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

REPLY BRIEF OF DEFENDANTS – APPELLEES/CROSS-APPELLANTS

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Oral Argument: 15 Minutes

Dated: April 25, 2022

TABLE OF POINTS & AUTHORITIES

ARGUMENT AND AUTHORITY

I. As a matter of law, the subject matter of the Annexation Agreement does not fit the statutory definition of a contract "to perform" governmental functions "authorized by law" under K.S.A. 12-2908.

In its Reply Brief and Cross-Appellee Brief ("Reply"), Olathe argues generally that the Annexation Agreement did not require Attorney General approval because it is authorized by K.S.A. 12-2908. That provision, if it applied, would not require Attorney General approval to be valid. K.S.A. 12-2908, however, limits application of 12-2908 to contracts "*to perform* any governmental service, activity or undertaking which each contracting municipality is *authorized by law to perform*." Emphasis added. In fact, the subject matter of the Annexation Agreement does not address *the performance* of any such governmental service, activity or undertaking which Olathe or Spring Hill were *authorized by law to perform*. Accordingly, K.S.A. 12-2908 does not apply and the Annexation Agreement could have only become effective with the Attorney General approval required by K.S.A. 12-2904.

In its Reply, Olathe also suggests that "Spring Hill appears to concede that the contract, by its terms, qualifies as a contract between municipalities under K.S.A. 12-2908." Reply, p. 17. Spring Hill, of course, makes no such concession. Indeed, Spring Hill's cross appeal brief explicitly states, "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,'" quoting the qualifying language of K.S.A. 12-2908. Brief of Defendant – Appellees/Cross Appellants, p. 32.

Finally, in its Reply, Olathe also refers Spring Hill to pages 18-24 of its Brief of Appellant, where it claims to have addressed the issues raised in the cross-appeal. Reply, p. 17. In this brief, therefore, Spring Hill will address the suggestion that the referenced portion of Olathe's Appellant's Brief somehow established that the Annexation Agreement qualified as a 12-2908 agreement.

A. The Annexation Agreement does not address the *performance* of any governmental function.

The Annexation Agreement in this case is virtually nothing more than a mutually restrictive covenant which operates to restrict annexation decisions of future governing bodies. It serves only to prevent annexations by Spring Hill and Olathe in certain unannexed areas designated in the Agreement. It is not, therefore, an agreement "to perform" any governmental service, activity or undertaking, including annexation. To the contrary, it is an agreement *not to perform* certain functions, i.e. annexations.

K.S.A. 12-2908 clearly envisioned agreements between municipalities to perform governmental services for each other such as police protection, fire protection, sewer, water, library, roads, etc. In fact, the legislative history advanced by Olathe evinces exactly this intent. See Appendix to Appellant's Brief, Exhibit 2

(Senate Committee Minutes). Olathe cited this history for the proposition that the bill was advanced "to expedite procedures" so that qualifying contracts "wouldn't have to go through the Attorney General's Office." Brief of Appellant, p. 24. That much is true. What Olathe fails to acknowledge, however, is that the legislative history virtually confirms that the type of contracts the legislature had in mind were those which addressed "consolidation of services." Such consolidation "would be a consolidation of function by contract." Appendix to Appellant's Brief, Exhibit 2 (Senate Committee Minutes). This is exactly the meaning which Spring Hill seeks to ascribe to K.S.A. 12-2908 when it refers to the *performance* of a "governmental service, activity or undertaking."

Nothing in the K.S.A 12-2908, however, indicates an intent for it to be used as authority for entering restrictive covenants. Specifically, nothing in K.S.A. 12-2908 even hints at authority for its potential use to *prohibit* the performance of governmental functions. Further, there is no language which can be read to authorize permanent restrictions intended to prevent the performance of governmental functions or prevent future governing bodies from doing so. Legislative history only cements this conclusion.

B. The Annexation Agreement does not cover functions the parties were "authorized by law to perform."

K.S.A. 12-2908(b) only permits contracts between municipalities to perform functions "which each contracting municipality is authorized to perform." Olathe,

once again, ignores this limiting language in K.S.A. 12-2908. Nowhere in its briefing does Olathe ever identify any legal authority suggesting that the parties were "authorized to perform," the subject matter of the Annexation Agreement. None exists.

The Annexation Agreement is nothing more than an exchange of restrictive covenants. There is no legal authority, however, suggesting that restrictive covenants binding future governing bodies are acts which Spring Hill and Olathe were "authorized to perform" prior to entering the Annexation Agreement. In fact, as explained fully in Spring Hill's original briefing, the *Jayhawk Racing* decision stands for the opposite conclusion. Accordingly, as a matter of law, the restrictions of the Annexation Agreement are not the kind which fall within the statutory definition of K.S.A. 12-2908.

Olathe suggests that the Annexation Agreement is required for City planning, generally, in that it "enables both cities to develop comprehensive plans for the expansion of infrastructure and essential services." Brief of Appellant, p. 21. If the Annexation Agreement actually covered the *performance* of any of those functions, of course, this would be a different case. However, it doesn't.

The closest the Annexation Agreement comes to touching on the performance of "infrastructure and essential services" functions is in paragraph 7 calling for "Mutual Comprehensive Planning." Olathe, however, did not sue to enforce

paragraph 7 and, accordingly, the District Court did not rule on whether that provision could be enforced. Instead, Olathe sued on the restrictive covenants contained in paragraph 6 of the Annexation Agreement because Olathe was only interested in preventing annexation by Spring Hill. Those prohibitive provisions, the only provisions Olathe sought to enforce, do not speak a word to the desire to "perform any governmental service activity or undertaking." They speak solely and completely to preventing Spring Hill from performing those functions.

If Olathe had sued to enforce the "Mutual Comprehensive Planning" provisions of paragraph 6, this would also be a different case. In fact, Spring Hill might not have even objected to the performance of those provisions. Again, however, that would be another case; not this one. In *this* case, Olathe seeks to enforce annexation restrictions under the theory that those provisions are "authorized" by K.S.A. 12-2908. Quite clearly, they are not.

C. The proper application of K.S.A. 12-2908 is a question of law; not the subject of a factual finding.

In its Reply, Olathe inexplicably begins to cite testimony from Olathe's previous City Attorney for the proposition that the Annexation Agreement is authorized by K.S.A. 12-2908. Reply, p. 17. Speaking of his discussions with other city attorneys, Tom Glinstra testified that he and other attorneys "determined that it could be done under 12-2908." Reply, p. 17. Olathe's Reply suggests that, perhaps, the trial court considered this testimony regarding the applicability of 12-2908 to the

Annexation Agreement. Reply, p. 18. Assuming that to be the case, Olathe even goes so far as to suggest that such a fact finding, if it existed, would be entitled to deference on appeal. Reply, p. 18. Both arguments are dead wrong.

First, the District Court did not and could not make a factual finding on the proper interpretation of K.S.A. 12-2908. In its Reply, Olathe claims that the District Court "weighed the evidence" in considering whether 12-2908 applied "in favor of Olathe." Therefore, Olathe argues, Olathe is entitled to application of the "deferential substantial competent evidence standard." Reply, p. 18. Olathe cites to the District Court's Judgment, to support this claim. Reply, p. 18 citing the record at R. III, 105. That portion of the Judgment, however, is the District Court's Conclusions of Law.

The District Court made no fact findings on the meaning of K.S.A. 12-2908. Accordingly, the District Court did not "weigh the evidence." It made a conclusion of law. 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 evidence offered at the preliminary injunction hearing, therefore, is irrelevant to this issue on appeal.

D. The Annexation Agreement fails for lack of Attorney General approval under K.S.A. 12-2904.

Because the Annexation Agreement is not the kind covered by K.S.A. 12-2908, it could only be valid if it had been approved by the Attorney General under

the terms of K.S.A. 12-2904 pertaining to interlocal agreements. Subsection (g) of 12-2904 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. In fact, no such approval was even sought.

Even if the Annexation Agreement had been submitted to the Attorney General, however, the Attorney General could not approve it. It does not set a "duration" as required by the Act. K.S.A. 12-2904(d)(1). Instead, the Annexation Agreement purports to operate forever unless both parties agree to dissolve it. Accordingly, the Attorney General could not approve this contract both (1) because it states no duration under the ICA, and (2) because it seeks to bind all future governing bodies in violation of *Jayhawk Racing*.

II. Even if K.S.A. 12-2908 applied to this Annexation Agreement, it would not conflict with or "take precedence over" *Jayhawk Racing*.

A. The *Jayhawk Racing* decision does not conflict with K.S.A. 12-2908 or any other provision of Kansas Law.

As set forth hereinabove, this Annexation Agreement does not fall within the description contracts covered by K.S.A. 12-2908 and, therefore, is void for failure

to obtain attorney General approval. In its Reply, however, Olathe adds another layer to its misreading of 12-2908. Olathe states, "Again, Spring Hill apparently does not dispute Olathe's proposition that, if the Contract is authorized by K.S.A. 12-2908, then the statute takes precedence over common law." Reply, p. 16. Of course, this claim is not true. Olathe cites no support for what it claims that Spring Hill "does not dispute," either in the record or under Kansas Law. Nonetheless, Olathe doubles down on this phantom claim two sentences later, asserting "Spring Hill only disputes the district court's declaration that the Contract is authorized by K.S.A. 12-2908." Reply, p. 17. Spring Hill most certainly "disputes" the contrived notion that some other Kansas Law somehow "takes precedence" over the *Jayhawk Racing* decision.

What Olathe's argument refuses to recognize, of course, is that there was no need for Spring Hill to specifically cross-appeal on the issue of whether 12-2908 "takes precedence" over the *Jayhawk Racing* decision, *because the District Court never made such a finding*. The District Court never found that the *Jayhawk Racing* decision took "precedence" over K.S.A. 12-2908 or any other existing legal authority. Likewise, the District Court never found that any existing legal authority took "precedence" over *Jayhawk Racing*. In fact, the whole notion that there is some conflict between *Jayhawk Racing* and some other provision of Kansas Law, is a mere figment of Olathe's imagination.

There is *nothing* in the *Jayhawk Racing* decision which conflicts with any other provision of Kansas Law. Stated another way, there is simply *no Kansas Law* suggesting that two municipalities may enter contracts which bind future governing bodies on matters of governmental function. None. Not K.S.A. 12-2908. Not the Home Rule amendment. No statute. No constitutional provision. No existing case law. Nothing.

The District Court found no conflict between the *Jayhawk Racing* decision and any other provision of Kansas Law. Indeed, Olathe made no coherent argument to the District Court that some other law took "precedence" over *Jayhawk Racing*. In fact, the claims of taking "precedence" were so vague that it could be credibly argued that such arguments have not been preserved for appeal. More importantly, however, Olathe simply gave the District Court no basis to conclude that any other law took "precedence" over *Jayhawk Racing*.

It is also important to consider that, at the time the District Court decided this case, the *Jayhawk Racing* decision had been very recently handed down by this Court. If Olathe really expected the District Court to find that some other law conflicted with the *Jayhawk Racing* decision, it also would have been necessary to establish whether the supposed conflict had been considered as part of this Court's deliberations in *Jayhawk Racing*. Without any such analysis, the District Court could not and did not find that this Court's *Jayhawk Racing* decision conflicted with

K.S.A. 12-2908 or any other Kansas Law. Furthermore, no such ruling was warranted or necessary.

If K.S.A. 12-2908, or any other Kansas Law, actually authorized municipalities to bind future governing bodies on governmental issues, or *any* issues, Olathe would have certainly pointed that out. It has not done so and cannot do so. Instead, Olathe merely cites generally to cases in which the legislature acted in "specific areas" formerly controlled by common law. See, e.g. *Stanley v. Sullivan*, 300 Kan. 1015, Syl. 1, 336 P.3d 870 (2014). Reply, p. 16. In *Stanley*, this Court considered the lower courts' dismissal of a habeas corpus action for the failure to exhaust administrative remedies. 300 Kan. at 1016. This Court reversed the lower courts' dismissal because it was based upon case law which preceded the legislature's adoption of K.S.A. 59-29a24, which *specifically* outlined when exhaustion of administrative remedies was required and, more importantly, when it was *not* required. This Court stated, "The 2012 legislature expressly exempted habeas corpus actions from the exhaustion requirements of K.S.A. 2013 Supp. 59-29a24. We will not engage in second guessing the legislature." 300 Kan. at 1022. Olathe, however, can cite no such statutory or constitutional provisions which would suggest a result different than that reached by this court in *Jayhawk Racing* or by the District Court in this case.

Like Olathe in this case, the Secretary in *Stanley* urged this Court to find a conflict between two separate provisions of law. This Court, however, found "no reason" to conclude the two provisions "at odds." This Court noted that "Statutes should be read as consistent with one another whenever it is possible to do so." 300 Kan. at 1021, citing *In re Marriage of Phillips*, 272 Kan 202, 205, 32 P.3d 1128 (2001). Likewise, in this case, there is no need to presume or create a conflict when there is no Kansas Law which conflicts with the *Jayhawk Racing* decision.

Of course, statutory law supersedes common law where the subsequent legislative enactment conflicts with prior common law. Likewise, of course, statutory law is trumped by constitutional law, but only *if* there exists some conflict between them. 300 Kan. at 1018, citing *Casco v. Armour Swift-Eckrich,* 283 Kan. 508, 524-26, 154 P.3d 494 (2007); *Perry v. Board of Franklin County Comm'rs,* 281 Kan. 801, 808-09, 132 P.3d 1279 (2006); *Schmidtlien Electric, Inc. v. Greathouse,* 278 Kan. 810, 822, 104 P.3d 378 (2005); *Mary E. Lane, Admr. v. The National Bank of the Metropolis,* 6 Kan. 74, 80-81 (1870). These concepts, however, have no application in this case.

Neither K.S.A. 12-2908 nor any other Kansas Law creates the authority for one governing body to bind the next. No conflict exists. Accordingly, neither the *Stanley* case nor any other case law supports Olathe's attempt to bind subsequent governing bodies with perpetual annexation restrictions.

B. The issue here is not the perpetual nature of the Annexation Agreement but whether it can be enforced against a subsequent governing body.

In Olathe's Reply to the cross appeal, it spends a great deal of effort and space discussing the perpetual nature of the Annexation Agreement. The perpetual nature of the Annexation Agreement, however, was not the reason Olathe's Petition was dismissed. The District Court, of course, referred to the "permanent" nature of the Annexation Agreement's restrictions in determining that it constituted an agreement covering a governmental function. R. III, 105. The District Court, however, did not find that perpetual agreements were void per se and certainly did not dismiss Olathe's Petition for that reason.

Although the Annexation Agreement obviously operates perpetually at Olathe's option, Spring Hill has never claimed that all perpetual contracts between municipalities are automatically void for that reason alone. Spring Hill's position in this case, adopted by the District Court, is merely that the *Jayhawk Racing* rule does not permit one governing body to bind the next on a governmental matter. This rule applies whether the offending restriction seeks to bind future governing bodies permanently or for a single day.

The result below would not be changed even if K.S.A. 12-2908 were interpreted to authorize municipalities enter perpetual agreements. Perpetual

agreements, even if permissible, cannot bind future governing bodies on governmental issues under *Jayhawk Racing*.

Whether or not perpetual contracts between municipalities are void, ab initio, need not be decided in this case. Accordingly, Olathe's treatise citation to the effect that perpetual agreements are not "void as a matter of public policy" entirely misses the point. Reply, p. 21 citing 10A McQuillan Mun. Corp. 29:104 (3d ed.). Spring Hill does not argue, and the District Court did not conclude, that the Annexation Agreement is void as a matter of public policy because it is perpetual. Following *Jayhawk Racing*, the District Court merely concluded that the Annexation Agreement could not be used to prevent Spring Hill's current governing body from choosing a different path on annexation than the previous governing body.

Arguing that K.S.A. 12-2908 authorizes permanently binding future governing bodies, of course, could produce absurd results in the context of governmental issues. Using an example in current events, one governing body might like to bind future governing bodies on health restrictions such as quarantines and mask mandates. If Olathe's reading of K.S.A. 12-2908 were correct, Olathe and Spring Hill could enter a contract binding each other to refrain from future quarantines or mask mandates. Under Olathe's reading of K.S.A. 12-2908, such an agreement would be not only valid, but it would "override" this Court's pronouncements in *Jayhawk Racing* regardless of what pandemic might confront

future governing bodies. Spring Hill suggests that Olathe's interpretation should be rejected because of this Court's disapproval of statutory interpretations which provide absurd results. *N. Nat. Gas Co. v. ONEOK Field Servs. Co.*, 296 Kan. 906, 918, 296 P. 3d 1106 (2013).

Neither Spring Hill nor the District Court has claimed that all perpetual contracts are invalid. Likewise, not all perpetual contracts violate the *Jayhawk Racing* rule. It is entirely possible that a court might decide, for example, that a perpetual contract between municipalities were valid if it were to address an administrative issue instead of a governmental issue. But for the lack of Attorney General approval, a court might have even properly found the Annexation Agreement in this case to be enforceable, at least to the extent enforced on the same governmental body which executed it. In either case, it might be possible that a perpetual contract could be found valid, at least to some limited extent. Neither of these scenarios, however, are like *this case*. This is a case where Olathe sought to bind the current Spring Hill governing body to decisions made, on a governmental issue, by a previous governing body sitting more than 15 years ago. Regardless of whether the original contract was void because of its perpetual nature, therefore, it could not be enforced today because of the *Jayhawk Racing* rule.

CONCLUSION

Even if the District Court had not dismissed Olathe's Petition under the *Jayhawk Racing* rule, it could and should have done so for the failure to obtain Attorney General approval under K.S.A. 12-2904. K.S.A. 12-2908 does not apply to the Annexation Agreement and, even if it did, it certainly would not "take precedence" over the *Jayhawk Racing* decision. Accordingly, in addition to all of the grounds relied upon by the District Court, the Judgment should be affirmed because the Annexation Agreement was not approved by the Attorney General.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 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 as well as a courtesy copy sent via email to:

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