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

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

BRIEF OF DEFENDANTS – APPELLEES/CROSS-APPELLANTS

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Oral Argument: 15 Minutes

Dated: February 21, 2022

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STATEMENT OF ISSUES ON APPEAL

I. Whether, in dismissing Olathe's lawsuit, the District Court correctly applied this Court's ruling in *Jayhawk Racing Properties, LLC v. City of Topeka*, 313 Kan. 149, 484 P.3d 250 (2021) (Jayhawk Racing)?

II. Whether, on the current record, Olathe is entitled to have this Court enter the temporary injunction refused by the District Court?

STATEMENT OF ISSUES ON CROSS-APPEAL

I. Whether the District Court erred in determining that approval of the Attorney General was not required for the validity of the Annexation Agreement under the Interlocal Cooperation Act ("ICA"), K.S.A. 12-2901 et. seq.?

STATEMENT OF FACTS

This action was brought by the City of Olathe ("Olathe") to enforce perpetual restrictive covenants set forth in an Annexation Agreement with the City of Spring Hill ("Spring Hill") executed in 2006. (R. I, 4). The District Court dismissed Olathe's Petition based upon this Court's holding in *Jayhawk Racing Properties, LLC v. City of Topeka*, 313 Kan. 149, 484 P. 3d 250 (2021) ("Jayhawk Racing"). (R. III, 96, 127). To summarize, the District Court held that the contract was unenforceable, as a matter of law, because it attempted to bind future City Councils to perpetual territorial restrictions in violation of *Jayhawk Racing*. (R. III, 96, 127). Olathe appeals that dismissal.

Spring Hill had argued that the Annexation Agreement was also invalid for lack of Attorney General approval required by K.S.A. 12-2904 of the Interlocal Cooperation Act ("ICA"). (R. III, 24). Indeed, Olathe did not plead that the agreement was approved by the Attorney General. (R. III, 4). In fact, at the evidentiary hearing on May 19, 2021, Olathe's former attorney admitted that Attorney General approval was not even sought. (R. V, 132:1-21). The District Court, however, disagreed with Spring Hill on this point, concluding that Attorney General approval was not necessary. (R. III, 104-05). Spring Hill cross appeals on this issue, arguing that the ICA is sufficient alternative grounds for the District Court's dismissal.

At the district court level, Olathe successfully argued that K.S.A. 12-2908 permitted the Annexation Agreement to be valid without Attorney General approval as an agreement "to perform any governmental service, activity or undertaking which each contracting municipality is authorized by law to perform." (R. III, 104-05). Olathe never identified or offered any evidence of the *performance* of any such *governmental service, activity or undertaking*. (R. V, 25-180). The Annexation Agreement identifies no such qualifying "service, activity or undertaking." (R. I, 22-31).

At the district court level, Olathe also argued that it had "relied" upon the Annexation Agreement in making policy. (R. V, 22). In support of its reliance

argument, Olathe offered conclusory testimony from its Chief Planning and Development Officer Amy Nassif. (R. V, 66-108). Although Ms. Nassif testified generally about all of the ways in which an enforceable Annexation Agreement would make her job easier, it cannot be said that the testimony supported a factual finding of "reliance." Olathe offered no evidence, for example, that any supposed reliance was either reasonable or detrimental. There was no evidence suggesting how Olathe's conduct might have been different had the Annexation Agreement not been executed.

Ms. Nassif only joined the Olathe's staff in 2017. (R. V, 96: 6). Her testimony, therefore, did not specifically address reliance on the 2006 contract. Ultimately, the District Court did not adopt Olathe's "reliance" argument and made no factual finding of "reliance." (R. III, 96, 127).

Olathe and Spring Hill entered the 2006 Annexation Agreement with the full knowledge that its validity was legally questionable. Olathe's former attorney, Thomas Glenstra, acknowledged that the Annexation Agreement adopted a "novel approach." (R. V, 128:24). More specifically, he testified, "This whole interlocal agreement for annexation purposes is a novel concept." (R. V, 125:21-22).

Mr. Glenstra also remembered an attorney for the City of Overland Park who expressed the opinion that the agreement was of questionable validity because it sought to bind subsequent governing bodies. (R. V, 127-28). The District Court

took judicial notice that, in 2005, the city attorney for Overland Park referred to their annexation agreement with Olathe as a moral commitment "as opposed to a legal commitment." (R. V, 160-163). Mr. Glenstra ultimately agreed that "everybody" entered into such agreements "with the knowledge that it may or may not be valid." (R. V, 128:23). Accordingly, in its Findings of Fact, the District Court said, "At the time Spring Hill and Olathe entered the annexation contract, there was a question as to whether the contract was binding in that it binds future city councils to the agreement." (R. III, 99).

Several new City Council members have been elected and seated in Spring Hill since the execution of the 2006 Annexation Agreement. (R. V, 157). In fact, at the time this matter was heard in the District Court, only one Spring Hill Councilmember remained unchanged since 2006. (R. V, 157:15).

Representatives of Spring Hill did approach Olathe officials in good faith to notify Olathe of its intentions to annex property outside the boundary restrictions expressed in the Annexation Agreement. (R. V, 177). Since, like the District Court, Spring Hill believes that the contract is invalid, that approach cannot be accurately characterized as a threatened "breach" of contract as Olathe characterizes it. Spring Hill then placed the annexations on the agenda for a City Council meeting on March 11, 2021. (Appellant's Brief, p. 6). Olathe subsequently filed this action and, with only a few hours of notice to Spring Hill, obtained a Temporary Restraining Order

preventing the annexations on the eve of that City Council meeting. (Appellant's Brief, p. 6).

At the evidentiary hearing on May 19, 2021, Spring Hill offered evidence that the annexations were being sought for a project called "Project Extract," which referred to the proposed construction of a Carvana facility. (R. V, 158:11). The potential benefits of the Carvana facility include employment and tax revenue which would benefit not only Spring Hill but all of Johnson County. (R. V, 173-74). Spring Hill offered evidence that Olathe could not deliver sewer service to the Carvana project in the same timely manner as Spring Hill. (R. V, 172:18-173:15). Spring Hill also offered evidence that its proposed annexations, unlike any annexation which Olathe could propose, were contiguous to current city limits; i.e. not an "island" annexation. (R. V, 164:5-15). Finally, Spring Hill offered evidence that Carvana would probably abandon the deal if Olathe's Application for Preliminary Injunction were granted. (R. V, 171:21-172:7).

On June 14, 2021, the District Court filed its Judgment denying Olathe's request for preliminary injunction. (R. III, 96). As of the entry of the Court's Judgment on June 14, 2021, there was no injunctive restraint or other legal impediment to completion of the annexations which had been originally scheduled for action on March 11, 2021. Hoping to salvage the Carvana deal, Spring Hill immediately proceeded to adopt the previously scheduled annexation petitions.

(Appellant's Brief, p. 13).

After filing this appeal, Olathe requested a stay of proceedings in a filing dated June 16, 2021. (R. III, 107; R. IV, 2). Over Spring Hill's objections, the District Court granted the stay on June 30, 2021. (R. V, 181). The Court of Appeals subsequently entered a similar order on September 2, 2021.

ARGUMENT AND AUTHORITY

I. The District Court correctly dismissed Olathe's lawsuit because it sought to enforce a perpetual contract binding future governing bodies in violation of *Jayhawk Racing*.

Standard of Review

Spring Hill agrees that the standard of review on a motion to dismiss is *de novo*.

This Court has recently held that "one city council may not bind a subsequent one to its political decisions" involving the exercise of governmental functions. *Jayhawk Racing Properties, LLC, et. al. v. City of Topeka*. 313 Kan. 149, 161, 484 P.3d 250, 258 (2021). Having determined that the contract in Jayhawk Racing was an exercise of a governmental function, this Court concluded that it "does not subject the City to a legally enforceable obligation." 313 Kan. at 161. The subject matter of the Annexation Agreement in this case compels the same result.

In *Jayhawk Racing*, the Plaintiffs attempted to enforce a contract entered by a previous City Council against the City of Topeka, years after members of the

contracting City Council had been replaced by election. In *Jayhawk Racing*, the contract at issue was a Memorandum of Understanding ("MOU") which purported to bind the City of Topeka to issue STAR bonds for development of the Heartland Park racing facility. This Court said, "Because the decision of the City Council to enter into the MOU and move forward on issuing STAR bonds was a governmental decision, the newly elected City Council had no obligation to carry out the policies of its predecessor." 313 Kan. at 162. Likewise, the City of Spring Hill cannot be perpetually bound to governmental policy decisions made by the City Council which was in place more than fifteen years ago.

In *Jayhawk Racing*, this Court said that the City of Topeka "was not bound to act in conformity with the MOU … because the City no longer considered the MOU to be in the best interests of the citizens of Topeka." 313 Kan. at 162. In this case, the current Spring Hill governing body no longer considers the 2006 Annexation Agreement to be in the best interests of the citizens of Spring Hill. While the 2006 governing body may have believed that eliminating any possibility of "annexation wars" justified drawing permanent boundaries, the current governing body does not. Under this Court's *Jayhawk Racing* decision, the 2006 governing body had no right to contractually bind all subsequent governing bodies to the policy positions it made in 2006.

"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, while proprietary functions are exercised when an enterprise is commercial in character, is usually carried on by private individuals, or is for the profit, benefit, or advantage of the governmental unit conducting an activity." *Jayhawk Racing*, 313 Kan. at 156. (Citing *KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, Syl. 6 (1997). In *Jayhawk Racing*, the governmental function pertained to taxation and the approval of STAR bonds. This Court gave several other examples of governmental functions: condemnation, street improvements, building a municipal gas plant, creating an electrical plant, storm water management, equalizing pay between police and fire fighters and holding elections. 313 Kan. at 155-56.

The *Jayhawk Racing* opinion recited four factors in identifying whether a contract covers a governmental or proprietary function:

> 1. An ordinance that makes new law is governmental; an ordinance that executes an existing law is proprietary. Permanency and generality are key features of a governmental ordinance.
>
> 2. Acts that declare a public purpose and provide ways and means to accomplish that purpose generally may be classified as governmental. Acts that deal with a small segment of an overall policy question generally are proprietary.
>
> 3. Decisions that require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be

> characterized as proprietary, even though they may also be said to involve the establishment of policy.
>
> 4. If the subject is one of statewide concern in which the Legislature has delegated decision-making power, not to the local electors, but to the local council or board as the State's designated agent for local implementation of State policy, the action receives a "governmental" characterization. 289 Kan. at 403-04.

313 Kan. at 155.

In this case, the District Court correctly concluded that the Annexation Agreement was "unenforceable" because annexation "is a governmental action, rather than an administrative action." (R. III, 99). Only a brief perusal of these factors is necessary to determine that limiting annexations of property is a purely governmental function. For example, the Annexation Agreement itself purports to be "irrevocable," corresponding to the "permanency" factor in identifying a governmental enactment. Further, the Annexation Agreement purports to lay out "public policy" arguments; another identifying hallmark of a governmental function. Finally, the exercise of annexation, in general, is one which has been delegated to municipalities by the Kansas Legislature; yet another identifier of a governmental function. Annexation can only take place through the exercise of a power granted by statute.

It is impossible to imagine a function which falls more squarely into the category of a governmental function than annexation. On appeal, in fact, Olathe does not even question the District Court's conclusion that the exercise of annexation

power is a governmental function. Accordingly, even if there were some legitimate basis to challenge the District Court's conclusion that the Annexation Agreement addresses a governmental function, such a challenge has not been raised on appeal.

In *Jayhawk Racing*, the Kansas Supreme Court favorably quoted the Iowa Supreme Court as follows: "One who contracts with a city is bound at his peril to know the authority of the officers with whom he deals, and a contract unlawful for lack of authority, although entered [into] in good faith, creates no liability on the part of the city to pay for it, even in quantum meruit." 313 Kan. at 157. Both Olathe and Spring Hill knew or, after a very brief examination of Kansas law should have known, that the Annexation Agreement could not be perpetual in nature and could not bind a subsequent City Council. Both cities were on notice of the limits placed on the Annexation Agreement by Kansas law. Obviously, Olathe can claim no right, therefore, to "rely" upon the enforceability of the Annexation Agreement.

With or without Attorney General approval, Olathe could never expect to permanently bind the City of Spring Hill to the terms of this Annexation Agreement entered by a predecessor City Council on a governmental function. Accordingly, the Annexation Agreement would be void, regardless of Attorney General approval, under the ICA.

In Appellant's Brief, Olathe argues, "Statutory law and the Constitution prevail over the common law pronounced in *Jayhawk Racing* and authorize the

contract." Appellant's Brief at 15. This statement might have been correct if there were actually any statutory or constitutional authority for the proposition that two municipalities may agree to bind future subsequent governing bodies in perpetuity on legislative or governmental matters. However, there isn't. The *Jayhawk Racing* decision does not conflict with any statutory or constitutional provision. Olathe's efforts to contort the language ICA or the Constitution to suggest otherwise were unavailing at the District Court because they are without support in case law or legitimate statutory construction. As set forth below, therefore, the District Court was correct in rejecting each such suggestion.

A. Contracts between municipalities are not exempt from the *Jayhawk Racing* ruling.

In its first argument for disregarding the *Jayhawk Racing* decision, Olathe suggests, "*Jayhawk Racing* is not applicable to contracts between municipalities." Appellants Brief, p. 16. Utilizing such a heading, one might expect that Olathe would point to some language in the *Jayhawk Racing* decision which suggests the holding was intended to be so limited. However, that is not the case. Instead, Olathe merely produces a laundry list of factual differences from this case without any plausible explanation of why such factual departures should produce a different result. Based upon nothing more than a list of irrelevant factual divergences, therefore, Olathe asks this Court to create a new exception to fit the facts of this case.

There is, however, no language whatsoever in the *Jayhawk Racing* decision which even hints that the holding is "not applicable to contracts between municipalities," as Olathe asserts. Reading the opinion as a whole, there is absolutely no reason to conclude that this Court intended that holding to be so limited. In fact, given the policy issues this Court was addressing in *Jayhawk Racing*, there is every reason to believe that this Court intended just the opposite.

In general, *Jayhawk Racing* addressed the limited circumstances under which one governing body should be permitted to contractually bind subsequent ones. In that opinion, with the articulated exception of contracts addressing "administrative" or "proprietary" matters, this Court held that one City Council simply had no power to bind a subsequent City Council. As support for that holding, this Court cited, with favor, *Board of Education v. Phillips*, 67 Kan. 549, 73 P. 97 (1903). 313 Kan. at 162. In that case, this Court held, "One legislature has no power by the enactment of laws to prohibit a subsequent legislature from the full performance of its duties in the enactment of such laws as in its judgment are demanded for the public safety or general welfare of the public." 67 Kan. 549, Syl. 2. Likewise, in *Jayhawk Racing*, this Court held that "government functions cannot be contracted away and that one legislative body cannot bind a successor legislative body to its policy pronouncements." 313 Kan. at 153.

Accordingly, Olathe's argument begs the question: If one governmental body cannot contractually bind the next on a governmental matter, how could the result be any different if two governmental bodies sought to do so simultaneously? The Brief of Appellant provides no credible answer. In fact, the reasoning of *Jayhawk Racing* does not permit such a gaping exception as all "contracts between municipalities" which Olathe would have this Court create.

The only exception to the general rule recognized in *Jayhawk Racing* was an exception for contracts pertaining to "proprietary" or "administrative" functions. In fact, the Court of Appeals had found the *Jayhawk Racing* contract to be valid, but only because it incorrectly categorized that MOU as "an exercise of an administrative function." 313 Kan. at 150. This Court reversed, however, concluding that the contract involved "the exercise of governmental policy-making powers." 313 Kan. at 153. Like the District Court in this case, the *Jayhawk Racing* Court, therefore, concluded that the contract was invalid and unenforceable.

It is acknowledged, of course, that the concurring opinion in *Jayhawk Racing* questioned the "ongoing validity and viability of the legal distinction between 'governmental' and 'proprietary' functions." 313 Kan. at 163. Like in *Jayhawk Racing*, however, this existing precedent is "not challenged by the parties here." 313 Kan. at 165. Accordingly, there is no need to re-examine the *Jayhawk Racing*

distinction in this case. In this case, there is no question but that the Annexation Agreement is an attempt to bind future City Councils

In summary, Olathe challenges the District Court on grounds that it failed to recognize an exception to *Jayhawk Racing* which, bluntly, does not exist. Accordingly, a re-examination of *Jayhawk Racing* is neither requested nor warranted. There is simply no exception to *Jayhawk Racing* for "contracts between municipalities" nor is there any good argument for creating one. The District Court, in this respect, should be affirmed.

B. K.S.A. 12-2908 is not an exception to Jayhawk Racing.

In the Appellant's Brief, Olathe suggests that K.S.A. 12-2908 is a statutory exception to *Jayhawk Racing*, empowering governing bodies to enter contracts which perpetually bind future governing bodies, even in the exercise of governmental policy-making functions. This argument, however, is based on nothing more than some clever wordplay on the language utilized by the District Court in ruling on the question of Attorney General approval under the ICA.

As set forth hereinabove, the District Court concluded that Attorney General approval was not necessary under the ICA. Spring Hill had taken the position that this contract falls under K.S.A 12-2904 which requires Attorney General approval. Olathe argued that Attorney General approval is not necessary because, it argued, the Annexation Agreement falls under K.S.A. 12-2908. On appeal, Olathe seizes on

language from the District Court's ICA ruling to suggest that K.S.A. 12-2904 "authorizes" the Annexation Agreement to bind future governing bodies, contrary to the holding in *Jayhawk Racing*. As set forth below, that was clearly not the intention of the District Court.

As described above, the District Court spent some nine pages in its Judgment of June 14, 2021 laying out the facts and reasoning behind its conclusion that *Jayhawk Racing* prevented enforcement of the Annexation Agreement. In the very last paragraph of its Judgment, however, the District Court changed the subject to Spring Hill's argument that enforcement was also barred by lack of Attorney General approval under the ICA. That paragraph begins by stating, "As a final matter, it is briefly worth noting that the agreement can exist under K.S.A. 12-2908 without requiring Attorney General approval under K.S.A. 12-2904." (R. III, 104). The District Court goes on to explain its view of the ICA, concluding the paragraph with the following statement: "Therefore, K.S.A. 12-2908 *authorizes* this agreement." (Emphasis added). (R. III, 105). In this context, the District Court obviously intended nothing more than that the approval of the Attorney General was not necessary.

In its appellate brief, however, Olathe claims: "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…". (Appellant's Brief,

p. 15). Olathe follows up by mischaracterizing District Court's ruling on the ICA as if it were a recognition that K.S.A. 12-2908 provides "express authority" for the Annexation Agreement. (Appellant's Brief, p. 18). Olathe states, "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." (Appellant's Brief, p. 18). With this simple sleight of hand, Olathe attempts to convert a ruling on the necessity of Attorney General approval under the ICA into a ruling of "express authority" for the Annexation Agreement to bind future governing bodies by virtue of K.S.A. 12-2908. However, no such ruling was made. Furthermore, the statutory language could never support such a ruling.

K.S.A. 12-2908 is merely one part of the ICA which outlines the conditions under which municipalities may contract with each other under the ICA without Attorney General approval. K.S.A. 12-2904, on the other hand, requires that interlocal cooperation agreements, "as a condition precedent to its entry into force, shall be submitted to the attorney general who shall determine whether the agreement is in proper form and compatible with the laws of this state." Neither section suggests, in any way, that contracts falling under either section may impair the authority of future governing bodies to act in a governmental or policy-making role.

As set forth herein below, the Annexation Agreement is not a contract which falls within the statutory language of K.S.A. 12-2908. Even if it were, however, there is nothing in K.S.A. 12-2908 which suggests that it could authorize a contract which would infringe on the authority of future governing bodies to address public welfare. K.S.A. 12-2908 speaks only to the authority of a city to enter certain kinds of agreements. *Jayhawk Racing,* on the other hand, speaks to the question of who may exercise contracting authority on behalf of a city; i.e. where one city council's authority ends and the next one begins. K.S.A. 12-2908 does not override *Jayhawk Racing*. Likewise, the *Jayhawk Racing* rule does not override K.S.A. 12-2908 because the two rules address entirely separate topics. Accordingly, K.S.A. 12-2908 is not an exception to *Jayhawk Racing* and the District Court was correct to reject Olathe's suggestion to the contrary.

C. Home rule is not an exception to Jayhawk Racing.

Although home rule was not raised as a basis of contracting authority in Olathe's Verified Petition, it is true that Olathe attempted to raise it as a defense to Spring Hill's Motion to Dismiss. At that stage, Spring Hill argued that home rule could be summarily rejected as a defense because it is neither articulated in the Annexation Agreement itself, nor plead as the basis for contractual authority in the Verified Petition.

The very first paragraph of the Verified Petition alleges that the Annexation Agreement was executed "under the statutory authority of K.S.A. 12-2901 et. seq." (R. I, 4). This allegation addresses not only the legal basis for the validity of the Annexation Agreement, but the intent of the parties in executing the Annexation Agreement. Accordingly, regardless of whether Olathe's belatedly-articulated "home rule" argument might have been plead in this case, it obviously wasn't.

On a Motion to Dismiss for failure to state a claim, the Court's only inquiry is focused on the allegations of the pleading itself; not alternate unpled facts or theories advanced in response to a Motion to Dismiss. For this reason alone, therefore, the District Court would have been justified in ignoring the "home rule" argument in granting the Motion to Dismiss.

The terms of the Annexation Agreement, attached and incorporated into the Verified Petition, do not mention or invoke "home rule" or the Kansas Constitution. Accordingly, the District Court was not required to address the home rule argument because the Verified Petition articulated no basis to do so.

Even if the District Court had chosen to address home rule, however, the result would have been no different because home rule, like the ICA, only addresses the contracting authority of cities; not who is entitled to exercise it. Even if home rule had been properly raised, therefore, it simply does not constitute a limitation upon, or exception to, the *Jayhawk Racing* rule. Likewise, *Jayhawk Racing* does not limit

home rule. Similar to Olathe's attempt to invoke K.S.A 12-2908 to block the *Jayhawk Racing* rule, therefore, home rule does not bar application of *Jayhawk Racing* because the two rules address separate topics.

The Home Rule Amendment existed, of course, at the time this Court decided *Jayhawk Racing*. If home rule had constituted a bar to the District Court's decision in this case, therefore, it would have barred to the ruling in *Jayhawk Racing* as well. Obviously, home rule did not bar the *Jayhawk Racing* decision. Like the District Court in this case, however, this Court clearly articulated the *Jayhawk Racing* rule without any reference to, or mention of, the Home Rule Amendment. Spring Hill submits that the reason for this omission, in each case, is that the Home Rule Amendment is simply irrelevant to question to be decided.

The Home Rule Amendment addressed a specific issue which is separate and distinct from the issue addressed in *Jayhawk Racing*. Prior to the Home Rule Amendment, cities had only such powers as were specifically granted by statute. *Claflin v. Walsh*, 212 Kan. 1, 509 P.2d 1130 (1973). The Home Rule Amendment authorized cities to manage their local affairs without the necessity of locating statutory authority for each and every act performed as natural part of that management. *Dillon Stores v. Lovelady*, 253 Kan. 274, 855 P.2d 487 (1993); *Dwagfys Mfg. Inc. v. City of Topeka*, 309 Kan. 1336, 443 P.3d 1052 (2019). In other words, the home rule argument addresses nothing more than the question of whether

the parties to the Annexation Agreement had the authority to execute it in the first instance; not whether it could bind future governing bodies.

Jayhawk Racing, like this case, did not address the authority of the City of Topeka to execute the MOU which was the subject of litigation. Furthermore, the *Jayhawk Racing* decision did not find that the City of Topeka lacked the authority to execute the MOU or perform the obligations undertaken in the MOU. Instead, in *Jayhawk Racing*, this Court merely found that "the newly elected City Council had no obligation to carry out the policies of its predecessor" and "was not bound to act in conformity with the MOU…". 313 Kan. at 162.

Likewise, in this case, the District Court did not determine that either Olathe or Spring Hill lacked the authority to enter into the Annexation Agreement. In other words, the District Court did not find that the 2006 governing bodies of Olathe or Spring Hill lacked authority to enter the Annexation Agreement. Presumably, the Annexation Agreement would have been enforced against either of the two governing bodies who agreed to it. Instead, expressly following the letter of the *Jayhawk Racing* opinion, the District Court merely ruled that the Annexation Agreement was "unenforceable upon the subsequent city council because it is a governmental action, rather than an administrative action." (R. III, 99). For these reasons, the Home Rule Amendment is as irrelevant to this case as it was to the *Jayhawk Racing* decision.

D. The *Simmons* Rule does not apply.

On appeal Olathe argues, "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." Appellant's Brief at 31. Initially, it appears that Olathe is confused about the locus of responsibility for protecting the "public interest" and making policy regarding the general welfare of the citizens of Spring Hill. That responsibility of course, rest on the shoulders of the *current* governing body of the City of Spring Hill, which has determined that the Annexation Agreement does not promote the "public interest." That responsibility does not rest either with the 2006 City Council, the City of Olathe, or any other entity whose judgment Olathe might like to substitute for that of the current City Council.

Since 1903, it has been the law of Kansas that one governing body may not bind the next on issues of "public safety or general welfare of the public." *Board of Education v. Phillips*, 67 Kan. 549, Syl. 2, 73 P. 97 (1903). "One contracting with a municipal corporation is bound at his or her peril to know the authority of the municipal body with which he or she deals." *Genesis Health Club, Inc. v. City of Wichita*, 285 Kan. 1021, Syl. 8, 181 P.3d 549 (2008). Accordingly, Olathe was bound to know the law of Kansas which is, according to *Jayhawk Rac*ing, that "the newly elected City Council had no obligation to carry out the policies of its

predecessor." 313 Kan. at 162. Certainly, therefore, Olathe could not have expected this Court to substitute anyone else's notion of "public interest" for the current City Council. For this reason, the District Court correctly declined Olathe's repeated invitations to re-weigh the competing public policy considerations involved in deciding whether to enforce the Annexation Agreement.

Even if this Court were inclined to entertain Olathe's invitation to re-weigh public policy determinations considered by Spring Hill's current governing body, however, Olathe clearly misapplies the *Simmons* Rule. The primary disconnect in Olathe's briefing is the failure to distinguish between agreements addressing "governmental" or "legislative" functions, on the one hand, and "proprietary" or "administrative" functions on the other. Because the contract in this case, like the MOU *Jayhawk Racing*, covered a governmental function, the subsequent City Council could not be bound under any circumstances.

The *Simmons* Rule, on the other hand, has been applied only to contracts covering "administrative" functions. The *Simmons* Rule says that contracts covering "administrative" functions *may be* binding, under certain limited circumstances, upon subsequent governing bodies. The *Simmons* Rule does not apply to the "governmental" functions addressed in *Jayhawk Racing*.

Olathe raises the *Simmons* Rule by citing a recent unpublished opinion of the Kansas Court of Appeals in support of the continued vitality of the *Simmons* Rule.

Appellate Brief at 29. (citing *Leavenworth Cty. Bd. of Cty. Commissioners v. Copeland*, No. 120, 616, 2020 WL 4379132 (Kan. Ct. App. 2020) quoting *Bd. of Comm'rs of Edwards Cty. v. Simmons*, 159 Kan. 41 (1944)). Both cases, however, address contracts covering "administrative" functions; not "governmental" or "legislative" functions such as the Agreement in this case and the one in *Jayhawk Racing*.

The *Copeland* case deals with a 5-year employment contract with the County's human resources director. The *Copeland* Court cited the *Simmons* Rule in support of the Court's opinion that contract was not valid, even though it was administrative in nature. The *Simmon*s Rule states that even a contract covering an "administrative" function is not binding on a subsequent governing body *unless it is necessary* to carry out that function. It is not an exception to *Jayhawk Racing* and does not apply to the Annexation Agreement in this case.

In *Copeland*, the Court of Appeals acknowledged "administrative" function contracts (as distinguished from "governmental"), are sometimes valid under the *Simmons* Rule:

> 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.

Copeland at p. 10 (emphasis added).

Copeland and *Simmons*, therefore, recognize a limited exception to the general rule that one governing body may not bind another. That exception, as narrow as it is, however, does not apply to the Agreement in this case nor to the *Jayhawk Racing* holding, both of which concern "governmental" functions. As set forth in *Jayhawk Racing*, contracts covering governmental function can *never* bind a subsequent governing body. In this case, the Agreement seeks to limit future use of annexation powers specifically authorizing annexation powers of municipalities. It is difficult to imagine a contract which falls more squarely into "governmental" or "legislative" functions of the City Council. Clearly the 2006 City Council could not bind the Council of 2021.

Even in *Copeland*, the Court found the contract covering an administrative function to be invalid because it was intended to improperly bind future governing bodies. As the *Copeland* Court explained:

> 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.

Copeland at 6. Clearly, the District Court was correct to decline application of the *Simmons* rule.

In the Appellant's Brief, Olathe claims that "courts have applied the Simmons rule to enforce contracts concerning government services…". Brief of Appellant, p. 30. The only two cases cited by Olathe, however, fail to deliver on that promised content. In *Zerr v. Tilton*, the Court, in a *per curiam* opinion, merely ruled that a resolution adopted by a County Commission establishing a solid waste management system did not exceed statutory authority. *Zerr v.Tilton*, 224 Kan. 394, 581 P.2d 364 (1978). The other case cited by Olathe for this proposition was decided two years before the *Simmons* rule had even been had even been handed down. *Verdigris River Drainage Dist. No. 1 v. State Highway Comm'n*, 155 Kan. 323, 125 P.2d 387 (1942). Quite simply, there is no authority for Olathe's reading of the *Simmons* rule nor for the proposition that the District Court misapplied it.

Because the Annexation Agreement in this case, like the MOU in *Jayhawk Racing*, covered a governmental function, the subsequent City Council could not be bound under any circumstances. The *Simmons* Rule is of no use to Olathe in this

case because it applies to a totally different category of contracts and functions. The contract in this case simply cannot bind any subsequent City Council.

II. The District Court's denial Olathe's request for a temporary injunction is not reversible.

Standard of Review

Spring Hill agrees that the proper standard of review for denial of a temporary injunction is abuse of discretion.

A. District Court was correct.

Initially, the denial of a temporary injunction is not reversible because the case was correctly dismissed. If the dismissal was correct, of course, this Court need not reach this issue. In fact, assuming the correctness of the District Court's dismissal, this Court need reach *any* other issue. Even if the Annexation Agreement were enforceable, however, the Temporary Injunction could not be reversed; at least not on the current record.

B. The Request for a Temporary Injunction is moot.

As Olathe admits, the annexations which made up Project Extract have already taken place. Brief of Appellant at p. 13. ("Within hours of the district court's ruling denying temporary injunction, Spring Hill adopted ordinances annexing the land for Project Extract."). Although Olathe hints at some grievance related to the speed with which the annexations took place when the temporary restraining order was dissolved, there is no dispute that Spring Hill was completely within its rights

to do so. More to the point, as it relates to mootness, the entire purpose of the request for a temporary injunction was to prevent these annexations. Because those have annexations have now taken place, that relief is no longer available and the request for a temporary injunction is plainly moot.

Generally, Kansas appellate courts do not decide moot questions or render advisory opinions. *State v. Montgomery*, 295 Kan. 837, 840 P.3d 866 (2012). An issue is moot if 'it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual of any purpose, and it would not impact any of the parties' rights. 295 Kan. at 840-41. *See also, State v. Roat*, 311 Kan. 581, 466 P.3d 439 (2020).

Olathe's request for a temporary injunction was aimed at enforcing the language of the Annexation Agreement which would have prohibited the annexation of the property designated for Project Extract. That annexation, by Olathe's admission, has now taken place. Accordingly, at least as to that requested relief, the issue raised on appeal is clearly moot.

Olathe has made no request for an order to de-annex the property. Legal authority for such a request, even if it had been made, could be described as either dubious or non-existent. A ruling on the correctness of the District Court's ruling on the request for temporary injunction, however, would serve no purpose at this point. Accordingly, even if this Court were to reverse the District Court's dismissal,

the primary relief sought in the request for temporary injunction is no longer available because of mootness.

C. The District Court's factual findings were insufficient to support a Temporary Injunction.

Even if the District Court's dismissal were not correct and Olathe's request for a temporary injunction were not moot, Olathe would still not be entitled to a temporary injunction because it is not supported by the factual findings made by the District Court. Not only were such factual findings not made; they were not warranted.

Although articulated in slightly different language over the years, the elements of proof necessary to obtain a temporary injunction have been fundamentally consistent for nearly forty years:

> "(1) substantial likelihood that the movant will eventually prevail on the merits: (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and (4) a showing that the injunction, if issued, would not be adverse to the public interest." *Wichita Wire, Inc. v. Lenox*, 11 Kan. App 2d 459, 462 (1986) citing *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980) and *Uarco Inc. v. Eastland*, 584 F. Supp. 1259, 1261 (D. Kan. 1984).

The District Court denied the request for temporary injunction because Olathe failed the very first element: substantial likelihood of success on the merits. Accordingly, the District Court made no factual findings on any of the other essential evidentiary elements. To be entitled to an injunction, therefore, Olathe would need

to carry its burden of proof on each element if, for any reason, this Court were to reverse and remand. Spring Hill contends that Olathe cannot meet that burden. Regardless, there is certainly no factual record sufficient to carry the establish the elements of a temporary injunction for this Court to reverse the temporary injunction ruling on appeal. For all of the forgoing reasons, therefore, this Court should not reverse the District Court's denial of the request for temporary injunction.

CROSS-APPEAL ISSUE

I. The District Court erroneously held that the Annexation agreement did not require Attorney General approval pursuant to the Interlocal Cooperation Act ("ICA").

Standard of Review

This issue addresses the District Court's ruling interpreting the ICA on Spring Hill's Motion to Dismiss and accordingly, the correct standard of review is *de novo*. *Steckline Commc'ns, Inc. v. J. Broad. Group of Kansas, Inc*. 305 Kan. 761, 768, 388 P.3d 84 (2017).

The first paragraph of the Verified Petition alleges that the annexation agreement was "executed between Olathe and Spring Hill *under the statutory authority of K.S.A. 12-2901 et. seq.*". (Emphasis added). (R. I, 4). The Agreement itself, attached to the Verified Petition as Exhibit A, acknowledges that "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…". (R. I, 22).

K.S.A. 12-2904 states: "(a) *Subject to the limitations of subsection (g), any power or powers, privileges or authority exercised or capable of exercise by a public agency* of this state including but not limited to those functions relating to economic development, public improvements, public utilities, police protection, public security, public safety and emergency preparedness, including but not limited to, intelligence, antiterrorism and disaster recovery, libraries, data processing services, educational services, building and related inspection services, flood control and storm water drainage, weather modification, sewage disposal, refuse disposal, park and recreational programs and facilities, ambulance service, fire protection, the Kansas tort claims act or claims for civil rights violations, *may be exercised and enjoyed jointly with any other public agency of this state…*". (Emphasis added). Subsection (g) states that such an agreement, *"prior to and as a condition precedent to its entry into force, shall be submitted to the attorney general* who shall determine whether the agreement is in proper form and compatible with the laws of this state." (Emphasis added). In this case, Olathe has not alleged and cannot allege either (a) the submission of the agreement to the Attorney General, or (b) that the Attorney General has reviewed and approved the agreement.

The approval of the Attorney General is not, and should not be treated as, a mere technicality. There are legitimate interests of third parties which the Interlocal Cooperation Act was intended to protect. Accordingly, the approval of the Attorney General is not to be viewed as some ministerial act which can be simply ignored or glossed over. In fact, K.S.A. 12-2904 specifically requires the Attorney General to review Interlocal Agreements and to reject the agreement if he/she "shall find that it does not meet the conditions set forth herein." Although the Annexation Agreement is not otherwise "compatible with the laws of this state," that analysis was not even necessary in order to compel dismissal of the Verified Petition. Failure to comply with the Interlocal Cooperation Act, in and of itself, establishes that the Annexation Agreement is void.

Although the District Court dismissed Olathe's case based upon the *Jayhawk Racing* decision, it did not find that the Annexation Agreement was also invalid for failure to comply with the ICA. For this reason, Spring Hill cross-appealed, to assert alternative sufficient grounds to support the dismissal.

A. K.S.A. 12-2908 Does Not Authorize this Annexation Agreement.

K.S.A. 12-2908 applies to a defined subset of contracts covered by the ICA. K.S.A. 12-2908 applies only to contracts between municipalities "to perform any governmental service, activity or undertaking which each contracting municipality is authorized by law to perform." The Agreement in this case does not speak a word

regarding "performance" of any governmental service. Quite to the contrary, this Agreement is nothing more than a series of mutually restrictive covenants. It serves only to prevent annexations by Spring Hill and Olathe in certain unannexed areas designated in the Agreement. Accordingly, this Agreement is not a contract of the kind described in K.S.A. 12-2908.

Olathe's briefing virtually ignores the language of K.S.A. 12-2908 which limits its application to contracts "to perform any governmental service, activity or undertaking which each contracting municipality is authorized by law to perform.". For example, in arguing that 12-2908 is an exception to *Jayhawk Racing*, Olathe asserts that *Jayhawk Racing* is "not applicable to contracts between municipalities." Brief of Appellant, p. 16. Effectively, Olathe asks this Court to determine that *all* contracts between municipalities fall into K.S.A. 12-2908 and *none* fall into K.S.A. 12-2904 which requires Attorney General approval. Such could not have been the intent of the Legislature when it created two categories; one which required Attorney General approval and one which did not.

Obviously, Olathe avoids any serious discussion of the limitations placed upon the application of K.S.A. 12-2908 because such an argument cannot stand serious scrutiny. The Annexation Agreement is not a contract "to perform any governmental service, activity or undertaking which each contracting municipality is authorized by law to perform.". Accordingly, the Annexation Agreement falls

under K.S.A. 12-2904 which requires Attorney General approval; not K.S.A. 12-2908. For this reason, the Annexation Agreement is also invalid for lack of Attorney General approval.

B. The Annexation Agreement was drafted as a K.S.A. 12-2904 Agreement.

As set forth hereinabove, the Annexation Agreement specifically invokes the authority of the Interlocal Cooperation Act. In addition, however, the Agreement, including all its terms and headings, clearly attempts to track the required contents of an Interlocal Agreement pursuant to K.S.A. 12-2904. For example, paragraph 1 of the Agreement addresses "Duration of the Agreement," corresponding to K.S.A. 12-2904(d)(1) which requires an Interlocal Agreement to specify its "duration." K.S.A. 12-2904(d)(2) requires an Interlocal Agreement to specify "the precise organization…or administrative entity created" to administer the Agreement and paragraph 2 of the Agreement states, "This Agreement creates no separate or independent legal entity." Paragraph 3 of the Agreement is entitled "Administration of the Agreement" and designates the City Administrators "to administer said Agreement." Where no legal entity is created to administer the Agreement, K.S.A. 12-2904(e)(1) requires it to contain a provision "for an administrator or a joint board…for administering the joint or cooperative undertaking." Paragraph 4 of the Agreement stipulates that the Agreement contemplates "No Separate Budget or Jointly Held property." K.S.A. 12-2904(d)(4) requires an Interlocal Agreement to

specify the manner of "establishing a budget" and subsection (e)(2) requires a recitation of "the manner of acquiring, holding and disposing of real and personal property." K.S.A. 12-2904(3) requires specification of the "purpose or purposes" of the Agreement, corresponding to the paragraph 5 of the Agreement entitled "Purpose of the Agreement." K.S.A. 12-2904(d)(5) requires specification of the method of "partial or complete termination" and the Agreement specifically includes the manner of "Termination" in paragraph 1. The Agreement, when read as a whole, clearly indicates the parties' intent that it be an Interlocal Agreement.

Regardless of whether Olathe is prepared to admit that the Agreement was intended to be an Interlocal Agreement, however, the plain language of the Agreement demonstrates that it is one pursuant to the definition of an Interlocal Agreement under the Interlocal Cooperation Act. This particular Interlocal Agreement, however, is void because it was never submitted to or approved by the Attorney General pursuant to K.S.A. 12-2904(g).

Even if it had been submitted to the Attorney General, however, the Attorney General could not have approved it because it violates Kansas law. It does not set a "duration" as required by the Act. That's important because any contract made by a municipality cannot and may not bind future governing bodies of the municipality on a governmental function. This is exactly what Olathe hopes to do in this case. As set forth below, such contracts are void where they attempt, as this Agreement

does, to bind future governing bodies on a governmental or legislative issue. For all of these reasons, the lack of Attorney General approval is fatal to Olathe's claims and, for that reason alone, the Verified Petition must be dismissed for failure to state a cause of action.

CONCLUSION

Because the Annexation Agreement is not enforceable against subsequent governing bodies, either under the ICA or this Court's ruling in *Jayhawk Racing*, the City of Spring Hill prays that this Court should affirm the District Court's dismissal of Olathe's Verified Petition. Even if this Court were to reverse that dismissal, however, the City of Spring Hill prays that the Court decline to reverse the District Court's denial of Olathe's request for temporary injunction because that matter is now moot and, in any event, there are insufficient factual finding and evidence to support injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following counsel of record for Appellees:

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APPENDIX

APPENDIX A

NOT DESIGNATED FOR PUBLICATION

No. 120,616

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LEAVENWORTH COUNTY BOARD OF COUNTY COMMISSIONERS,
Appellee,

v.

TAMARA COPELAND,
Appellant.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; EDWARD E. BOUKER, judge. Opinion filed July 31, 2020. Affirmed.

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.

ATCHESON, J.: 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

APPENDIX A

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]

[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.

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.

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.

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.

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.

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

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.

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

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.