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.

CITY OF OLATHE'S RESPONSE TO BRIEF OF AMICUS CURIAE, BONITA STATION INVESTMENTS, LLC

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

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RESPONSE TO BONITA STATION'S STATEMENT OF INTEREST

Bonita Station Investments, LLC ("Bonita Station") acknowledges that it is "the owner of the 125-acre property underlying this annexation dispute." Amicus Br. at 1. From the beginning, it was well aware of this lawsuit and had ample opportunities to intervene but declined to do so.

As an applicant for annexation in the City of Spring Hill, Bonita Station was on notice that Spring Hill's annexation policy provided that "[a]ll annexations undertaken by the City will be in conformance with the *Spring Hill Comprehensive Plan*." (R. VI, Ex. 26, Item 5). It was also on notice that Kansas statutes permit comprehensive plans "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[.]" (Emphasis added). K.S.A. 12-747(a).

There is no dispute that, at the time Bonita Station applied for annexation into Spring Hill, there was an Annexation Contract (the "Contract") prohibiting Bonita Station's requested annexation, and the Contract was adopted into Spring Hill's Comprehensive Plan. Appellant Br. at 4, 8-9. The Contract was entered with the advice of counsel for both cities, approved by the city councils of both cities, and duly executed on behalf of both cities. (R. I, 24, 30-31; R. V, 109:13-25). There is no dispute that Bonita Station's annexation request would cause Spring Hill to breach the Contract

with Olathe unless a court would deem the Contract to be unenforceable. (R. V, 50:14-16, 81:20-21).

The agenda for the Spring Hill City Council meeting of March 11, 2021, included Bonita Station's annexation petition and ordinance. (R. VI, Ex. 14, Items 9-11). Bonita Station would have been on notice that the annexation did not occur because Olathe was granted a restraining order on March 11, 2021, which prohibited annexation of land north of the Boundary Line, including Bonita Station's property, designated "Project Extract." (R. III, 18-22). Accordingly, by March 11, 2021, Bonita Station was well-aware that Olathe had sued Spring Hill to enforce the Contract between the two cities.

The district court later held an evidentiary hearing and denied Olathe's request for temporary injunction. (R. V, at 25; R. III, 96). Again, Bonita Station did not present evidence at the hearing or intervene in the action. Within hours of the ruling, Spring Hill adopted ordinances annexing Bonita Station's property. (R. IV, at 2).

On July 30, 2021, the district court stayed its ruling denying temporary injunction and entered an injunction during the pendency of appeal, which prohibited Spring Hill from "taking further steps to annex, approve, develop, or issue permits for the land designated as 'Project Extract,' including but not limited to the site designated for the Carvana project[.]" (R. IV, at 4). But still, Bonita Station did not move to intervene.

Now, for the first time on appeal, Bonita Station seeks to inject new issues into this case regarding purported landowner rights. Bonita Station declined, time and time again, to try to intervene in this lawsuit to protect any interests it may have had that Spring Hill did not already represent.

ARGUMENTS AND AUTHORITIES

I. Introduction

Bonita Station asserts that, "If enforced, annexation agreements such as that between Olathe and Spring Hill permanently impose one city council's annexation policy decisions on its successors, forever contract away the city's annexation power, and unilaterally eliminate landowners' rights to seek annexation by the city of choice[.]" Amicus Br. at 1-2. This argument fails because it: (1) was not raised or ruled on below, and (2) is both factually and legally wrong. The cities of Spring Hill and Olathe agreed upon a valid and legally binding contract that serves the public interest and is authorized by K.S.A. 12-2908 and the Home Rule Amendment, Kan. Const. Art. 12, § 5. It does not unlawfully contract away legislative powers and it does not take away any purported "landowners' rights."

Bonita Station's argument also cuts against the practical reality of annexation, which is, by its nature, a long-term decision. De-annexation is possible, but rare. See K.S.A. 12-504(b). The boundaries created through annexation are not like policy platforms, which ebb and flow with the tide of

popular support. Instead, they provide long-term stability for a city and its residents, enabling the provision of critical government services and providing certainty to property owners, inside and outside of city limits. See R. V, 169:10-170:14.

Importantly, the composition of a governing body can change every few years (or sooner). See R. V, 88:3-6. If annexation decisions changed every few years, city services and property owner expectations would be in limbo and no long-term comprehensive planning could be carried out. This result would foster the same chaos Johnson County cities experienced during the annexation wars of the late 20th century. See Appellant Br. at 10. Comprehensive planning for cities and abutting rural communities would be meaningless.

Through K.S.A. 12-2908 and the Home Rule Amendment, the Legislature gave cities critical tools to promote the public welfare through long-term, locally-driven development decisions, including the Contract. Bonita Station's arguments would produce absurd results, create instability, and simply cannot override the statutory and constitutional powers afforded to cities.

II. Bonita Station cannot raise issues for the first time on appeal.

Bonita Station's argument regarding landowner rights was not raised or ruled upon in district court. "Kansas appellate procedure does not allow a

nonparty, including an amicus curiae, to raise an issue for appellate review[.]" *Sierra Club v. Moser*, 298 Kan. 22, 87-88, 310 P.3d 360 (2013); see *State ex rel. Six v. Kansas Lottery*, 286 Kan. 557, 561, 186 P.3d 183 (2008) ("[T]he *amici* do not have standing to file appeals. We will not consider issues argued by nonparties when those issues are beyond the ones raised by the parties."). Bonita Station—a nonparty who chose not to intervene below—simply cannot raise an issue for the first time on appeal. See Appellant's Response to Mot. to File Amicus at 4-6 (02-14-2022). Accordingly, the Court should disregard this issue.

III. The District Court found that the Contract protects landowner's interests.

The Contract protects landowner's interests by giving them certainty about future land use and government services. See Appellant Br. at 9-10. The district court found that, without the Contract's enforcement, "Olathe would be unable to provide certainty to property owners regarding compatible land uses and development opportunities[.]" (R. IV, 2.) Bonita Station cannot rewrite or rebut the record on appeal. See *LSF Franchise REO I, LLC v. Emporia Restaurants, Inc.*, 283 Kan. 13, 19, 152 P.3d 34 (2007) ("The appellate court does not weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact.").

Bonita Station tellingly provides no support for the premise that landowners have a right to be annexed by the city of their choice, or to petition the city of their choice for annexation in the first place. The annexation statutes, K.S.A. 12-519 *et seq.*, provide no such rights. Instead, the annexation statutes operate to protect landowners from nonconsensual annexation of their property and to provide a remedy when a city annexes property but fails to supply governmental services in return. See K.S.A. 12-520(a)(7) (requiring landowner consent); K.S.A. 12-533 (permitting landowner to sue city for failure to provide services); see also *Stueckemann v. City of Basehor*, 301 Kan. 718, 730-31, 348 P.3d 526 (2015) ("In addition to the specific purpose of notification, we have held the general 'purpose of the annexation statutes is to protect the rights of the landowners against unilateral action by a city annexing their land.'"). The annexation statutes also do not require a city to accept a landowner's petition for annexation. See, e.g., K.S.A. 12-520(a) ("the governing body of any city, by ordinance, *may* annex land to such city if any one or more of the following conditions exist" (emphasis added)). Thus, Bonita' Station's conclusory claim that enforcing the Contract would harm landowners' rights is a red herring. See Amicus Br. at 1-2.

Finally, on page nine of its brief, Bonita Station asks a series of speculative rhetorical questions that have no bearing on this appeal. The crux of Bonita Station's complaint appears to be that its property may not be

annexed by the city of its choosing at the time of its choosing. This is not a legally cognizable harm. For example, a landowner in Overland Park cannot petition to have property annexed into Olathe or Lenexa. The Legislature did not give landowners a statutory right to annex their property into the city of their choosing.

IV. Bonita Station's perpetual contract argument is not preserved, and regardless, the Contract's termination provisions are enforceable.

The Contract specifically allows for termination by mutual consent. (R. I, 25). It further calls upon the parties to meet periodically to discuss comprehensive planning and the provision of municipal services along the annexation borders. (R. I, 28-29). The parties can renegotiate the terms, create exceptions to the Boundary, or agree to discontinue the Contract altogether.

To the extent Bonita Station argues that the Contract is perpetual, such was not the ruling of the district court and is not preserved for the reasons stated in Section I above and section II(A) of Olathe's Reply Brief. Regardless, the Contract's termination provisions are enforceable, as set forth in Section II(B) of Olathe's Reply Brief and Section II of its Cross-Appellee Brief.

V. Contrary to Bonita Station's argument, the common law ruling of Jayhawk Racing does not render the constitutionally and statutorily-authorized Contract unenforceable.

The *Jayhawk Racing* holding applies to public-private contracts, not to contracts between municipalities authorized by statute or the Kansas

Constitution. Although Bonita Station spends much of its brief analyzing the origins of *Jayhawk Racing Properties, LLC v. City of Topeka*, 313 Kan. 149, 484 P.3d 250 (2021), its analysis ignores the *Simmons* rule, which is applicable here and has coexisted with such caselaw for decades. See *Bd. of Comm'rs of Edwards Cty. v. Simmons*, 159 Kan. 41, 151 P.2d 960, 969 (1944). *Jayhawk Racing* did not overrule (or even mention) the *Simmons* rule, which provides that a contract may bind successive governing bodies if "it is a commitment of a sort reasonably necessary to protection of the public property, interests or affairs being administered." *Simmons*, 151 P.2d at 969. Put simply, the *Simmons* rule is not limited by, or confined to, the *Jayhawk Racing* holding. The crux of the *Simmons* rule is that certain long-term contracts, as here, are necessary for the protection of the public interest. See Appellant Reply Br., Section III(D).

To bolster *Jayhawk Racing*'s applicability, Bonita Station string cites cases for the proposition that annexation decisions are a "legislative function." See Amicus Br. at 4-5. But these cases are taken out of context. They do not concern *Jayhawk Racing*, its predecessors, or municipal contracts. Instead, they distinguish between the advisability of annexation (a legislative function) and the role of courts in reviewing an annexation for statutory compliance (a judicial function). For example, *State ex rel. Jordan v. City of Overland Park*, 215 Kan. 700, 527 P.2d 1340 (1974), states:

> "It is unquestionably true that the annexation of territory by a municipality is a pure legislative function granted to municipalities by the legislature of the State. The primary judicial function upon review of this municipal function is to insure that the municipality has acted within the scope of the legislative authority and that such action is reasonable."

City of Overland Park, 215 Kan. at 708-09 (quoting *Botsford v. City of Norman*, 354 F.2d 491, 494 (10th Cir. 1965)).

The other cases string-cited by Bonita Station stand for the same proposition—that the advisability of annexation is a legislative decision, and a court is limited to reviewing an annexation for statutory compliance. See *McDowell v. City of Topeka*, 239 Kan. 263, 266, 718 P.2d 1308 (1986) ("The platting and annexation of land by municipal corporations are legislative functions.... The wisdom, necessity or advisability of annexing territory to cities is not a matter for consideration by the courts. The basic function and duty of the courts is to determine whether a city has statutory authority and whether it has acted thereunder in passing an annexation ordinance."); *Cedar Creek Properties, Inc. v. Bd. of Cty. Comm'rs of Johnson Cty.*, 249 Kan. 149, 153, 815 P.2d 492 (1991) (same); *City of Lenexa v. City of Olathe*, 228 Kan. 773, 774-75, 620 P.2d 1153 (1980), *on reh'g*, 229 Kan. 391, 625 P.2d 423 (1981) (same); *Sabatini v. Jayhawk Const. Co.*, 214 Kan. 408, 413, 520 P.2d 1230 (1974) (same); see also *Appeal of City of Lenexa to Decision of Bd. of Cty. Comm'rs of Johnson Cty.*, 232 Kan. 568, 576, 657 P.2d 47 (1983) ("The judicial

review of the Board's determination of the *advisability* of the annexation, however, is the review of the legislative function. The duty of the district court, and of this court on appeal, is limited to a determination of whether the Board has the statutory authority to enter the order which it made.").

In sum, these cases distinguish between the legislative role of deciding to annex a given property and the judicial role of reviewing that annexation for statutory compliance—they do not state that a city's contract to enter or refrain from annexation is a "legislative function," as that term is used by *Jayhawk Racing*. Nor do they undermine the applicability of the *Simmons* rule, K.S.A. 12-2908, or the Home Rule Amendment, Kan. Const. Art. 12, § 5, which independently authorize the Contract. If anything, these cases caution against judicial intervention in the realm of annexation in the absence of any statutory or constitutional violation, which have not been alleged here.

Bonita Station also points to certain caselaw from other states, which hold that annexation contracts are not enforceable against successive governing bodies. Amicus Br. at 5-7. But Bonita Station's reliance on such caselaw is misplaced. The leading case cited by Bonita Station, *City of Safety Harbor v. City of Clearwater*, 330 So. 2d 840, 841 (Fla. Dist. Ct. App. 1976), is outdated, as it was decided before Florida enacted its Interlocal Service Boundary Agreement Act in 2006, F.S.A. § 171.20 *et seq.*, which authorizes

annexation contracts. See L. 2006, c. 2006-218, § 1, eff. June 14, 2006; see also F.S.A. § 171.203(6)(e).

Other more persuasive caselaw has, in contrast, upheld the enforceability of annexation contracts. See *United City of Yorkville v. Vill. of Sugar Grove*, 376 Ill. App. 3d 9, 875 N.E.2d 1183 (2007) (upholding annexation contract ("boundary line agreement") between neighboring city and village); *City of Kennedale v. City of Arlington*, 532 S.W.2d 668, 673 (Tex. Civ. App. 1976) (upholding annexation contract ("apportionment agreement") between the cities of Fort Worth and Kennedale, in which Fort Worth "relinquish[ed] all extraterritorial jurisdictional rights" to the land at issue); see also *City of Centerville v. City of Warner Robins*, 270 Ga. 183, 508 S.E.2d 161 (1998) (upholding consent order between two cities in which "both municipalities were estopped from 'entertain[ing], accept[ing], or approv[ing] of an annexation petition or request which includes territory or property within the water or sewer service area of the other party.'").

However, even this persuasive caselaw does not account for the uniqueness of Kansas law, which provides broad Home Rule powers and statutory authority for annexation contracts, or the character of annexation, which is, by its nature, a long-term decision that shapes the orderly development of a city for decades.

VI. The Contract is authorized by K.S.A. 12-2908.

Bonita Station argues that the Contract does not fall under K.S.A. 12-2908 because "[n]either city actually 'performs' any 'service, activity or undertaking' pursuant to the agreement." Amicus Br. at 11. Yet, the Contract states the clear intent to avoid duplication of the provision of extraterritorial services; to engage in joint planning with respect to the provision of services; to provide certainty to property owners regarding the provision of services; and to encourage the provision of services to landowners. (R. I, 23-26). Undisputed testimony established that the Contract is critical to, and inseparable from, the performance of government services. See Appellant Br. at 21.

Bonita Station further argues than an agreement to refrain from exercising annexation powers does not qualify as a performance. Amicus Br. at 11. This narrow construction of performance under a contract runs counter to black letter law. See Forbearance or Promise of Forbearance, 3 Williston on Contracts § 7:44 (4th ed.). A party to a forbearance contract "performs" by fulfilling the contractual duty, which means refraining from action here. See Black's Law Dictionary (9th ed.) at 1252 (defining "performance" as "[t]he successful completion of a contractual duty"). Thus, the act of refraining from annexation under the Contract also qualifies under K.S.A. 12-2908 as performance of a governmental activity or undertaking.

Bonita Station's argument that the Contract does not fall under K.S.A. 12-2908 because it bears similarities to K.S.A. 12-2904 is easily dismissed. Amicus Br. at 11. As explained in Section II of Olathe's Cross-Appellee Brief, any similarity between K.S.A. 12-2904 and the Contract is irrelevant to the question of whether the Contract is independently authorized by K.S.A. 12-2908.

Finally, Bonita Station claims that K.S.A. 12-2908 does not create an exception to the general common law rule that one governing body cannot bind a subsequent one. In support, Bonita Station cites the dissenting opinion in *Robinson v. City of Wichita Employees' Ret. Bd. of Trustees*, 291 Kan. 266, 241 P.3d 15 (2010) for the proposition that "when the legislature intends to abolish a common-law rule, it must do so in an explicit manner." 291 Kan. at 298 (Luckert, J., dissenting). However, this statement does not represent the standard this Court currently follows. Instead, the Court has held: "When the legislature chooses to enact statutes that control specific areas that were formerly controlled by the common law, the statutory enactments supersede the common-law rules." *Stanley v. Sullivan*, 300 Kan. 1015, Syl. ¶ 1, 336 P.3d 870 (2014). Applying the correct standard, it is clear the Legislature enacted K.S.A. 12-2908 to control the area of contracts between municipalities that involve the performance of a government service, activity, or undertaking, thus superseding the common law rule. See *State v. Spencer Gifts*, 304 Kan. 755,

Syl. ¶ 2, 374 P.3d 680 (2016) ("The plain language selected by the legislature, when it does not conflict with constitutional mandates, trumps both judicial decisions and the policies advocated by the parties.").

VII. The Contract is authorized by the Home Rule Amendment.

Bonita Station tries to limit the scope of the Home Rule Amendment beyond its design. It suggests that K.S.A. 12-101 limits a city's contracting authority only to "corporate or administrative powers." Amicus Br. at 13. However, K.S.A. 12-101's list of Home Rule powers is illustrative and non-exhaustive. The statute says: "Each city being a body corporate and politic, may *among other powers*…Make 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. (Emphasis Added.)

Within its proper scope, the Kansas Constitution confers broad powers on cities "to determine their local affairs and government" and such powers "shall be liberally construed for the purpose of giving to cities the largest measure of self-government." Kan. Const. Art. 12, § 5(b) and (d). Moreover, a city's exercise of its home rule power is valid unless it conflicts with a state law uniformly applicable to all cities that governs the subject. See *Dwagfys Mfg., Inc. v. City of Topeka*, 309 Kan. 1336, 1340, 443 P.3d 1052 (2019). Neither Bonita Station nor Spring Hill have identified any uniformly applicable statute that governs the subject of forbearance from annexation. Nor could they.

Ultimately, the Contract falls within the scope of the Home Rule Amendment because it solves local problems with local solutions that are not already governed by state law. See Appellant Br. at 25-28. *Jayhawk Racing* did not, and could not, limit the scope of cities' Home Rule power.

CONCLUSION

The Contract is valid, enforceable, and binding against successive governing bodies because it is authorized by statute, the Kansas Constitution, and common law. Olathe asks this Court to reject Bonita Station's attempt to inject new issues into this appeal and to provide all relief outlined in Olathe's prior briefing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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