no necessity exist[s].' " *Simmons*, 159 Kan. at 53 (quoting *Fisk*, 134 Kan. at 398). Absent necessity, the legislative exercise amounts to an impermissible attempt of the elected officials " 'to tie the hands of their successors.' " *Simmons*, 159 Kan. at 53 (quoting *Fisk*, 134 Kan. at 398). As those cases and the authority cited in them show, the rule reaches back deep into Kansas legal history. Although longevity is not necessarily veneration, the limitation on municipal authority continues to be observed. See *Kennedy v. Board of Shawnee County Comm'rs*, 264 Kan. 776, 792-93, 958 P.2d 637 (1998) (recognizing rule stated in *Simmons*); *Jayhawk Racing Properties, LLC v. City of Topeka*, 56 Kan. App. 2d 479, 499, 432 P.3d 678 (2018) (noting continued viability of rule and criteria in *Simmons*), *rev. granted* 309 Kan. 1348 (2019).

As *Simmons* suggests, the rule limiting the duration of a contract is not ironclad, and the court fashioned a test separating the permissible from the impermissible:

> "[W]hether the contract at issue, extending beyond the term, is an attempt to bind successors in matters incident to their own administration and responsibilities or whether it is a commitment of the sort reasonably necessary to protection of the public property, interests or affairs being administered. In the former case the contract is generally held to be invalid, and in the latter case valid." *Simmons*, 159 Kan. at 54.

A contract exceeding the elected body's term must be reasonable and consistent with sound public policy. *Simmons*, 159 Kan. at 54-55. The test has been cited with favor in *Kennedy*, 264 Kan. at 792, and *Jayhawk Racing*, 56 Kan. App. 2d at 498-99. What the courts outlined in *Simmons* and *Fisk* more than 75 years ago remains the governing law.

***4** If a legislative body violates the rule, it acts outside its authority, and the resulting contract is void. As an *ultra vires* municipal act, the offending contract has no binding force. It is a legal nullity. *Genesis Health Club, Inc. v. City of Wichita*, 285 Kan. 1021, Syl. ¶ 6, 181 P.3d 549 (2008); *Blevins v. Douglas County Bd. of Comm'rs*, 251 Kan. 374, Syl. ¶ 8, 834 P.2d 1334 (1992). Parties contracting with municipalities may not assert unjust enrichment, estoppel, or other equitable doctrines to obtain the benefit of the bargain from an *ultra vires* contract even if they have rendered their contractual performance. *Genesis Health Club*, 285 Kan. at 1042-43; see *Blevins*, 251 Kan. at 383-84.

B. Copeland's Five-year Contract Exceeded Board's Term

In applying those principles, we confront a gatekeeper issue: What is the "term" of a board of county commissioners? If it is more than five years, then the *Simmons* rule doesn't apply to the contract with Copeland. The district court concluded the term of the board could not be that long but declined to identify a specific period. We ultimately take the same approach and arrive at the same endpoint, although our path differs here and there.

We start with common ground. Each commissioner serves a four-year term. K.S.A. 2019 Supp. 19-202(d). The terms are staggered: Voters choose one commissioner in a given election year and the other two in the next election two years later, although that pattern may be altered when vacancies are filled between elections. K.S.A. 2019 Supp. 19-202(c). Over the course of four years, the voters elect all three commissioners. Those givens do not provide an obvious answer to the term of the board as a collective legislative body.

The parties and the district court all refer to K.S.A. 19-219, which requires county commissioners to meet the second Monday in January of *each year* to choose a chair "for a term of one (1) year" to preside over meetings. The balance of the statute discusses selection of a substitute if the elected chair is absent for a particular meeting or if he or she leaves the board during the year. Although we do not ultimately decide the point, we doubt K.S.A. 19-219 defines the term of a board of commissioners. The statute really drives nothing more than an internal administrative decision of the board members to select one of their own to preside over meetings and sets a one-year term for the presiding commissioner. The selection of a chair amounts to a bureaucratic function divorced from the makeup of the board itself or its authority to conduct the business of the county, attributes that do bear directly on what might fairly be considered the board's term.

We think the term of a municipal legislative body necessarily ties to the election cycles for the body, since the voters effectively pass on the makeup of the body. For a three-

member county commission, the term of the body would be either two years, corresponding to each election cycle regardless of the number of seats on the ballot, or four years, corresponding to the period for all of the seats to have been on a ballot. Four years also replicates the term of office, arguably lending weight to the longer period. We don't see the appointment of a replacement for a commissioner leaving office before completing his or her term as triggering a new term for the body. See K.S.A. 2019 Supp. 19-203(a) (statutory procedure for filling commission vacancy). That would render the body's term unpredictable and arbitrary. Likewise, the voters' decision to return incumbents to office wouldn't extend the body's term for precisely the same reason.

***5** The term of a county commission necessarily must be a fixed, knowable period. But the parties have pointed us to nothing definitively declaring the term, and we have fared only marginally better in our own search. Discussion in *Shelden v. Board of Commissioners*, 48 Kan. 356, 358, 29 P. 759 (1892), and repeated in *Board of Commissioners v. Smith*, 50 Kan. 350, 355, 32 P. 30 (1893), favors the idea that a board is reconstituted each election cycle, meaning the applicable term here would be two years. But we choose not to read those cases as controlling precedent, given the constitutional and statutory changes in the composition, terms of office, and other mechanics governing county commissions in the interceding century and a quarter.

In short, we think the term of the board probably was either two years or four years and under no circumstances more than four years. Since we have no need to refine the determination to decide this case, we decline the opportunity. The five-year contract the board approved for Copeland exceeded the body's term and, therefore, was subject to the rule outlined in *Simmons*.

In an effort to avert that conclusion, Copeland suggests the board had no fixed term as a legislative body because one and possibly two positions would not be on the ballot in a given election cycle, so there always would be at least one carryover commissioner from election to election. According to Copeland, the board would have a perpetual or infinite term as a result. We find the suggestion improbable. Although counties and cities, as political subdivisions of the state, have continuing and uninterrupted corporate existences, that's materially different from suggesting the elected legislative body itself operates in perpetuity unless all of its members stand for election at one time. Distinguishing legislative bodies that way because some have staggered terms of office and others don't makes no particular sense. We are disinclined to impute arbitrariness or irrationality to a common-law rule by reading into it something our predecessors have not expressly identified as one of its components.

Similarly, were the *Simmons* rule constrained in the way Copeland suggests, the *Kennedy* court presumably would have said so and relied on that ground for rejecting the contract argument made against Shawnee County in that case. The court did not and, instead, outlined and applied *Simmons* in rejecting the contract claim. *Kennedy*, 264 Kan. at 792-93. Finally, there apparently could be a sequence of vacancies and replacements between elections on a three-member county commission resulting in all three positions being on the next following general election ballot. See K.S.A. 2019 Supp. 19-202(a). The possibility, though remote, also undercuts Copeland's argument.

C. Applying the Simmons *Rule to Copeland's Contract*

We, therefore, should apply the test laid down in *Simmons* to the five-year employment contract the board entered into with Copeland. The test does not impose a categorical rule prohibiting all contracts exceeding a board's term. The limitation focuses on contracts "incident to" the board's "own administration and responsibilities." *Simmons*, 159 Kan. at 54. The hiring of a county department head answerable directly to the board falls within that rule. And the conclusion is only redoubled here, since Copeland oversaw personnel practices and decisions. Those are distinctly administrative functions tied most immediately to the internal operation of the county. The hiring of executive level employees who implement the board's decisions on—and, indeed, its vision of—how the county will operate as a governmental entity cuts to the core of the sort of administrative functions and responsibilities embraced in the *Simmons* rule.

***6** By contrast, contracts excepted from the rule secure public property or are necessary for the promotion of broad policies or programs directly improving the services delivered to the citizenry at large. The county typically contracts with third parties to accomplish those objectives. The cases offer illustrative examples that demonstrate by counterpoint why the rule applies to the contract with Copeland.

So the City of North Newton, a comparatively small municipality, could lawfully enter into a 15-year contract with the City of Newton to use the latter's sewage treatment system. See *City of North Newton v. Regier*, 152 Kan. 434, 438, 103 P.2d 873 (1940). The benefit to the residents of North Newton

seems manifest: They received a vital service without having to make the capital investment in a treatment facility. The duration of the contract was reasonable, given the effort and expense to install the required collection pipes. And North Newton paid for the service based on a fee schedule tied to usage. More recently, the Kansas Supreme Court upheld a five-year contract between Gove County and a private entity to provide trash collection because the service was vital to the public health and welfare and the arrangement avoided significant costs to purchase trucks and hire employees to pick up and dispose of trash throughout the county. See *Zerr v. Tilton*, 224 Kan. 394, 400, 581 P.2d 364 (1978).

The contract in *Simmons* also promoted a public interest, although, perhaps, in a less direct way. There, the board hired a private lawyer on a contingent fee basis to pursue delinquent taxes from a railroad in receivership with the expectation the litigation would be protracted and time consuming and any recovery uncertain. The court recognized that the contract exceeded the board's term but found it to be appropriate and enforceable, emphasizing that lawyers employed to handle extended litigation, such as the receivership action, "cannot reasonably be said ... [to] lose all authority to act the moment the term of the contracting board expires, regardless of the status of matters pending." *Simmons*, 159 Kan. at 54.

As those cases show, boards properly entered into contracts extending beyond their terms to provide essential services, such as sewage treatment and trash collection, through outside parties, when the arrangements were fiscally responsible and otherwise reasonable. The contract for legal services in a particularly involved piece of litigation similarly advanced an objective public benefit by both ensuring continuity of representation and curtailing ongoing costs through a contingent fee.

The employment contract with Copeland, as a department head reporting directly to the board, rests on demonstrably different footing. The five-year contract intruded directly and deeply into the board's administration of county operations, most particularly personnel policies and practices. The severance provision compounded the impermissible intrusion. A future board would face a material economic detriment in terminating Copeland, since she was to receive her full salary and fringe benefits for the duration of the contract. And she would have to be replaced or her duties delegated to other county employees presumably already working at capacity. When Holland urged his fellow board members to approve the contract, he touted the arrangement, in part, because Copeland "needs our protection from those that may still want to try to fire her in the next several years because of the work she is doing for the County." If Copeland were to be terminated, it would be a future board that would do it. That's precisely how things played out in October 2017. Holland, thus, promoted the contract as a means of tying the hands of a successor board.

*7 The United States Court of Appeals for the Tenth Circuit recognized a corollary to the *Simmons* rule for certain employment contracts and upheld a three-year agreement the Kansas Turnpike Authority's board made with John E. Kirchner, its preferred candidate to be the agency's general manager. *Kirchner v. Kansas Turnpike Authority*, 336 F.2d 222, 228-29 (10th Cir. 1964). The court cited *Simmons* and other Kansas cases generally limiting the duration of a contract with a governmental entity to the term of the entity's board. And the court acknowledged a potential problem with the contract because a majority of the positions on the appointed KTA board would turn over within three years.

The court held the contract with Kirchner to be valid because the three-year term was itself reasonable and likely necessary to secure the services of a qualified candidate at an acceptable salary. Those prospects would have dimmed considerably if the offer were for an at-will arrangement—all to the disadvantage of the agency. 336 F.2d at 228-29. The court pointed out that Kirchner's predecessor worked under a similar contract with a three-year term and the Kansas Attorney General's office had issued an opinion affirming the board's ability to hire a general manager for such a term. According to the court, those circumstances cut against any "ulterior motives" by the board to subvert a future board's authority. 336 F.2d at 228.

Not surprisingly, Copeland tries to fit her contract within the confines of the *Kirchner* exception. We assume that twist on the *Simmons* rule is consistent with and ought to be engrafted to Kansas law. A federal court opinion is not, however, a binding declaration of state law. *KPERS v. Reimer & Koger Associates, Inc.*, 262 Kan. 635, Syl. ¶ 12, 941 P.2d 1321 (1997). But even with that assumption, Copeland's effort fails. First, of course, Copeland accepted the position as human resource director with a one-year contract. We gather the board had reorganized how the county handled personnel functions, and Copeland was the first to occupy the newly created position of human resources director. But nothing in the record supports the notion that a five-year contract was

essential for attracting or retaining well-qualified candidates for the job.

In the same vein, Copeland argues that the contract conferred a public benefit because under her direction, with the support of the board that brought her in, the county moved from personnel processes rooted in cronyism to ones based on merit with some civil service protections for some employees. And Copeland characterizes her ouster as part of the new board's plan to return to a less-than-professional system apparently affording the commissioners considerable say-so in who would get what jobs with the county. Holland also suggested the county realized cost savings through an improved payroll system and other bureaucratic changes. The appellate record is skimpy on evidence establishing those claims. Still, taking them as facially accurate, they don't establish a tenable legal basis for upholding the contract, especially given its duration and severance provision.

Improvements to internal personnel functions, like payroll, don't reflect the sort of core public services warranting extended contractual commitments upheld in *City of North Newton* and *Zerr*, even if they may be more efficient or less expensive. Although each member of this panel may have a general preference between patronage and civil service systems for local governments, we would overstep our judicial prerogative to treat one as inherently and inestimably good and the other as similarly bad in deciding this case. Given the limited record and the absence of evidence the county has engaged in impermissible hiring or other personnel practices based on political affiliation or protected characteristics such as race or sex, our choice would be a generic one intruding upon the board's legislative authority. In short, Copeland's generalized claim that she and Holland were advancing the cause of good government doesn't save her contract.

D. Copeland Identifies No Factual Disputes Precluding Summary Judgment

***8** Copeland suggests summary judgment was inappropriate because there remain disputed facts bearing on the board's intent in entering a five-year contract with her and the question of intent is material to the outcome. But Copeland doesn't point to specific disputes in the summary judgment papers or the supporting evidentiary materials submitted to the district court. We are not obligated to scour the record for some particular factual dispute that may be material simply because the party losing on summary judgment generally asserts there must be one.

The record does show the board had the intent to contract with Copeland to remain as the human resources director for five years; that's apparent from the agreement itself. The contract facially appears to violate *Simmons*—it exceeds a term of the board and simply retains a high-level county employee answerable directly to the board in excess of that term. We understand Copeland to be arguing, in part, that there are factual disputes about why the board (or more precisely Holland and Bixby) believed a five-year contract served a beneficial public purpose or was necessary in a way fitting it within an exception to the *Simmons* rule.

In opposing the county's motion for summary judgment, Copeland offered evidence to the district court bearing on the board's reasons or motives for the contract. She says there may be disputes about that evidence requiring a jury trial. But we have considered that evidence in the best light for her, consistent with the proper standard of appellate review, and found it insufficient to bring the contract within an exception to *Simmons*.

As Copeland suggests, a jury could consider and resolve conflicts in the material evidence. In doing so, the jury might weigh the evidence *against* Copeland on some of those points. But we have resolved any possible conflict *in favor of* Copeland—the best she could possibly do in front of a jury. Even in that light, she has failed to establish sufficient legal grounds to warrant enforcement of the contract. Accordingly, the existence of such a factual dispute would not preclude the district court from entering summary judgment against Copeland or us from affirming that ruling. See *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 276, 261 P.3d 943 (2011) (Summary judgment may be entered on what is normally a fact question for a jury when the evidence taken in the best light for the nonmoving party fails to establish a basis for the jury to return a verdict for that party.).

We have defused Copeland's argument by assuming away any conflict by considering the factual record entirely in her favor. We, therefore, have no reason to reverse the summary judgment simply because there might have been material factual disputes.

E. Severability

Finally, Copeland argues that the clause in the contract fixing the term at five years may be severed or excised and the remainder of the agreement enforced. The argument misapprehends the *Simmons* rule. If the rule applies (and we

have determined that it does), then the contract is void as an *ultra vires* exercise. The board did something it has no legal authority to do. As we have said, the result is a legal nullity. Just as equitable doctrines will not protect a party contracting with the municipality from the adverse consequences of the agreement being declared void, a district court may not sever the offending portion of the contract or reform its terms to resuscitate the bargain. Simply put, if a contract with a municipality is void under *Simmons*, there is nothing that can be manipulated into a viable agreement. See *Blevins*, 251 Kan. at 383-85. The impact on the party contracting with the municipality is undeniably harsh, and that party's protection lies in assessing the municipality's authority to act before entering into the arrangement. 251 Kan. at 385.

***9** In fashioning her argument, Copeland first points to the severability clause in the contract. The clause states that if a court were to find "any provision ... of this agreement ... to be invalid, the remaining terms shall remain in full force and effect." But the clause does not apply here. Because the contract was void as a violation of the *Simmons* rule, none of its terms ever became effective. So there was nothing that could remain in effect. By way of a contrasting example, suppose a city entered into a service contract with a private party that included a forum selection clause requiring any suit for a breach be filed in that city's municipal court. Municipal courts in Kansas don't have the authority to hear civil actions, such as breach of contract claims. If the contracting party sued the city in the district court and the city objected, the district court could find the forum selection clause invalid and enforce the remainder of the agreement. The ineffective forum selection clause would not taint the rest of the otherwise valid contract. Here, however, the contract's legally impermissible duration contaminated every aspect of the agreement.

Copeland cites *Gilhaus v. Gardner Edgerton Unified School Dist. No. 231*, 138 F. Supp. 3d 1228, 1239-40 (D. Kan. 2015), as supporting a different conclusion. In that case, several school district employees sued the district and other defendants under both federal civil rights law and Kansas law, and the federal district court denied defendants' motion to dismiss on the grounds the complaint failed to state claims upon which relief could be granted. As to a state law contract claim, the court held that if a "post-employment benefits clause" in School Superintendent William Gilhaus' contract exceeded the school board's "authority," it could be severed, and the remainder of the agreement could be enforced. The court cited cases relying on general contract principles governing severability. And the court also determined the contract did not impermissibly bind future school boards because various provisions merely allowed those boards to freely exercise or decline options. 138 F. Supp. 3d at 1138-39. So the court recognized the contract as a whole to be viable rather than void. The court was not addressing a legal circumstance it would consider analogous to this one. Nor do we see them that way. In turn, the court's treatment of severability is inapposite to Copeland's situation. If they were legally comparable, we would find the court's willingness to sever portions of the contract to be inconsistent with *Simmons* and *Blevins* and their specific treatment of *ultra vires* municipal contracts.

Copeland alternatively argues the district court in this case could have treated the contract as one for a year, paralleling the original agreement, and, thus, replacing the offending five-year term. This alternative solution suffers from multiple problems. Again, the five-year contract was void, so there was nothing to reform or revise. Even if there were, the district court would have been imposing a contract term on the parties that bore no relationship to their actual intent or the resulting written agreement. Typically, courts cannot and do not rewrite the parties' contract to insert new or different terms. See *Fourth Nat'l Bank & Trust Co. v. Mobil Oil Corp.*, 224 Kan. 347, 353, 582 P.2d 236 (1978) ("It is not the function of the courts to make contracts but to enforce them."); *Lindsey Masonry Co. v. Murray & Sons Construction Co.*, 53 Kan. App. 2d 505, 533, 390 P.3d 56 (2017) (Atcheson, J., concurring) ("[C]ourts typically cannot make contracts for the parties by imposing essential terms that the parties themselves have failed to agree upon.").

In addition, as the County points out, a one-year term would not have helped Copeland. The board adopted the contract on September 1, 2016, and she signed it the same day. The successor board first voted to take some arguably adverse action against Copeland inconsistent with the contract on October 12, 2017, and voted to fire her on October 30. Copeland's hypothetical one-year contract would have expired by then. Just what their employment relationship would have been at that stage isn't entirely clear, but the contract itself would not have governed. Copeland's suggestion of a one-year contract doesn't stave off summary judgment.

Conclusion

***10** Having considered the parties' arguments and authority and having examined the summary judgment record, we find

no legal or factual errors in the district court's determination that the five-year contract between the board and Copeland is void and, thus, unenforceable as a matter of law.

Affirmed.

All Citations

467 P.3d 540 (Table), 2020 WL 4379132

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

Certificate of Service

I hereby certify that the above and foregoing Appellant's brief was served on the counsel of record by notice of electronic filing on the 7th day of January 2022 with a copy of the same foregoing document being served via electronic mail upon:

Curtis L. Tideman, #13433
10851 Mastin Blvd., Suite 1000
Overland Park, KS 66210-1669
(913) 451-5100
(913) 451-0875 (FAX)
Email: curtis.tideman@lathropgpm.com

ATTORNEY FOR DEFENDANTS -
APPELLEES/CROSS-APPELLANTS

/s/ Anthony F. Rupp
Anthony F. Rupp, #11590