IN THE SUPREME COURT OT MISSOURI

No. SC97626

SOPHIAN PLAZA ASSOCIATION, et al.,

Respondents,

v.

CITY OF KANSAS CITY, MISSOURI,

Appellant.

Original Proceeding from the Circuit Court of Platte County, Missouri
Case No. 15AE-CV00546

Transfer from the Missouri Court of Appeals, Western District
Case No. WD80678

Respondents' Substitute Brief

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ATTORNEYS FOR RESPONDENTS

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THE ORIGINS OF THE CITY'S TRASH REBATE PROGRAM

After promising free trash pick-up to persuade voters to support a city-wide earnings tax, on January 15, 1971, Kansas City ("the City") enacted an ordinance providing for the collection of solid waste from all residences. The ordinance expressly excepted "residential refuse from trailer parks or buildings containing seven or more dwelling units." [SLF 286, City Code § 16.20(a)] (Appendix to Respondents' Substitute Brief- (A28)).

Three lawsuits challenged the constitutionality of §16.20(a) on equal protection grounds. [SLF 292-308]. On February 20, 1976, the Platte County Circuit Court found §16.20(a) arbitrary, an unreasonable classification and unconstitutional. [SLF 1-2].

The Stipulation and Agreement

Subsequently, the City and plaintiffs executed a Stipulation and Agreement ("Stipulation") obligating the City to provide trash collection services to all residences or pay a cash equivalent to owners of trailer parks and buildings containing seven or more dwelling units. [SLF 5-7] (A5). On August 31, 1976, the parties executed the Stipulation. [SLF 5-7]. The Stipulation defined "Owners" as the owners or authorized managing agents of the owners of "buildings containing seven or more dwelling units and the owners or authorized managing agents of trailer parks located within the City of Kansas City, Missouri." [SLF 5-6, ¶ 1].

The Stipulation defined "Services" to mean "residential refuse collection and disposal services which meet or exceed criteria now established by the provisions of Chapter 16 of the Code of General Ordinances of Kansas City (A23), or which meet or exceed criteria hereafter established by any ordinance of city-wide application, by state law or by other lawful regulation issued pursuant thereto relating to residential refuse collection." [SLF 6, ¶ 1(c)]. The City also agreed that cash payments to owners would be determined by a formula based, in part, on the average cost of providing refuse services to other residents in Kansas City, Missouri. [SLF 6, ¶¶ 2-4].

The 9-1-76 Modified Judgment Incorporated the Stipulation

At the City's/plaintiffs' request, the Court incorporated the terms of the Stipulation into its Modified Judgment ("Injunction") and made the provisions mandatory. [SLF 3-4] (A3).

The Injunction resolved the constitutional claim in a manner "satisfactory to the Court as well as to the parties, particularly since it extends beyond the issues herein to address the matter on a city-wide basis, providing just and equitable relief not only to the plaintiffs, but also to owners of similarly situated properties not parties in this litigation." [SLF 3-4]. The Court entered a mandatory injunction "directing the City…to provide refuse collection services, or the cash equivalent thereof, to the properties of the plaintiffs and to the properties of others similarly situated, and to dwelling units located in trailer parks, under the terms and conditions specified in the Stipulation and Agreement filed herein." [SLF 4].

The parties' appeals were withdrawn. [SLF 97-99]. The City amended its refuse collection ordinance and incorporated the language and intent of the Stipulation and Injunction. [SLF 289-291 (Ordinance 48388) (A47) (effective December 1, 1977—15 months later)].

THE CONTUMACIOUS ACTS BEGIN

In 1995 City Auditor Mark Funkhouser published a performance audit of the Trash Rebate Program. [SLF 8-45]. Funkhouser understood that the "program was mandated by the Sixth Judicial Court in 1976 as a settlement to a lawsuit brought by apartment owners" against the City; he claimed the City's costs required renegotiation of the settlement with the plaintiffs. [SLF 9].

Assistant City Attorney Jack Schrimsher stated that the court settlement provided for even distribution of taxpayer money to everyone and the settlement shall remain in effect as long as the City has a trash system. [SLF 79]. Schrimsher told the auditor that "the city would be in contempt of court if they tried to change the ordinance without changing the entire trash collection system." [SLF 80, ¶ 3].

Funkhouser recommended eliminating the trash rebates for financial reasons. [SLF 48; SLF 161 at 35:4-9].

The 2004-2005 Trash Rebate Program cost the City $1,365,908. [SLF 49-51]. Then, the City still provided cash payments to all owners of buildings with seven or more units that were registered with the City, including condominiums, regardless of whether the owners were original plaintiffs in the 1970s lawsuits. [SLF 113, at 36:13-23]. The

City paid condominium associations trash rebates for several decades until it terminated the Trash Rebate Program in 2010. [SLF 113, at 36:24-25; 37:1-2; Tr. at 188:8-11].

Michael Shaw managed the Solid Waste Division of the Public Works Department. [SLF 105, at 5:8-23]. Shaw told Public Works Director, Stan Harris, that the City was required by a Court Order to continue the Trash Rebate Program regardless of the City's financial constraints. Harris did not disagree. [SLF 115, at 42:4-21]. The following year, City Manager Wayne Cauthen submitted a budget memorandum to Funkhouser and the City Council proposing elimination of the Trash Rebate Program as a means to address the City's financial circumstances. [SLF 83, 87; SLF 176 at 95:2-7, 13-16, 25; 96:1-4, 20-25].

On March 27, 2008, the 2008-09 Budget Amendment proposed a budget eliminating the solid waste rebate for buildings with seven or more units—a projected savings of $1.4 million. [SLF 88-94]. The Council approved eliminating the Trash Rebate Program. [Tr. at 329:2-8].

On April 9, 2008, Shaw sent a letter to building owners and management companies receiving trash rebates announcing the Trash Rebate Program's elimination effective May 1, 2008. [SLF 52]. "The Solid Waste Division is taking this step in order to comply with the recently adopted City budget, which eliminated funding for this program." [SLF 52; SLF 125, at 84:20-25; 85:1-25].

Shaw wrote a confidential memorandum to Harris stating: "Apartment Rebate eliminated from budget. Requires ordinance changes. Caution: we will likely be sued."

[SLF 53; SLF 126, at 88:21-25; 89:8-12]. Shaw believed eliminating rebate payments was a violated the Stipulation and 1976 Injunction. [SLF 126, at 89:13-24].

The Heartland Apartment Association ("HAA") is an advocacy group representing about 40,000 apartment units in Kansas City. [SLF 248, at 5:12-20]. HAA is composed of the most politically influential and financially well-to-do apartment owners. LF550, ¶87. On May 2, 2008, Shaw met a representative of the HAA concerning the planned elimination of the Trash Rebate Program. [SLF 56]. HAA's attorney advised council members that if the City eliminated the Trash Rebate Program, the City would be in breach of the Stipulation. [SLF 253, at 23:17-25; 24:1-24].

Harris requested an ordinance amendment to codify the Program's elimination [SLF 266, at 11:8-25] because FY 2009 budget provided no funding for the payments and his department had ceased making the payments May 1, 2008. The new ordinance would provide justification for the elimination of rebates. [SLF 267, at 13:12-21; 15:25; 16:1-19; SLF 268, at 17:1-10; SLF 54-55]. Following Harris' presentation, the Transportation and Infrastructure Committee heard public comments on the proposed ordinance, including from HAA, which advised that it would be breaching its agreement and the 1976 Injunction if the City eliminated the Trash Rebate Program. [SLF 95-96 (video clip); SLF 235, at 88:2-25; 89:1-2].

The City knew it had three options: it could continue the Trash Rebate Program; it could eliminate free trash pickup for the entire City; or it could eliminate the Trash Rebate Program. [SLF 235, at 89:3-5]. ***The City made a deliberate, purposeful decision to eliminate the Trash Rebate Program from the budget, knowing that there was a***

Court Order and contract mandating the continuation of benefits. [SLF 235, at 89:3-14, 17-20].

Troy Schulte, the City's Budget Director from 2003 to 2009 and current City Manager, testified that the City eliminated the Trash Rebate Program because of ongoing budget difficulties. [Tr.326:8-10; 329:2-8]. Schulte recommended that the City's legal department seek Court approval prior to the program elimination because he wanted a final resolution of the legality of terminating a Court-mandated program. [Tr.337:7-22]. Nonetheless, on May 13, 2009, the Finance and Audit Committee took up for consideration Ordinance No. 080935, amending Chapter 62 Code of Ordinances (A50) by repealing subsection A (3) of Section 62-41 and 62-42 for the purpose of eliminating all payments in lieu of City-provided services to mobile home developments, travel trailer camps, buildings containing seven or more dwelling units and home associations, and establishing an effective date. [SLF 271, at 30:8-17; SLF 95-96].

Harris advised committee members that the proposed ordinance would not go into effect until May 2010: "This would give our law department opportunity to review this with the courts prior to it going into effect and we anticipate some potential litigation associated with this. So we wanted to give the opportunity for the law department to—to investigate this fully and then actually report back to you before this actually goes back into—actually goes into effect itself." [SLF 271, at 31:10-20; SLF 95-96]. However, Schulte was unaware of any efforts by the City's legal department to seek judicial relief from the Court's Injunction between May 13, 2009 and May 2010. [SLF 204, at 46:1-6; 10-14].

On January 28, 2010 HAA and the City agreed to settle their dispute over the City's proposed elimination of the Trash Rebate Program by eliminating the Trash Rebate Program citywide except for those members of HAA identified in Exhibit A to the Tolling Agreement dated July 17, 2009 between the City and HAA. HAA and its members would not challenge the repeal of Section 62-42 or bring an action to enforce the Injunction as long as the City continued the "trash rebate" program for HAA members. [SLF 57-58].

As a result of the settlement between the City and HAA, HAA members currently receive trash rebate payments. [SLF 249, at 7:13-19].

On January 28, 2010 the City adopted Ordinance No. 080935, as amended, effective May 1, 2010, eliminating the Trash Rebate Program. [SLF 61].

CLASS REPRESENTATIVE TESTIMONY

The class representatives, Sophian Plaza Association, Townsend Place Condominium Association, Inc. and Stadium View Apartments, testified at trial on behalf of the Class. Sophian had received trash rebates since 1978, when the building converted from apartments to condominiums, until the program stopped in May 2010. [Tr.188:8-17]. The rebate funds were deposited into Sophian's operating budget, and used to pay for building maintenance, trash removal and recycling. [Tr.188:8-25; 189:1-14]. Sophian did not know of the City's intention to eliminate the Trash Rebate Program until it learned the City had defunded the program in the spring of 2008. [Trial Tr. at 190:4-9].

Townsend Place participated in the Trash Rebate Program from the time of its completion and occupancy in 1989 or 1990 until the City discontinued the program for non-Heartland members. [Tr.131:20-25; 132:1-3]. Townsend received between $1,500 and $2,000 per year in trash rebate payments, and used the funds to defray various building expenses, including trash removal. [Tr.132:9-15].

Dennis and Rita Walker have owned the Stadium View Apartments since 1993 [Tr.195:23-24; 198:8] and received rebate checks of $200 to $300 per month. [Tr. 98:4-25; 199:8-13]. The Stadium View occupancy rate varied from about 85 percent to 93 percent since 1993. [Tr.199:1-7].

THE CITY'S WILLFUL ACTS

The Trial Court found, in part on the basis of the testimony of Schulte, that the City chose to eliminate the Trash Rebate Program with full knowledge of the existence of the Injunction and knowingly violated the Injunction. [Tr. 344:22-25; 345:1-4; L.F. 549].

Schulte testified that the City's knowing violation of the Injunction was a calculated risk that the City would be sued. [Tr.345:1-7]. Council Member Bill Skaggs suggested the City Council put some money in its contingency fund to pay for a potential lawsuit. [SLF 77-78; SLF 238, at 98:13-25; 99:1-6].

When the City ran into financial problems in 2008 to 2010, the City could have said, "We can't afford to do a free trash pickup, but we are going to do a very reduced rate but at least charge each household two dollars," but chose not to. [Tr.356:13-18].

DAMAGES

The Trial Court found that the Class suffered past damages in the amount of $10,274,704.00. [LF551]. The City did not call a witness to testify about damages. [LF551].

ATTORNEYS' FEES

Class Counsel in this case were awarded attorney's fees in the total amount of $4,109,881.60, with the City paying $1,362,562.50 plus expenses in the amount of $59,035.56, and $2,747,319.10 to be paid by the Class from the common fund. Attorneys' fees did not include the damages charged against the City for the per diem award ($2,846 per day until the contempt is purged) as that amount is not yet knowable, or pre-judgment and post-judgment interest, and not for this appeal. LF553.

INTRODUCTION

The City sought transfer based on its belief that the Western District allowed judicial estoppel to create standing in a party. The City claimed that a conflict existed between the Western District's decision *In re JDS*, 482 S.W.3d 432 (Mo. App. 2016) and the Western District's opinion in this case.

Now, in its brief, the City tacitly admits the absence of a conflict by abandoning that argument. Standing involves subject matter jurisdiction because it goes to the heart of a court's authority to decide a case. *In re JDS* properly held that judicial estoppel cannot create standing, that is, to create subject matter jurisdiction. That notion is settled and undisputed. For that reason, the Western District never employed judicial estoppel to create standing in this case; rather, the Western District's decisional matrix applied judicial estoppel to limit the City's attempt to invoke constitutional and procedural defenses 40 years too late, not to create subject matter jurisdiction. "This case involves circumstances which justify the application of judicial estoppel to prevent the City from challenging the validity of the 1976 Modified Judgment." *Sophian Plaza Ass'n v. City of Kansas City*, No. WD 80678, 2018 WL 5795541, at *7 (Mo. Ct. App. Nov. 6, 2018).

The City claims that it cannot be estopped by its earlier actions and failures to act. What it really means is that any constitutional defense it should have, but failed to raise in the 1976 action, could be raised 40 years later. The usual rules regarding waiver of defenses not raised do not apply to the City – or so the City argues. As will be shown, judicial estoppel is but one reason the City's arguments 40 years later are unavailing. Waiver, ratification and invited error are sufficient to decide the case without regard to

judicial estoppel; if judicial estoppel applies, and it does, it too sinks the City's arguments.

Oft times an appeal turns on a single pivotal issue. This case has two such pivot points.

The first is whether third-party beneficiaries may enforce contracts written for their benefit and/or judicial judgments that expressly extend the benefits of the judgment obtained to all persons similarly situated to the named plaintiffs in the action. The Class Plaintiffs *do not* claim that they were parties to the 1976 proceeding. They *do* claim that they are among the "all similarly situated" building owners to whom the 1976 Modified Judgment expressly referred. Here, the City asserts through a variety of devices that because the 2017 Class Plaintiffs were not parties to the 1976 action, they have no rights under the 1976 Judgment. Indeed, the City argues that it can never enter into a contract involving third-party beneficiaries. Further, the City never denies its contempt on appeal nor does it claim that it did not breach the 1976 Settlement Agreement. It merely says that the Class Plaintiffs cannot bring this contempt action or the breach of contract action.

If the Court concludes that the City's position is correct, that a city can never enter into a contract providing any benefits to third-party beneficiaries and that only the original parties can bring a contempt action or a breach of contract action against the City, the City must still figure its way around the error it invited. All of the three petitions that were consolidated into the 1976 case and Modified Judgment sought class certification. The City received a Judgment on the central constitutional question in April 1976. Before the judgment became final, it asked the trial court to enter a judgment that

applied to all similarly situated property owners. One must presume that had that not happened, class certification proceedings made superfluous by the City's request for application of the 1976 trial court's judgment to "all buildings containing seven or more dwelling units and to all trailer parks containing dwelling units" would have commenced at some point. LF39. The City's decision effectively agreed to class-like treatment of "all similarly situated" owners pretermitted the need for class certification. If it was error for the trial court to proceed on a class-like basis, the City had an obligation in 1976 to object. It did not; rather, it fully embraced that decision because it invited it. To assert now that the failure officially to certify a class obviates the entire 1976 proceeding was error that falls on the City, not the Class Plaintiffs.

The second pivot focuses on the City's claim that no court can tell it what to do. Though that is said a bit more bluntly than the City puts it, the City contends – again through a variety of unusual legal arguments – that the 1976 Modified Judgment was void the moment it was signed by the trial court. The City's position finds expression in untried separation of powers arguments it never raised in the original proceedings. These arguments reduce to this: Kansas City has the power to pass whatever ordinances it wants to pass and no court can diminish that power. This argument contains an unstated premise – that the equal protection clause does not limit the City any more than a court can limit it. This, too, is a legally novel proposition for obvious reasons.

Finally, though not a pivot point, there is the admission contained in the City's agreement with the HAA – that the collection of refuse or payments in lieu of trash collection were mandated by the 1976 Modified Judgment. This 2010 Agreement

excepted the HAA from all City ordinances relating to refuse collection(!) within the City and reinstated the 1976 Modified Judgment, but only for a select group of politically influential and affluent apartment owners in Kansas City. Because the Class Plaintiffs have no such political clout, the City cut them out of the HAA agreement, re-passed an ordinance that was legally identical to the 1976 ordinance declared unconstitutional, and now claims that no order of any court can stop a City bent on discriminating against some of its citizens.

I. Plaintiffs' Standing to Bring a Contract Action – Responding to Kansas City's Point II.

Introduction

Kansas City's Point II asserts that the Class Plaintiffs[1] here did not have standing to bring a breach of contract action. Unlike many civil contempt cases that are founded on a judicial order alone, this case is founded on the Agreement between the City and the 1976 Plaintiffs that became part of the Modified Judgment at the express request of the parties, including the City. The Agreement is a binding contract; the City does not argue otherwise.

Given the significance of the existence of a contract upon which the Modified Judgment was based for both the breach of contract and the civil contempt claims, the Plaintiffs believe it necessary to respond to the City's first two points in reverse order to aid in the legal analysis.

The Stipulation and Agreement between the 1976 Plaintiffs and the City is a contract; the City entered into that Agreement to resolve litigation. That contract obligated the City to provide refuse service or, if not actual refuse service, then to make payments in lieu of refuse collection. The Agreement required the City to provide these benefits not only to the Original Plaintiff property owners, but also "to all buildings containing seven or more dwelling units." SLF06. The Agreement extended until

[1] "**Class Plaintiffs**" or "**Plaintiffs**" refers to the Plaintiffs in the 2017 contempt/breach of contract action. They are the Respondents in this case. "**Named Plaintiffs**" or **"Original Plaintiffs**" refers to the 15 Plaintiffs in the 1976 declaratory judgment action that resulted in the Modified Judgment.

terminated. Termination could occur by the Agreement's terms only "if the City terminates city-wide refuse services to privately owned dwelling units" in the City. SLF07. Thus, if the City wished to terminate the agreement, it had to treat all property owners in the City equally. City obligated itself to furnish refuse collection or payments in lieu of refuse collection to *every qualifying private dwelling* in the City or to furnish those to *no qualifying private dwelling* within the City:

> "If the City terminates city-wide services to privately owned dwelling units, including payments in lieu of such services, the City shall have no further obligation to hereunder to make the cash payments or provide direct services herein provided and for as long as such services and payments are terminated, otherwise such obligation shall continue."

SLF07 (emphasis added). It did so to obtain a court-approved remedy to its equal protection violation. It is important to note here that the City's ordinance made residential trash collection the city-wide rule. The 1976 Modified Judgment simply excised the unconstitutional exclusion of 7+ dwelling unit buildings and trailer parks from the ordinance, leaving the general rule intact. The addition of the option to make payments in lieu of trash service was at the City's request, was not ordered by the 1976 court as the only remedy for the equal protection violation and gave the City judicial approval of an option it sought in advance of its implementation.

The Original plaintiffs' petition pleaded class claims and made a demand for damages. LF25-29. The consideration for the contract flowing to the City in agreeing to settle included (1) the termination of the appeal, (2) the creation of a court-approved option in the City to make payments rather than collect refuse or terminate the program

altogether, (3) the avoidance of potential payments of damages in a follow-on civil rights action brought by the Plaintiffs, and (4) the potential certification of the pleaded class (and attendant damages) in that follow-on proceeding.

A. Standard of Review

Kansas City's first point asserts that the class plaintiffs did not have standing to bring this breach of contract action. The City asserts that only the original parties to the 1976 Petition may bring a breach of contract action arising from the City's willful decision to ignore the requirements of the 1976 Modified Judgment.

"Because standing is a question of law, review of the issue on appeal is de novo." *Schweich v. Nixon*, 408 S.W.3d 769, 773 (Mo. 2013).

B. The Plaintiff Class Has Standing to Enforce the 1976 Contract

Assuming for argument's sake alone that only the 1976 Stipulation and Agreement exists and that that the Agreement had not been incorporated into the Modified Judgment, Plaintiffs here have standing to bring a breach of contract action.

This is the relevant query for this Point: *Do the Class Plaintiffs in this case have standing to obtain a breach of contract judgment against the City based on the contract standing alone?*

1. Standing Generally

> [A] primary objective of the standing doctrine is to assure that there is a sufficient controversy between the parties that the case will be adequately presented to the court. That, plus the purpose of preventing parties from creating controversies in matters in which they are not involved, and which do not directly affect them are the principal reasons for the rule which requires standing. *Ryder v. St. Charles Cnty.*, 552 S.W.2d 705, 707 (Mo.

> banc 1977). Standing is a necessary component of a justiciable case that must be shown to be present prior to adjudication on the merits. *CACH, LLC*, 358 S.W.3d at 61; *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. banc 2002).

Schweich v Nixon, 408 S.W.3d 769, 774 (Mo. 2013). The City does not dispute that if the Agreement covers these Class Plaintiffs, then the Class Plaintiffs have been damaged – either by the loss of refuse services or in the loss of payments in lieu of refuse services.

2. Section 432.070 Does Not Abrogate/Derogate the Common Law and thus Does not Abrogate/Derogate a City's Authority to Confer Third-Party Beneficiary Status in a Contract

The City first asserts that §432.070, RSMo (A58) prohibits any city from entering into any contract that contemplates third-party beneficiaries of any sort. As a general rule, "[c]ontracts made by a city, if authorized, are no different from other contracts and are measured by the same tests and subject to the same rights and liabilities." *Burger v. City of Springfield*, 323 S.W.2d 777, 783 (Mo.1959). The City's argument is that the common law notwithstanding, §432.070 abrogates the common law.

Nowhere does §432.070 expressly prohibit a City from contracting for the benefit of a third party. Indeed, the statute makes no reference to third-party beneficiaries at all.

Here is what §432.070 says:

> No county, city, town, village, school township, school district or other municipal corporation shall make any contract, [1] unless the same shall be within the scope of its powers or be expressly authorized by law, nor [2] unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be [3] in writing and dated when made, and [4] shall be subscribed by the parties thereto, or [5] their agents

authorized by law and duly appointed and authorized in writing.

Id. (Brackets setting out limitations added).

Section 432.070 acts as a special statute of frauds applicable to municipalities to avoid municipal liability for implied in fact contracts. The statute was "enacted to preclude parties who have performed services for a municipality or county or other governmental entity without entering into a contract from subsequently recovering the value of those services based upon an implied contract." *Inv'rs Title Co. v. Hammonds,* 217 S.W.3d 288, 294 (Mo. 2007).

> The manifest purpose of [§ 432.070] is that the terms of the contract shall, in no essential particular, be left in doubt, or to be determined at some future time, but shall be fixed when the contract is entered into. This was one of the precautions taken to prevent extravagant demands, and to restrain officials from heedless and ill-considered engagements.

Newsome v. Kansas City, Missouri Sch. Dist., 520 S.W.3d 769, 778 (Mo. 2017) quoting *Woolfolk v. Randolph County*, 83 Mo. 501, 506 (Mo. banc 1884).[2]

This special statute of frauds provision does not abrogate (completely preempt) the common law. "Where the legislature intends to preempt a common law claim, ***it must do so clearly***." *Public Service Com'n of State v. Missouri Gas Energy,* 388 S.W.3d 221, 231 (Mo.App.2012)(emphasis added). Thus, "[u]nless a statute ***clearly*** abrogates the common law either expressly or by necessary implication, the common law rule remains valid." *Id.* at 230 (emphasis added).

[2] Yet §432.070 does not preclude recovery for contracts implied in law that are not otherwise *ultra vires*. *Inv'rs Title Co.*, 217 S.W.3d at 296.

Where the claim is that the statute is in derogation, that is partial preemption, of the common law, the settled rule expresses the same principle in terms of strict construction. Statutes in derogation of the common law must be strictly construed. *Strottman v. St. Louis I.M*, 109 SW 769,777 (Mo. 1908). The common law is, as previously shown, clear in its teaching that cities are like other parties when it comes to contracts. While §432.070, places express limits on the authority of cities to contract for services, it does no more than that. For the City's argument to prevail – that the statute prohibits third-party beneficiaries in a municipal contract – the Court must conclude that the common law applicable to cities was clearly abrogated by §432.070, or was implicitly derogated by some unannounced/unstated legislative policy floating unseen below the surface of §432.070. Strict construction simply does not countenance implicit derogation.

Section 432.070 provides neither a clear nor even a reasonably implied abrogation/derogation of the common law as to cities concerning contracts creating intended, expressly mentioned in writing, donee third-party beneficiaries. Absent such a clear statement of legislative intent to exempt municipal contracts from the common law of contracts as to third-party beneficiaries, § 432.070 cannot undermine the general rule that "[c]ontracts made by a city, if authorized, are no different from other contracts and are measured by the same tests and subject to the same rights and liabilities." *Burger*, 323 S.W.2d at 783.

In sum, there is no statutory basis for a conclusion that §432.070 prohibits the City from entering into a contract that provides benefits to third-party beneficiaries.

Nor is there any basis for that conclusion in the case law.

The City relies primarily on implied contract cases that do not address third-party beneficiary claims at all. Indeed, the City's cases stand for the agreed-to and unremarkable proposition that strict compliance with §432.070 is required before a valid contract exists between a city and anyone.

In *Mays-Maune & Assocs., Inc. v. Werner Bros.*, 139 S.W.3d 201, 203 (Mo.App. 2004), Mays–Maune, a building material supplier, filed a civil action for money damages against Werner Bros. Inc. (the subcontractor), Bridwell Construction and Design (the general contractor), and Grandview R–II School District (the school district) for failure to pay for building materials supplied by the plaintiff. Mays-Maune's theory of recovery against the school district sounded in unjust enrichment. "The plaintiff is not seeking enforcement of the contract between the school district and the general contractor. The plaintiff's claim against the school district is for unjust enrichment, which is a theory of implied contract." *Id.* at 208-09. The Eastern District concluded that "[t]he statutory requirement that the contract be in writing is mandatory and strict compliance is required in order to bind the school district." Id. at 208. Further, "the fact that the school district has received the benefit of the plaintiff's performance does not make it liable on the theory of implied contract. … Such a claim [based on implied contract] is prohibited. " *Id.* at 208-09.

The issues in *Mays-Maune* did not involve third-party beneficiary claims and cannot be read to prohibit a city's liability to third party beneficiaries under §432.070.

In *Gill Constr., Inc. v. 18th & Vine Authority*, 157 S.W.3d 699, 705-06 (Mo.App.2004), the 18th and Vine Authority entered into contracts with Gill Construction for improvements within Kansas City. When Gill performed work that exceeded the work contracted for and the Authority refused to pay, Gill sued the Authority and the City. Gill had no contract with the City. The City argued that it was not liable to Gill even if the contracts between Gill and the Authority were legal because the Authority was not the City's agent and the contracts were solely between Gill and the Authority. The trial court dismissed Gill's claim against the City. Gill appealed. The Western District concluded that "in order to impose an obligation on the City, Gill was required to enter a contract that complied with the statute. Because there was no contract between the City and Gill that complied with Section 432.070, the circuit court did not err in dismissing Gill's breach of contract claim against the City." *Id.* at 709. Again, there is no discussion in *Gill* of any third-party beneficiary claims; *Gill* cannot be read to prohibit a city's liability to third-party beneficiaries under §432.070.

The City also cites an unreported federal district court decision holding that strict compliance with §432.070 is required before a school board can be sued for breach of contract. As the City notes, *Catapult Learning, Inc. v. Bd. of Education*, No. 4:07CV935SNL, 2007 WL 2736271 (E.D.Mo. Sept. 17, 2007), resulted in dismissal of Catapult Learning's breach of contract claim because "[t]here is no written contract signed by the plaintiff and the Board, in existence." Id. at *3. Again, this case in no way implicates a claim by a third-party beneficiary against a City when there is a contract that otherwise complies with §432.070.

Missouri law recognizes third-party beneficiary claims even when one of the contracting parties is a city. *St. Joseph Light & Power Co. v. Kaw Valley Tunneling, Inc*., 589 S.W.2d 260 (Mo.banc1979) is instructive. There, St. Joseph Light & Power Company filed suit against St. Joseph, Missouri (a city) and Kaw Valley Tunneling to recover for damages to its buildings and facilities resulting from the construction of a sewer by the city. The jury returned a verdict against the city for damages.

The Court applied common law contract principles to interpret the contract as manifesting an intent to make injured property owners third-party beneficiaries of the contract between Kaw Valley and the city. Although the issue whether a city could face liability to third-party beneficiaries of its contract was not directly implicated because the city did not raise that issue, the Court's dicta noted that "the contract merely makes Kaw Valley responsible for protecting and repairing adjoining property, in addition to any responsibility the city might bear." *Id.* at 273.

In *Kansas City Hispanic Ass'n Contractors Enter., Inc. v. City of Kansas City*, 279 S.W.3d 551, 554 (Mo. Ct. App. 2009), H & R Block obtained approval for public funding of Block's world headquarters building by tax increment financing and executed a "Development Agreement" with Kansas City. The contract required that a certain amount of the work be contracted to minority business enterprises ("MBE"). The contractor completed the building without the necessary MBE participation. Diaz Construction and the Kansas City Hispanic Contractors' Association sued for breach of contract, asserting that as MBE's they were third party beneficiaries of the contract.

The Western District concluded that Diaz was an incidental third-party beneficiary. As an incidental beneficiary, he lacked standing to pursue a breach of contract claim. Diaz was an incidental beneficiary because "H & R Block and the TIF Commission [the City's did not assume a direct obligation to MBEs,…." *Id.* at 556.

Again, the language of the Agreement here controls. "In deciding whether the agreement was intended to create contractual rights in third parties, the nature of the agreement, the identity of the alleged intended beneficiaries and the specific duty said to have been created toward them are all factors to be considered." Restatement (Second) of Contracts § 313 (1981). When those factors are considered in this case, it is clear that the Class Plaintiffs are intended donee third-party beneficiaries.

The Agreement requires the City to provide a direct and intended benefit to the Class. "[T]he City will either (a) furnish refuse services to all buildings containing seven or more dwelling units … located in Kansas City or (b) make cash payments to the owners of such buildings … in lieu of such services." SLF05. Where, as here, there is an intent to confer third-party benefits, neither §432.070 nor the cases interpreting that statute abrogate/derogate a City's authority or right to confer third-party beneficiary status upon a class of its citizens by a contract that otherwise meets the requirements of §432.070.

3. No Direct Consideration is Required for Third-Party Beneficiaries to have Standing to Enforce a Contract

The Class Plaintiffs here agree that their contract claim depends on its status as a third-party beneficiary for purposes of the breach of contract claim. The City does not claim that the Agreement reached with the Original Plaintiffs lacked consideration. Rather, the City asserts that because no direct consideration flowed from the Class Plaintiffs to the City, no consideration supports the Class Plaintiffs' claim that the City owed a duty to them. According to the City, "the only way the Class can obtain standing to enforce the contract is if its members are third-party beneficiaries." (App.Sup.Br.29).

A third-party beneficiary is definitionally not a party to the contract itself; a third-party beneficiary could never sue upon a contract if a court were to adopt the City's flawed logic.

In contract actions, a party has a legally protectable interest at stake (and thus standing) if it has a right to enforce the contract as a party or as a third-party beneficiary. *Farmers Ins. Co., Inc. v. Miller*, 926 S.W.2d 104, 107 (Mo.App.1996). A legally protectable interest means "a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, either immediate or prospective." *American Economy Ins. Co. v. Ledbetter*, 903 S.W.2d 272, 274 (Mo.App.1995) (citation omitted).

Third-party beneficiaries have standing to enforce a contract that provides benefits to them even though they are "not privy to a contract ***or its consideration***." *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co., L.P.*, 75 S.W.3d 247, 260 (Mo. 2002)(emphasis added).

4. The Class is an Intended Donee Third-Party Beneficiary

Missouri law recognizes three types of third-party beneficiaries: donee, creditor and incidental. *Id.* Only donee and creditor beneficiaries have standing to recover on the contract. *Id.* The distinction between donee and creditor third-party beneficiaries depends on whether the promisor's or the promisee's obligations are at issue. "A person is a creditor beneficiary if the performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary." *Id.* Refuse collection was not something the original fifteen plaintiffs (the promisees) already owed to their similarly situated counterparts. The Class is not a creditor beneficiary of the original plaintiffs.

The Class here is a donee beneficiary of the City. The City agreed to "confer upon [the Class] a right against the promisor [the City] to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary." RESTATEMENT (FIRST) OF CONTRACTS § 133 (1932)(defining donee beneficiary). Further,

> A person is a donee beneficiary if the purpose of the promisee [the original plaintiffs] in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary **or** to confer upon him a right against the promisor to some performance neither due, nor supposed nor asserted to be due from the promisee to the beneficiary.

L.A.C., 75 S.W.3d at 260 (emphasis added and necessary to highlight the fact that "donee" does not exclusively mean the recipient of a gift).

"Although it is not necessary that the third-party beneficiary be named in the contract, the terms of the contract must express directly and clearly an intent to benefit an identifiable person ***or class***." *Id.* (emphasis added). "It is not necessary for the parties to

the contract to have as their 'primary object' the goal of benefitting the third parties, but only that the third parties be primary beneficiaries." *Id.*

In compromising that litigation, the original fifteen plaintiffs and the City entered into the 1976 Agreement that reached beyond the Original Plaintiffs. The City agreed to provide refuse collection or cash payments in lieu of refuse collection for all owners of multi-dwelling units and trailer parks. LF90-92. Specifically, the City agreed to "furnish refuse services to ***all buildings containing seven or more dwelling units*** and to ***all trailer parks*** containing dwelling units, ***located in Kansas City*** [or to make cash payments lieu thereof]." SLF05. (emphasis added).

The 1976 Agreement was the City's logical and economically-sound response to the trial court's initial judgment that the City could not provide refuse collection to some of its citizens, but not others. LF88-89. As previously argued, the consideration for the contract flowing to the City in agreeing to settle included (1) the termination of the appeal, (2) the creation of a court-approved option in the City to make payments within rather than collect refuse or the termination of the program altogether, (3) the avoidance of potential payments of damages in a follow-on civil rights action brought by the Plaintiffs, and (4) the potential certification of a class (and attendant damages) in that follow-on proceeding. LF25-29

The City then performed this contract on a city-wide basis for 30+ years – further evidence that the City intended to benefit this class of residents, making them "donee" third-party beneficiaries with standing to enforce the Agreement.

a. The Third-Party Beneficiaries Here did not Receive a Gift from the City.

The City now tries to undo its Agreement, contending MO.CONST.ART.6 §§ 23, 25 prohibits cities from making private gifts. This argument is simply a misunderstanding of the law. As previously explained, the nomenclature "donee" in a third-party beneficiary context does not refer solely to a gift. Donee third-party beneficiaries obtain enforcement rights from a promisor when a contract "confers upon [them] a right against the promisor." *L.A.C.*, 75 S.W.3d at 260. This right in third-parties to enforce a promise is part of the consideration between the parties in the contract; it is not a gift.

St. Louis Children's Hosp. v. Conway, 582 S.W.2d 687 (Mo.banc1979) offers no aid to the City. There a city "gifted" property or money to a private entity in exchange for no consideration. Here the City agreed (promised as the promisor) to compromise litigation by agreeing to provide refuse collection for all of its citizens to avoid a continuing judgment finding it liable for equal protection violations. This consideration formed the contract that had as its intended beneficiary not only the original plaintiffs, but also all similarly situated owners located in Kansas City.

The Class Plaintiffs, as intended donee beneficiaries, have standing to enforce this contract.

Conclusion

For all these reasons, the Class had standing to a breach of contract action. The City's Point II should be denied.

II. The Plaintiff Class Had Standing to Bring this Civil Contempt Action – Responding to the City's Point I.

Kansas City's first point asserts that the Class Plaintiffs did not have standing to bring this civil contempt action. The City asserts that only the original plaintiffs in the 1976 Petition could bring a civil contempt action arising from the City's willful decision to ignore the requirements of the 1976 Modified Judgment. Interestingly, the City never argues that it did not commit contempt; rather the City argues only that the Class Plaintiffs cannot bring a contempt against the City because they lack standing to do so.

"Because standing is a question of law, review of the issue on appeal is de novo." *Schweich v. Nixon*, 408 S.W.3d 769, 773 (Mo. 2013).

A. Standing to Enforce Civil Contempt

1. Based on the Judgment Alone

The City asserts that only an original party to an underlying proceeding resulting in an injunction may bring an action in civil contempt to enforce that injunction. For this supposed rule, the City cites a number of domestic relations cases in which the original parties to domestic proceeding are before a court after one of the original parties failed to abide by provisions of a trial court's judgment establishing certain child custody or support requirements. *See*, *D.R.P. v. M.P.P.*, 484 S.W.3d 822 (Mo. App 2016)(child visitation and cases cited therein). The City also relies heavily on *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 578 (Mo.1994)(criminal contempt case). Indeed, the language in these cases does not attempt to distinguish between a party to a civil contempt case or a party to the original action. Thus, when *Mummert* says: "Civil

contempt is intended to benefit a party for whom an order, judgment, or decree was entered. Its purpose is to coerce compliance with the relief granted," it means that so long as the party to the civil contempt action is one for whom the original order was entered and that party to the civil contempt proceeding has a present interest in the relief granted, that party has standing. *Id. Mummert* does not stand for the proposition that only a party to the underlying proceeding can ever enforce an injunction.

a. Persons with a present pecuniary interest in a judgment have standing to bring a civil contempt action.

Standing in a civil contempt context follows this rule.

> As a general rule proceedings for contempt to enforce a civil remedy and to protect the rights of parties litigant should be instituted by the aggrieved parties, or those who succeed to their rights, ***or*** *someone who has a pecuniary interest in the right to be protected*.

State ex rel. New York, C. & St. L. R. Co. v. Nortoni, 331 Mo. 764, 771, 55 S.W.2d 272, 274–75 (1932)(emphasis added). The presence of the disjunctive in the rule indicates that one need not be both a party to the underlying litigation and have a "a pecuniary interest in the right to be protected" to establish standing. A "pecuniary interest in the right to be protected" alone is sufficient. *Popsicle Corp. of U.S. v. Pearlstein*, 168 S.W.2d 105, 109 (Mo.App.1943) cites the same rule and adds that the pecuniary interest must be a present interest.

In *Secor v. Singleton*, 35 F. 376, 377 (C.C.E.D. Mo. 1888), stockholders of the Missouri, Iowa & Nebraska Railway Company obtained a final decree against the then county judges of Scotland county and the county collector, enjoining them and their

successors in office levying certain taxes. Later, the Keokuk & Western Railroad became the owner of the exempt property. Stockholders of the Keokuk & Western, though not parties to the original proceeding, sought contempt to keep Scotland County from collecting the taxes. The court noted that "[i]f the present complainants are now stockholders of the Keokuk & Western Railroad, which has become the owner of the exempt property, I am inclined to the view that that gives them a sufficient interest to maintain this prosecution…." *Id.* at 378. This position flowed from the law's conclusion that "it is essential that the person who sets on foot a prosecution for contempt should have some present interest in enforcing obedience to the order which has been violated." *Id.* See *MacNeil v. United States,* 236 F.2d 149, 154 (1st Cir. 1956)("'An action for civil contempt can only be commenced by an aggrieved party or by someone who has an interest in the right to be protected" citing *Federal Trade Commission v. A. McLean & Son,* 94 F.2d 802 (7th Cir. 1938)) and *In re Paleais*, 296 F. 403, 407 (2d Cir. 1924)("The general rule is that a proceeding for contempt to enforce a civil remedy can be instituted by an aggrieved party, or by one who succeeds to his rights, or by one who has a pecuniary interest in the right to be protected").

In any event, ***none*** of the City's cases denies standing to bring a civil contempt action to persons whose interests were adjudicated in an action, whose rights are expressly identified in the judgment and for whom specific relief is created in the judicial decree.

This case involves exactly that just-described and fairly-rare fact scenario. The events preceding the entry of the Modified Judgment, the terms of the Modified

Judgment itself, and the City's conduct and statements subsequent to entry of the Modified Judgment, all demonstrate that the Modified Judgment was intended and designed to afford relief to *all* owners of relevant properties, not just the named parties to the 1976 action. In the circumstances of this case, the Modified Judgment treated all such owners as members of a class for whom the Modified Judgment provided a specific pecuniary benefit.

Indeed, the trial court's judgment expressly stated that the judgment applied to persons/entities that were not named parties in the case. It did so at the behest of the City. The Modified Judgment expressly and specifically confirmed that the named parties designed the Settlement Agreement to confer a specific benefit upon both the Original Plaintiffs and all those similarly situated but not named parties – the Class Plaintiffs in this case.

> [T]the Court finds the proposals contained in that Stipulation and Agreement to be a solution to the refuse collection problem, satisfactory to the Court as well as to the parties, ***particularly since it extends beyond the issues herein to address the matter on a city-wide basis***, ***providing just and equitable relief*** not only to the plaintiffs, but ***also to owners of similarly situated properties not parties to this litigation***.

LF94 (emphasis added).

b. Rule 92.02 does not change the law of standing for a contempt action

The City claims that Rule 92.02 (A64) denies standing to the Class Plaintiffs. It does not.

That Rule applies only to injunctions, not contempt actions. It provides in pertinent part: "Every order granting an injunction … is binding only upon the parties to the action,…." *Id.* All Rule 92.02 says is that Kansas City and the Original Plaintiffs are the only ones that can be bound by the 1976 Modified Judgment – no one else. This is nothing more than what due process requires where an *in personam* judgment is entered.

But the Rule is silent as to who may enforce the injunction by contempt. And it says nothing to prohibit an intended and specifically identified third-party beneficiary from enforcing a judgment entered for the benefit of that person.

c. The Class Plaintiffs here have a pecuniary interest.

The 1976 Modified Judgment ordered Kansas City to provide to all "Owners" of more-than-seven-unit-apartment buildings and trailer parks located within Kansas City residential refuse collection and disposal services or make payments in lieu of such services. LF40. The judgment became final. Neither party took an appeal. Kansas City obeyed the trial court's order for 30+ years, until 2010. In 2010, Kansas City adopted an ordinance purporting to overrule the trial court's judgment/order and terminated services/payments in lieu of services to the Class Plaintiffs here. It overruled the trial court because it adopted a nearly identical ordinance infected with the same equal protection violation as the 1976 Modified Judgment found unconstitutional. In 2010, in its Settlement Agreement with the HAA, the City acknowledged that the Modified Judgment "requir[ed] the City to provide refuse collection and disposal services, or the cash equivalent thereof, to the properties of the plaintiffs in the Lawsuits and the

properties of others similarly situated," and that the City adopted the refuse rebate program "as mandated by the Modified Judgment." LF44.

The City's unilateral termination of its obligations under the Modified Judgment – unilateral because it was made without court consultation or approval – interrupted the Class Plaintiffs' pecuniary rights and gave Class Plaintiffs standing to enforce the Modified Judgment precisely because the Class Plaintiffs have a present, pecuniary interest under the 1976 Modified Judgment taken from them by the City's unilateral action.

2. Because of the Existence of the Agreement

Here the parties to the 1976 proceeding "jointly request the Court to incorporate this Stipulation and Agreement in a judgment entered herein and to make compliance with the provisions hereof mandatory…." LF41. The trial court's Modified Judgment expressly made the Stipulation and Agreement "a part hereof" and appended that document to the Modified Judgment. LF37-38.

> Generally, where the object of the contract does not, by its nature, require court approval to render the terms of the contract enforceable, court "approval" of the contract does not merge the contract with the decree, and the contract remains independently enforceable. [Citations omitted] Even in such circumstances, the parties can elect to have the otherwise enforceable contract incorporated into a decree (as distinguished from simply being approved by the court), in which case the contract does merge with the decree, and is thereafter only subject to enforcement or modification by the court. [Citations omitted].

Sch. Dist. of Kansas City, Missouri v. Missouri Bd. of Fund Comm'rs, 384 S.W.3d 238, 261 n.21 (Mo.App.2012). Thus, where independently enforceable contracts are

incorporated into equitable decrees at the request of the parties, the contract completely merges into the judgment. "Thereafter the contractual provisions are to be enforced as an order of the court, and may be reformed or amended only by a modification of the decree." *Jenks v. Jenks*, 385 S.W.2d 370, 377 (Mo. App. 1964).

Given the incorporation of the Agreement into the Modified Judgment, it appears that Missouri law makes contempt the only path by which these third-party beneficiaries can enforce the decree. To deny them standing would effectively allow the City to insulate itself from liability in contract because of the incorporation of the decree. The language in *Popsicle* and other cases allowing one with a pecuniary interest to enforce an injunction by civil contempt recognizes that contempt is the remedy the courts demand for violations of a Court's orders – even those granting third-parties' rights based on otherwise enforceable contracts.

Conclusion

The City's Point I should be denied.

III. Personal Jurisdiction.

The City next asserts that the trial court did not have personal jurisdiction over the third-party beneficiaries to the Settlement Agreement because they were not named parties to the 1976 litigation and no class was certified. This rendered the 1976 judgment void as to any non-party, according to the City.

A. Standard of Review

Review is *de novo*, as questions of personal jurisdiction are questions of law. *Hollinger v. Sifers*, 122 S.W.3d 112, 115 (Mo. App. 2003).

B. The City May Not Raise Another Person's Personal Jurisdiction Claim

One of the problems with the City's argument is that it cites legal rules as though they are bumper stickers – pithy sayings without any concrete reference to anything specific under discussion. For example, the City cites *Wuebbeling v. Clark*, 502 S.W.3d 767, 686 (Mo App. 2016) for the proposition that lack of personal jurisdiction renders a judgment entered against a person void. That is true as a general proposition; no one disagrees with that rule. But *Wuebbeling* involved a trial court's decision to enforce an order it had previously set aside. Personal jurisdiction was not at issue in *Wuebbeling*. Nor is it in this case.

Similarly, the City notes that *J.C.W. v. Wyciskalla*, 275 S.W.3dd 249, 275 (Mo. banc 2009) defines "personal jurisdiction" as the "power of a court to require a person to respond to a legal proceeding that may affect the [that] person's rights or interests." No one disputes that definition. But, as discussed below, the third-party beneficiaries of the

City's Settlement Agreement were not bound by the 1976 Modified Judgment. If anything, *Wyciskalla* stands for the proposition that the City's personal jurisdiction argument here is stillborn. It is stillborn because the right to assert a lack of personal jurisdiction on behalf of the 2017 Class Plaintiffs is their right – not the City's. As the City rightly notes, the right to assert a lack of personal jurisdiction is a "personal privilege." *State ex rel. Lambert v. Flynn*, 154 S.W.2d 52, 57 (Mo. banc 1941). And because it is a "personal privilege" the power to assert its absence is personal as well. The 2017 Class Plaintiffs are not raising that issue and never have.

The City does not claim, nor could it, that the 1976 trial court lacked personal jurisdiction over it. Indeed, the City concedes that it was properly before the 1976 trial court.

Personal jurisdiction may be waived. *State ex rel. Heartland Title Servs., Inc. v. Harrell*, 500 S.W.3d 239, 241 (Mo. 2016). Thus, even if the City could assert the Class Plaintiffs' personal jurisdiction rights, it could also waive them. By including all similarly situated owners in its Agreement, the City necessarily invited the Class Plaintiffs to the table and waived any personal jurisdiction argument it might have about their inclusion in the Modified Judgment.

There was no formal class certification in 1976. That much is true. The Class Plaintiffs contempt proceeding asserts that the City was bound by the Modified Judgment and that that Judgment expressly granted rights to these Class Plaintiffs at the City's request. See, Point I (discussing the Class Plaintiffs' third-party beneficiary status). And because the City was bound by the Modified Judgment, the Class Plaintiffs were entitled

to enforce the 1976 Modified Judgment in this contempt/breach of contract action and secure the rights granted them at the City's insistence.

Thus, the issue is not whether a class was formally certified in 1976; the issue is whether an individual benefitting non-party – a third-party beneficiary to the Agreement incorporated into the 1976 Modified Judgment – can enforce the Judgment/Agreement via a contempt or breach of contract action when the City thumbs its nose at the judiciary. Any benefitting non-party to the 1976 action – that is any person who owned or came to own qualifying property in Kansas City and for whom the City expressly agreed to provide either refuse service or payments in lieu of refuse service – acquired the right to enforce the Agreement/Modified Judgment. The right to the pecuniary benefits in that Judgment could be enforced individually by a benefitting non-party in an action for contempt because of the existence of a present, lost pecuniary interest. It simply does not matter that the benefitting non-party was absent from the 1976 proceedings or that a class was not certified.

The lack of formal class certification issue raised by the City is irrelevant. Its argument concerning a lack of personal jurisdiction over the third-party beneficiaries as a basis for its argument that the 1976 Modified Judgment is void has no foundation in the law of personal jurisdiction or the law of judgments.

The lack of any formal class-certification order is not relevant at this stage of the litigation because of invited error as well. The original plaintiffs pleaded class-action claims, and the parties proposed to the court a resolution which resolved the plaintiffs' claims on a class-wide basis. The City cannot now complain about the 1976 trial court's

failure to adhere to various formalities surrounding the certification of a class, when the City invited the court to enter a judgment containing class-wide relief. *See, e.g.*, *Taylor v. Taylor*, 525 S.W.3d 608, 613 (Mo. App. S.D. 2017) ("The general rule is that a party cannot rely on 'invited error' on appeal. That is, a party cannot lead a trial court into error and then employ the error as a source of complaint on appeal.") (citations, brackets, ellipsis, and internal quotation marks omitted); *Wilson v. Union Pac. R.R. Co.*, 509 S.W.3d 862, 875–76 (Mo. App. E.D. 2017).

The lack of formal class certification is irrelevant at this stage for two additional reasons. First, the goal of class certification is to obtain judicial approval of the Rule 52.08(a) and (b) factors. (A61). The 1976 trial court's Modified Judgment applied to "similarly situated owners of similarly situated not parties in this litigation." LF38. This "similarly situated" phraseology, which adopted the City's voluntarily-entered Agreement, is a conclusion that necessarily includes commonality, typicality, and adequacy of representation required by Rule 52.08(a)(1-4). Numerosity is a given. And because the relief granted was declaratory and injunctive only, the 52.08(b)(2) factors are also fully met. Further, what the City did later with HAA is evidence of the risk of inconsistent adjudications about which Rule 52.08(b) (1)(A)(B) or (b)(2) are concerned. Indeed, the City never identifies which elements of the certification analysis would have failed, emphasizing only the lack of a formal certification. A formal certification would likely have produced the same outcome as the voluntary class-wide settlement approved by the court.

Second, the judicial estoppel argument as it is advanced in the context of personal jurisdiction by the City is also irrelevant. Rather than attempt to respond to the unfocused spray of the City's arguments outside the personal jurisdiction context, Class Plaintiffs simply note that "the claim" in the 1976 case was that the City's acts violated equal protection. The City's argument that "judicial estoppel cannot be applied to grant jurisdiction *over a claim* that could not otherwise be brought" is another legal aphorism that the City cites without understanding. The whole of the City's Point III focuses on personal jurisdiction over parties, not subject matter jurisdiction over claims. Indeed, the City quotes *In re J.D.S.*, 482 S.W.3d 431, 443 (Mo. App. 2016) for the proposition that "[a] litigant cannot obtain standing to bring an action solely based on judicial estoppel…." But standing involves subject matter jurisdiction. And while personal jurisdiction can be waived by the party, "subject matter cannot be waived." *CACH, LLC v. Askew*, 358 S.W.3d 58, 61 (Mo. 2012).

The 1976 trial court had subject matter jurisdiction over the 1976 Plaintiffs' equal protection claim. The Modified Judgment was not void as to the City nor as to the 1976 Plaintiffs. The City does not now contend otherwise. And because it was not void, the 2017 Class Plaintiffs – again, the intended, expressly-included, donee third-party beneficiaries – may enforce that judgment via a contempt proceeding when the City thumbs it nose at the judiciary thirty years later.

Conclusion

Point III should be denied.

IV. Separation of Powers.

The City's next point asserts that the 1976 Modified Judgment violated separation of powers. The Point depends for its efficacy on the Court believing one of two propositions about the Modified Judgment advanced by the City.

(1) The City argues that the Modified Judgment is a specific ordinance imposed on the City. This, according to the City, constituted lawmaking powers given only the City Council.

(2) The City also argues that the Modified Judgment deprived the City of its right to pass ordinances to address the City's refuse collection policy for the future.

Neither of these propositions is true. They are factually and legally inaccurate.

As a prelude to the Court's consideration of this issue, it is important to place the City's supposed "new" ordinance in context. Ordinance 62-41 (Jan. 28, 2010) provided:

> *City-provided refuse collection and disposal services*, whether by employees of the city or employees of a refuse collection service operating under contract with the city, *shall include curbside collection of refuse… solely from eligible dwelling units in the city*. For purposes of this chapter, the following are ***not eligible dwelling units*** and shall not receive city-provided refuse collection and disposal services:
>
> (1) ***Mobile home developments***, travel trailer camps, clustered multi-family housing, and ***buildings containing seven or more dwelling units*.**

(LF22-23; admitted by City at LF 61)(emphasis added).

The 1976 Ordinance declared unconstitutional in part provided:

> ***The director shall provide*** for the collection and disposal by the city of residential refuse in the city, except as otherwise provided hereafter,…

> ***(a)*** ***The director shall not provide*** for the collection and disposal of residential refuse ***from trailer parks, or from buildings containing seven or more dwelling units***,….

SLF286 (emphasis added).

A few of the words are different in the two ordinances. For example, trailer park became "mobile home development." But the relevant general rule and its exception in both ordinance is identical for equal protection purposes.

A. Standard of Review

This is a legal issue reviewed *de novo.*

B. The Modified Judgment did not Write or Impose an Ordinance

The best place to begin is the 1976 Ordinance. City Code §16.20 read:

> ***The director shall provide*** for the collection and disposal by the city of residential refuse in the city, except as otherwise provided hereafter,…
>
> (a) ***The director shall not provide*** for the collection and disposal of residential refuse ***from trailer parks, or from buildings containing seven or more dwelling units***,….

SLF286 (emphasis added).

The plain language of the ordinance tells a different story than the one advanced by the City. The ordinance under scrutiny required the City to collect refuse for every residential dwelling in the City; that was the rule that applied to all residential dwellings. Then the ordinance created an exception to that generally-applicable obligation. It expressly denied such refuse collection only to residential dwellings with seven or more dwelling units or trailer parks.

The original Order/Judgment (SLF01-02) merely declared §16.20(a) unconstitutional. It did not suggest a remedy. The April 7, 1976 original Judgment entered a mandatory injunction directing the City to provide refuse services to the plaintiffs "unless and until the City enacts a valid ordinance which establishes a reasonable and justifiable classification for those persons who are not entitled to refuse collection services by the City." (A1). When it entered the Modified Judgment, the trial court "set aside and vacated" the April 7, 1976 original Judgment. *Id*.

The Modified Judgment again declared §16.20(a) unconstitutional. It entered a Mandatory Injunction

> directing the City of Kansas City to provide refuse collection services, or the cash equivalent thereof, to the properties of the plaintiffs and to the properties of others similarly situated, and to dwelling units located in trailer parks, under the terms and conditions specified in the Stipulation and Agreement filed herein.

SLF04.

1. The Modified Judgment is final and binding on the City

Civil contempt is a case within the original case; it is an action to enforce the previous, final judgment of a trial court. The City did not challenge that constitutional ruling on appeal. The City does not dispute that it was a party to the original proceeding. The City's failure to appeal rendered the 1976 final and binding on the City. "[An] unappealed judgment must be recognized as an adjudication, adverse to plaintiffs, of the issues…." *McDown v. Wilson*, 426 S.W.2d 112, 118 (Mo. App. 1968). "An unappealed final judgment is conclusive of the matters adjudicated…." *Freeman v.*

Leader Nat. Ins. Co., 58 S.W.3d 590, 598 (Mo. Ct. App. 2001). It is the law of the case that an ordinance that excludes from gratis, city-wide residential trash service all trailer parks/7+-dwelling buildings violates equal protection.

The effective Judgment – the Modified Judgment—does not mention or amend any ordinance, nor suggest any remedy by ordinance – beyond a declaration that §16.20(a) is unconstitutional.

What about the incorporated Stipulation and Agreement? That document never uses the word ordinance either. It does say this, however:

> 6. If the City does terminate city-wide services to privately-owned dwelling units, including payments in lieu of such services, the City shall have no further obligation hereunder to make the cash payments or to provide direct services herein provided and for so long as such services and payments are terminated, otherwise such obligation shall continue.

SLF07.

There is simply nothing in the Modified Judgment or in the Agreement it incorporates that dictates an ordinance.

C. Separation of Powers

The City rightly asserts that the constitutional mandate requiring separation of powers can be violated in two ways. The first is negative – it forbids. "'One branch may interfere impermissibly with the other's performance of its constitutionally assigned [power] ... [citations omitted].'" *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. 1997), quoting *I.N.S. v. Chadha*, 462 U.S. 919, 963, 103 S.Ct. 2764, 2790–91, 77 L.Ed.2d 317 (1983). (Powell, J., concurring). The second is

affirmative – it requires an act. "'Alternatively, the doctrine [of separation of powers] may be violated when one branch assumes a [power] ... that more properly is entrusted to another. [citations omitted].'" *Id.*

The City incorrectly asserts that the trial court violated separation of powers in both ways.

1. The Modified Judgment did not assume legislative powers.

First, the City insists that the trial court should have refused its invitation to enter the injunctive relief the City asked the 1976 trial court to enter. By not refusing, the trial court – the City must somehow conclude – assumed legislative powers that belonged solely to the City. For this part of its argument the City asserts that the Modified Judgment imposed a specific ordinance on the City.

Assuming for argument's sake alone that the 1976 trial court had decided the case without reference to any Agreement, the trial court still had authority to order refuse collection for the Plaintiffs.

"[I]t is a proper role of the courts to compel legislative bodies to meet their constitutional obligations while leaving it to those bodies to determine how to meet them." *E. Missouri Coal. of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, 386 S.W.3d 755, 763 (Mo. 2012). *Accord Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 843–44 (Mo. Banc 1963).

It is the federal and state constitutions' equal protection guarantees that interfered with the City's freedom to choose any policy it wanted, not the trial court's Modified Judgment.

The Modified Judgment declared §16.20(a) unconstitutional. That decision effectively excised §16.20(a) from the ordinance. That left the ordinance's generally-applicable duty in the City to collect residential refuse in place without the 7-dwelling unit exception. Thus, even if the trial court had said nothing else but that §16.20(a) violated equal protection, the effect was the same. The City's own ordinance (without its unconstitutional provision) required the City to collect refuse from the 7+ dwelling unit/ trailer park properties. The 1976 trial court's order directed nothing that the now-constitutional ordinance did not already require the City to do. *Thus, City's claim that the Modified Judgment's declaration of the unconstitutionality of §16.20(a) usurped the City's legislative prerogatives ignores what its own ordinances required of the City once the unconstitutional provisions were excised.*

The City may argue that the payments in lieu of refuse collection service provision of the Modified Judgment was not in the original ordinance. That is true. But the trial court gave the City a choice – a choice the City asked for – in how it would follow its existing ordinance with the unconstitutional provision excised. Further, the City immediately codified that provision by adopting an ordinance that gave the City the option to make payments in lieu of actual refuse collection, an option the City sought and the trial court approved.

What the trial court did *not* do is require the City to make the payments. The 1976 Modified Judgment permitted the City three options: (a) termination of the refuse program, (b) adherence to its constitutional duty to collect refuse for all residential dwellings if it left its refuse collection ordinance on the books, or (c) adopt the payment

option. The existence of these options necessarily left the policy choice in legislative hands.

A judicial decision excising an unconstitutional statutory/ordinance provision and an injunction ordering compliance with the constitution is exactly what the Court sanctioned in in *Rebman v. Parson,* ___ S.W.3d ___ No. SC 97307, 2019 WL 1613630, (Mo. banc Apr. 16, 2019).

There, Lawrence Rebman sought a declaratory judgment that an appropriations statute enacted by the general assembly was unconstitutional and a permanent injunction to prevent the State from terminating his employment as an administrative law judge. The trial court declared certain provisions of the appropriation's bill targeting Mr. Rebman for termination unconstitutional as applied to Rebman. The trial court severed the unconstitutional language from the statute and permanently enjoined the State from terminating Rebman's employment pursuant to the unconstitutional language.

The State argued the injunction encroached on the General Assembly's plenary authority to appropriate funds by ordering the expenditure of state funds not authorized by a duly enacted appropriations statute. The Court disagreed. Concluding that because the injunction did not order the expenditure of unappropriated funds, it did not violate separation of powers.

There is simply no factual basis for the City's claim that the trial court wrote "a legislative fix" for the City. (App.Br.45). The Mandatory Injunction did no more than require the City to follow its existing ordinance with the unconstitutional provision

removed, choose to make payments rather than pick up the trash or terminate the refuse collection program altogether. The City was not ordered to make the payments; it was not ordered to pass an ordinance. The City essentially asked, "Can we make payments rather than picking up the trash?" The trial court said, "Yes. If you choose to make the payments rather than pick up the trash as your ordinance requires, you are assured that you meet the demands of equal protection."

The City's argument that the Modified Judgment commanded the legislative body to adopt a specific ordinance wholly ignores what happened in this case and the legal ramifications of those events.

2. The Modified Judgment did not interfere with or otherwise prohibit the City's ability to pass an ordinance repealing the trash rebate program without the court's permission.

Nor is there merit to the City's contention that the 1976 Modified Judgment prohibited/interfered with the City's ability to repeal the trash rebate program. The City did not even try to modify its trash program beyond that program previously declared unconstitutional in 1976.

The City did not try to craft a different policy solution to its refuse issues, though it was surely permitted to do so. All the 1976 trial court did was say that the equal protection clause prohibited singling out 7-dwelling residential buildings/trailer parks from the City's general and voluntarily accepted obligation to collect residential refuse from every other residential dwelling. The City's "new" ordinance did exactly what the old ordinance did; it created an identical unconstitutional classification. The new ordinance was unconstitutional under the City-requested Modified Judgment the moment

it was passed precisely because it was legally indistinguishable from the one litigated in 1976.

This is archetypal contumacious behavior. Civil contempt exists when a court finds: "(1) the contemnor's obligation to perform an action as required by the decree; and (2) the contemnor's failure to meet the obligation." *D.R.P. v. M.P.P.*, 484 S.W.3d 822, 826 (Mo.App.2016)(citations omitted). The trial court here found that that claim against Kansas City met both elements – and that the City was in contempt.

It becomes all the more contumacious (and hypocritical) when one considers that the City's new ordinance, never amended, was not applied to the politically powerful HAA. The trial court found that political power was the reason for the City's willingness to keep the 1976 Modified Judgment alive for the HAA members. LF550, ¶87.

The City's agreement with HAA recited that the collection of refuse for 7+-dwelling units was mandated by the 1976 Modified Judgment. LF42-48 The City had passed a law making all 7+-dwelling buildings ineligible for the City's gratis refuse collection services. Ordinance 62-41. Nonetheless, the City violated its own law by granting gratis refuse service to HAA by contract while denying that same service to the less politically influential owners of trailer parks/7+-dwelling buildings under the guise of an ordinance already declared unconstitutional.

Against this background the City argues: "By entering a mandatory injunction with no end date, the court stripped the City of its ability to ever pass another legislative scheme on this topic without first getting the permission of the court…." App.Sup.Br.46. As previously noted, the injunction had an end date – the City could terminate the

injunction by the terms of ¶6 of the Settlement Agreement. Further, as the Western District concluded: "To the extent the Modified Judgment gave the City the option of making cash payments to multi-unit building and trailer park owners instead of providing refuse collection services, that option was (a) requested by the City; and (b) gave the City greater—not lesser—flexibility in managing its operations." Slip Op. 8.

But undaunted by the facts, the City turns to *Albright v. Fisher*, 64 S.W.106 (Mo. 1901) for the proposition that a trial court may not restrain a city from "considering, passing, or adopting, or taking any further action upon or in relation" to an ordinance to extend a street car." *Id.* at 109. Such a judicial restraint would be an "usurpation of power for it to assume functions which belong exclusively to [the legislative] body." *Id.* at 110. The City argues that "[t]o enjoin the passage of a future ordinance would be for the court to 'interfere with the exercise of [legislative] functions,' yet that is precisely what the 1976 court did, at least as enforced by the trial court in this case." App.Sup.Br.47

No one disagrees with these judicial statements. But where are the words by which the 1976 trial court prohibited the City's Council from passing an ordinance? They simply do not exist. Again, the 1976 Modified Judgment simply told the City to follow its ordinance with the unconstitutional provisions excised – or choose a different option for which the City sought approval to inoculate it from further litigation. The City commends the April 7, 1976 Judgment as an example of what the trial court should have done because it left the City with the option to follow the injunction only "until the City enacts a valid ordinance setting a reasonable and non-arbitrary classification." The absence of that language from the Modified Judgment is tantamount to a judicial

prohibition against passing any ordinance, according to the City. But, again, the City could terminate the injunction by the terms of ¶6 of the Settlement Agreement. This is not a restraint imposed by the 1976 trial court; it is a constraint imposed by the equal protection clause. The City always retained the power to pass an ordinance that did not violate the constitution.

Instead the City adopted an ordinance that was virtually identical, that is, contained the identical classifications already judicially and finally declared to be devoid of any rational basis.

The City now contends that its new ordinance has a rational basis – and thus does not violate the equal protection clause. See App.Sup.Br.48, n.10. Leaving aside that the asserted rational basis for the identical ordinance is an economic one (it is okay for the City to discriminate when it is expensive not to) and leaving aside that the economic necessities that supposedly justify the new ordinance do not control when it comes to the politically-connected HAA, the City's proper course was to ask the judiciary to consider its new argument and relieve it of the 1976 Modified Judgment. The City had the affirmative duty either to defend its new ordinance in the contempt proceeding on that basis or initiate a new proceeding to assert that its new (identical) ordinance had a rational basis; it did neither. It chose instead to assert a legally untenable separation of powers argument it never raised in 1976. The Class Plaintiffs had no duty to retry the equal protection issue; it was decided adverse to the City in 1976 under a legally identical ordinance. But the City's complaint that it was forever bound by the 1976 Modified Judgment and had no legal or legislative options is preposterous.

D. Summary Judgment on the Separation of Powers Defense was Proper

The City's assigned error here turns on the Court's acceptance of its separation of powers arguments. As shown, they are impotent.

Even if the arguments on the substantive merits were not impotent, waiver and judicial estoppel dictate that the City cannot raise that issue now.

The Class Plaintiffs repeat here that the City was a party to the 1976 proceeding. Whether under the law of the case doctrine, collateral estoppel or res judicata principles, the City is bound by the judgment and may not collaterally attack it. The 1976 Modified Judgment decided the equal protection issue; that judgment was on the merits; the judgment was entered against the City; the City had a full and fair opportunity to litigate the issues raised in the 1976 case. *See, Oates v. Safeco Ins. Co. of Am.*, 583 S.W.2d 713, 719 (Mo. 1979)(setting out elements for collateral estoppel). It cannot now attack the judgment; it could, however, have sought to modify or annul it if a court could be convinced that a rational and reasonable basis for the new ordinance existed.

a. Waiver

The City asserts that because the 1976 Modified Judgment is void because it violated separation of powers, it can be collaterally attacked now. The issue is whether the City could waive its right to assert its separation of powers argument by not advancing it in the 1976 proceedings.

Claims and defenses invoking constitutional objections are subject to "stringent procedural requirements regarding the raising and preservation of constitutional issues." *Damon v. City of Kansas City*, 419 S.W.3d 162, 178 (Mo.App.2013). Constitutional

violations are waived if not raised at the earliest possible opportunity. *City of Kansas City v. McGary*, 218 S.W.3d 449, 452 (Mo.App. 2006). "The critical question in determining whether ***waiver*** occurs is whether the party affected had a ***reasonable opportunity*** to raise the unconstitutional act or statute by timely asserting the claim before a ***court of law***." *Damon*, 419 S.W.3d at 178 (citation omitted)(emphasis original).

The City plainly fails that test. The City followed the Modified Judgment from 1977 to May 1, 2010. During that 33 years, the City either provided refuse collection services to owners of buildings with seven or more dwelling units and trailer parks, or chose its hand-selected option and made cash payments to those persons. The City admits that it provided these trash collection services in compliance with the Modified Judgment until 2010. And its agreement with the HAA is an admission that the 1976 Modified Judgment "mandated" the service that it agreed to provide HAA contrary to its own ordinance. LF44.

The City's compliance with the Modified Judgment for more than three decades, coupled with the City's awareness of its obligation to seek judicial relief before eliminating the Trash Rebate Program, and its failure to do so, constitute a waiver of any constitutional objection to the Modified Judgment it may now claim. *See Damon*, 419 S.W.3d at 178.

The City asserts that it cannot waive the separation of powers guarantee because separation of powers is an "institutional" right that cannot be waived. It cites no direct case for this proposition. Rather it relies on *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). That case held that a person can waive a right to trial of a

counterclaim before a federal Article III tribunal. But the U.S. Supreme Court held, separation of powers does not permit Congress to expand or limit the power of Article III courts beyond what the Constitution permits. This is a non-waivable, institutional right.

What is an institutional right? It appears to be a government-structure right – that is, a right that, if waived, would fundamentally alter the way government operates under its organic document. It is thus a right that potentially affects not only the case *sub judice*, but other cases not before the court because the settled role of, for instance, the judiciary, would become untethered to its constitutional prerogatives and restraints, if wavier were permitted. A close analog is the previous discussion centered on the City's claim that judicial estoppel cannot create standing. This rule is an institutional rule affecting an institutional right. This is because standing is tantamount to subject matter jurisdiction. One cannot grant a court the authority to act when that authority is denied it by rules related to justiciability, that is, one cannot create standing by failing to raise standing in a previous proceeding. To permit judicial estoppel to create standing would be to permit judicial estoppel to alter the courts' authority to proceed at all.

The separation of powers defense the City raises for the first time nearly 4 decades too late does not implicate an institutional right in this context; it is an argument that even if properly raised and rejected, affects only Kansas City. It is an argument, even if properly raised and rejected does not go to a court's authority to decide. Thus, waiver by Kansas City here does not threaten the constitutionally-imposed structure of government and for that reason does not place at risk the structural integrity of government. Thus, the

failure to raise the issue in 1976 bars the City from raising it now. Affirmative defenses not raised are waived.

The City's argument reduces to no more than this: even if the City violates equal protection, no court can declare a portion of an ordinance unconstitutional and then adopt an option the City seeks to meet its constitutional duty. The City seeks immunity from liability from constitutional violations under the guise of separation of powers.

b. Judicial Estoppel

The City also asserts that judicial estoppel cannot operate to bar its decades-late separation of powers defense.

Judicial estoppel bars a litigant from taking a position in one legal proceeding, and thereby obtaining the benefits from that position, and later, in a second legal proceeding, taking a contrary position in order to obtain other benefits. *Brooks v. Fletcher*, 337 S.W.3d 137, 140 (Mo.App.2011). Judicial estoppel is available "to prevent parties from playing fast and loose with the court." *Id.* at 143 (citation omitted).

Judicial estoppel serves to preserve "the dignity of the courts and ensure order in judicial proceedings." *Id.* at 144. "Were parties allowed to take inconsistent positions at their whim, it would allow chaotic and unpredictable results in our court system, which of course would be problematic for a host of reasons." *Id.*

Missouri courts have utilized the test for judicial estoppel set forth by the United States Supreme Court:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded

> in persuading a court to accept that party's earlier position…. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 140 (quoting *Zedner v. United States*, 547 U.S. 489 (2006)).

Application of these three factors to the uncontroverted facts compels application of judicial estoppel to prevent the City from asserting its constitutional objection to the Modified Judgment.

1. The City Has Taken Inconsistent Legal Positions

The City's constitutional objection in this case is inconsistent with its legal position in the prior proceeding. In the 1976 case, the City drafted and executed a Stipulation and Agreement then asked the court to incorporate its preferences into the Modified Judgment. This ended the litigation.

In sharp contrast here, the City disclaims authorship of the Agreement and asserts that the Modified Judgment is unconstitutional. The City's current legal position is clearly inconsistent with its legal position in 1976 when it requested that the Court "make compliance with the provisions hereof mandatory." The first element of the judicial estoppel doctrine is satisfied.

2. The City succeeded in persuading the 1976 court to accept its position.

Its successful effort to have its Agreement made part of the Modified Judgment allowed the City to avoid an appeal and created a pre-approved option in the City to address its constitutional violation flexibly. The City complied with its mandatory obligations for 33+ years.

3. The City seeks to assert an inconsistent position in order to achieve an unfair advantage or impose an unfair detriment on the Class Plaintiffs.

Finally, the City would obtain an unfair advantage as well as impose an unfair burden on Class Plaintiffs unless judicial estoppel is applied. Through its compliance with the Modified Judgment for 33 years, the City encouraged the Class Plaintiffs to forgo their own litigation and to rely on the expectation of trash collection benefits, whether in the form of trash collection services or monthly payments in lieu of trash collection. Class Plaintiffs have in fact relied on receipt of those benefits provided by the City and have recently suffered losses when the benefits were unilaterally revoked.

The City, by contrast, obtained peace and finality from the resolution of the 1976 litigation through entry of the Modified Judgment. Notwithstanding receipt of this benefit, the City now wants to abandon its burden and obtain a different benefit – immunity from liability in this lawsuit – by taking a legal position inconsistent with its 1976 plea to the Court to incorporate the remedy drafted and executed by the City.

Again, "[j]udicial estoppel is invoked to protect the dignity of the judicial proceedings and to prevent parties from playing fast and loose with the judicial process by taking inconsistent positions in two different proceedings." *Vacca v. Missouri Dep't of Labor & Indus. Relations*, ___ S.W.3d___, No. SC 96911, 2019 WL 1247074, at *1 (Mo. Mar. 19, 2019). "Judicial estoppel … is in the nature of a sanction for misuse of the courts." *Id at *4, n.4.*

This Court should not condone the City's adoption of inconsistent legal positions and should apply judicial estoppel to bar the City's affirmative defense based on a constitutional objection.

Conclusion

Point IV should be denied.

V. Various Contract Issues.

A. Standard of Review

This multifarious point raises evidentiary and legal arguments. As to the former, review is under *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). The latter, mostly contract interpretation issues, is subject to de novo review. *Crestwood Shops, L.L.C. v. Hilkene,* 197 S.W.3d 641, 648 (Mo. Ct. App. 2006).

B. The 1976 Agreement does not violate § 432.070 (See also Respondents' Point I).

The City first claims that the 1976 Agreement violates §432.070 and is void. Section 432.070 says:

> No county, city, town, village, school township, school district or other municipal corporation shall make any contract, [1] unless the same shall be within the scope of its powers or be expressly authorized by law, nor [2] unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be [3] in writing and dated when made, and [4] shall be subscribed by the parties thereto, or [5] their agents authorized by law and duly appointed and authorized in writing.

Id. (Brackets setting out limitations added).

Section 432.070 acts as a special statute of frauds applicable to municipalities to avoid municipal liability for implied in fact contracts. *State ex rel. State Highway Comm'n v. Washington*, 533 S.W.2d 555, 558 (Mo.1976). "It imposes three requirements: a contract must be within the scope of the governmental entity's powers, for proper consideration, and duly authorized and in writing." *The Lamar Co., LLC. v. City of Columbia*, 512 S.W.3d 774, 783 (Mo.App.2016). These requirements exist to

"preclude parties who have performed services for a municipality or county or other governmental entity without entering into a contract from subsequently recovering the value of those services based upon an implied contract." *Inv'rs Title Co.*, 217 S.W.3d at 288. The statute also serves to ensure that "the terms of the contract shall, in no essential particular, be left in doubt, or to be determined at some future time, but shall be fixed when the contract is entered into." *Newsome v. Kansas City, Missouri Sch. Dist.*, 520 S.W.3d 769, 778 (Mo. 2017)(citation omitted). Substantial compliance with the statute is sufficient. *Lynch v. Webb City School District*, 418 S.W.2d 608, 614 (Mo.App.1967).

The City does not claim that no consideration supported the Settlement Agreement. Rather it claims that the Agreement was outside the City's authority and that the person who signed the Agreement did not have authority to bind the City.

1. The 1976 Settlement Agreement is within the scope of the City's authority.

The Settlement Agreement was within the scope of the City's powers and otherwise authorized by law. Because cities may be parties to litigation, they necessarily have the power to resolve litigation by settlement agreement. As discussed more fully infra, City Charter §28 grants the City Attorney the authority to control the "management of litigation." Likewise, Section 260.215 (A53) expressly authorizes cities to provide for the collection and disposal of solid wastes and "to contract…with any person…in this or other states to carry out their responsibilities for the storage, collection, transportation, processing, or disposal of solid wastes." §260.215. The Agreement permitted the City to choose to pay Class Plaintiffs a sum of money to handle the City's obligation to collect

refuse. There is no legitimate dispute; this Agreement was within the scope of the City's powers.

a. Police Power

The City nonetheless contends the 1976 Settlement Agreement contracted away the City's police power. This is an argument that the Agreement was void *ab initio* because the City cannot contract away its police power.

The police power refers to the exercise of the sovereign right of a government to promote order, safety, health, morals, and the general welfare of society. *The Lamar Co., LLC. v. City of Columbia*, 512 S.W.3d 774, 784 (Mo.App.2016) ; *State ex rel. Kansas City v. Public Service Comm'n,* 524 S.W.2d 855, 864-65 (Mo. banc 1975). Cities must, nonetheless, exercise their police powers constitutionally:

> It is the function of the courts to determine whether a statute [or ordinance] purporting to constitute an exercise of the policy power…unjustifiably invades rights secured by the Constitution
> ...
> It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute [or ordinance]…the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed.

Id. at 862 (citation omitted). It was this principle, and more specifically the Constitutional guarantee of equal protection under the law, that formed the basis for the 1976 judgment.

As the Western District concluded: "Requiring the City's actions in the exercise of its police power to comply with the state and federal Constitutions does not violate the separation of powers—instead, it constitutes the proper, and time-honored, role of the judiciary in our tripartite form of government." Slip Op. 8

But while Constitutional protections restrain the exercise of the police power, that power remains an "essential attribute of government." *City of Columbia,* 512 S.W.3d at 784. Accordingly, a City may not contract away its police power to another, but instead must have it "at all times available for use to meet such public needs as may arise." *Id*. "In other words, if a contract surrenders or contracts away governmental functions, then it exceeds the scope of a governmental entity's powers, and is void." *Id.*

The key inquiry is whether the City has contracted away its ***control*** over the policy power. *Compare City of Columbia*, 512 S.W.3d at 784-85 *with Kindred,* 292 S.W.3d at 425-26.

For instance, in *City of Columbia* Lamar's predecessor in interest had filed a lawsuit against the City of Columbia following the City's denial of four permit applications for the erection of new billboards. *Id.* at 778. The parties settled that lawsuit and executed a settlement agreement that, if enforceable, would have prohibited the city from enforcing its billboard ordinance on certain relocated or new billboards. *Id.* This gave Lamar (and not Columbia) control to establish its own standards for billboards within the city limit. Lamar thus became the municipal government for purposes of billboards.

The Western District in *Lamar* determined that the contract was void because the City could not contract away the future enforcement of its billboard ordinance. Nor could it allow a third party to dictate the terms upon which billboards (a matter within the police power of the City) would be constructed. *Id.* at 785.

Conversely, *Kindred v. City of Smithville*, 292 S.W.3d 420, 424 (Mo.App.2009), involved an agreement for an easement which would allow Smithville to enter Kindreds' property to install, repair, replace and maintain water and sewer lines. *Kindred*, 292 S.W.3d at 422. The agreement provided that the Kindreds could make future connections to the lines without the payment of any fee to the City. *Id.* at 423. Several decades later, the Kindreds wanted to develop their property and sought access to the lines. *Id.* The City refused, contending there was no remaining capacity. The Kindreds sued for specific performance. *Id.* The City defended by claiming the agreement was void because public policy prevented them from contracting away their rights and obligations pertaining to municipal facilities. *Id.* at 425. The court disagreed, concluding that even though the subject of the contract was the City sewer system, "the City did not contract away or surrender its police powers to control and regulate its sewer system when it gave the Kindreds the right to connect to the water and sewer lines…." *Id.* at 426. As the City retained the right to control its sewer system, the contract was enforceable. *Id.*

The police power here relates to the disposal of solid waste. The General Assembly defines that power in §260.215. It "relates to the storage, collection, transportation, processing and disposal" of solid wastes. §260.215 (1); *see also State ex rel. American Eagle Waste Industries v. St. Louis County*, 272 S.W.3d 336, 342-43

(Mo.App.2008) (recognizing that it is the "***operation aspects*** of trash collection, that once initiated, may indeed fall within the purview of a county's police power")(emphasis added). Section 260.215 likewise confirms the validity of this contract. It expressly authorizes a City to contract "with any person…in this or other states to carry out their responsibilities for the storage, collection, transportation, processing, or disposal of solid wastes." §260.215.3(1). Thus, entering into this contract was an exercise of the City's police power, not the surrendering of it. The key inquiry for the Court is whether the 1976 Settlement Agreement surrendered the City's power to control how solid waste is stored, collected, transported, processed and disposed of.

The City never explains how the 1976 Settlement Agreement does so. Nor can it. The Agreement did not surrender the City's ability to mandate how residents stored waste, the manner and frequency at which it would collect waste, how it would transport waste or where it could dispose of waste. Nor did it give anyone the right to ignore any City ordinance relating to the storage, retrieval, collection or disposal of waste. Still more, the Agreement did not even require that the City have a waste collection system at all. Under the Agreement, the City expressly reserved the right to terminate its city-wide waste program at any time, at which time its obligations to multi-unit dwelling owners and trailer parks would have also ceased, as well as to the entire city. LF92. In other words, the City retained complete control over its power to collect, or not collect, waste from its citizens. The 1976 agreement only confirmed that if the City chose to provide such services, there was a mechanism in place to ensure that the City would exercise that police power constitutionally. LF90-92. *See Public Service Comm'n*, 524 S.W.2d at 861

(contract which addressed how costs would be borne for something designed to protect the public health or safety was within the scope of the City's powers).

With no ability to show that it contracted away any of its police powers, the City's argument is reduced to this: because waste collection is a police power of the sovereign, a City is free to avoid any contract related to waste collection. Of course, this goes too far. But "the police power is not so powerful that it impairs the obligations of contracts where such impairment is not necessary to achievement of the objection for which the power is being exercised." *Public Service Comm'n*, 524 S.W.2d at 864. The 1976 Settlement Agreement promoted, rather than hindered, the public health, safety and welfare. Accordingly, a denial of the trial court's judgment manifested by a breach of that Settlement Agreement restored disparate treatment for certain multi-dwelling building and trailer park owners and became actionable by those whom that breach aggrieved (the Class).

b. The 1976 Settlement Agreement Expressly Stated that the City Was Not Bound in Perpetuity

The City next argues as part of its §432.070 *ultra vires* contention that the Settlement Agreement "bound all future City Councils to continue the program…." (App.Sup.Br.58). The underlying factual predicate of the City's argument is false.

The 1976 Settlement Agreement never bound future City Councils in perpetuity. It did just the opposite. The City retained complete discretion to terminate *city-wide* trash services at any time, at which point the City's obligation to provide services to the class members (or cash payments in lieu thereof) would have also ceased. LF92. The

Judgment only established a mechanism by which the City, if it chose to continue a city-wide waste program, would do so in conformity with equal protection. Likewise, and as some City officials actually recommended, the City could have attempted to modify how it accomplished equal treatment by seeking to have a court modify the 1976 judgment. This is not a bound-forever result. The only thing that binds the City in this context is the Equal Protection clause.

City of St. Louis v. Cavanaugh, 207 S.W.2d 449 (Mo.1947) offers the City no solace. There, Cavanaugh contended the ordinance establishing a bridge toll was void because the voters approved bonds to finance the bridge's construction upon the stipulation that the bridge should forever be a free bridge. *Id.* at 453. The Court ruled that power to charge the toll was a separate and independent legislative power that preexisted the construction of the bridge, and which the bond vote could not impact. *Id.* at 453-54. Accordingly, members of the City Board of Alderman could not bind their successors forever with an ordinance providing for no tolls. *Id.* at 455.

Cavanaugh did not involve the contumacious refusal to follow a previous court order finding an ordinance unconstitutional, excising the unconstitutional provision from the ordinance, and adopted an alternate remedy proposed by a city. At most, *Cavanaugh* stands for the broad proposition that a city may not abdicate its legislative powers or restrict a future legislature's ability to exercise its legislative powers. Thus, the City in 1976 could not have obligated future City Councils to continue a City-wide waste service—and it did not. But Kansas City could contract for a mechanism to perform such service constitutionally so long as the City decided to continue the program.

The City's current complaints about the contract violating §432.070, limiting its police power and hampering future city councils ring particularly hollow when the City agreed to perform its 1976 promises for this politically influential group of home owners – the HAA. That side agreement does nothing but reflect the City's persistent and malevolent effort to do once again what equal protection guarantees prohibited them from doing in 1976—to treat one group of its citizens differently from others with no rational basis (perhaps other than future political support) for doing so. It also demonstrates with startling clarity that the City itself can contract away its own obligation to follow its ordinances.

c. The Assistant City Attorney Who Signed the Agreement had Authority to Bind the City.

Finally, the contract was "subscribed by the parties thereto" through their duly authorized legal representatives. The City now contends that its own assistant city attorney**,** who represented the City in the 1976 litigation, filed all manner of legally binding papers for the City, and made arguments for the City to the court, could not execute the Settlement Agreement. If the City had not authorized its assistant city attorney to do these things, it would have been in default in 1976. The City cannot claim that it may pick and choose 30+ years later what things the assistant attorney did with authority and those that he did without authority to act for the City.

This argument conflicts with the City's own Charter provisions as well as controlling Missouri law.

First, §28 of the City's Charter in effect in 1976 provides that the City law department shall "represent the city in all legal matters" and "***shall direct the management of all litigation*** in which the city is a party or is interested." (A8) (emphasis added). A "representative" is "[s]omeone who stands for or acts on behalf of another." BLACK'S LAW DICTIONARY, 1494 (10th ed. 2014). Moreover, the authority to "direct the management of all litigation" includes the authority to stipulate to the resolution of litigation. *Promotional Consultants, Inc. v. Logsdon*, 25 S.W.3d 501, 505 (Mo.App.2000). "An attorney in charge of a case has implied authority from his client to enter into any stipulation for the control of the progress of the action, even to the entering of judgment in favor of the opposing party." *Id.* (emphasis added); *see also Kenney v. Vansittert*, 277 S.W.3d 713, 720-21 (Mo.App.2008)("a party contending that his attorney lacked authority to bind him carries a heavy burden" and "authority is presumed to be present in the client's attorney of record and where the attorney undertakes negotiations with the opposing party."). Indeed, "[o]ur courts have only permitted parties to avoid settlements concluded by their attorneys where the evidence has failed to raise this presumption of authority, or where the fact-finder is truly convinced the authority is lacking." *Id.* at 721. "Where such apparent authority is present, the compromise of a pending suit will be binding upon his client, unless it be so unfair as to put the other party upon inquiry as to the authority, or imply fraud." *Id.*

Here, the City has actually confirmed that its attorney had authority to execute the 1976 Settlement Agreement by passing an ordinance incorporating its terms to create the

Trash Rebate Program (SLF 286-288 (Ordinance 48388)) and thereafter performed the Settlement Agreement for more than 3 decades.

The City isolates §82 and §95 (A16, A20) from its controlling-in-1976, 1967 Charter and takes them out of context. 1967 Charter, Article III authorized the City attorney's office to direct the management of all litigation in a section titled "Law Department." Sections 82 and 95 appeared in the separate Article IV, the subject of which was Finance. As is clear from surrounding charter provisions, such as §80 (A12) which creates a division of purchase and supplies, §82 was intended to apply to ***purchasing contracts***--that is, agreements under which the City was expending monies to purchase supplies, equipment or services—not a stipulated settlement agreement.

Section 82 notes that "all contracts shall be awarded to the lowest and best bidder after due opportunity for competition." (A16). It likewise states that "persons contracting with the city under term contracts shall, during the term of the contract, furnish to the city at the prices therein specified, the supplies, materials or equipment, or the contractual services…in such quantities as may be required…." *Id.* It makes sense for the City's Finance Director to certify the existence of available funds when a City department wishes to make a purchase.

Donovan v. Kansas City, 175 S.W.2d 874 (Mo. banc 1943), on which the City relies, involved a purchase-of-goods contract.[3] But the 1976 Settlement Agreement was

[3] *Kennedy v. City of St. Louis*, 749 S.W.2d 427 (Mo. Ct. App. 1988) involved a physician employment contract, not a settlement agreement, and a more much restrictive

not a purchasing contract. Instead, it resolved the constitutional claim of the original fifteen plaintiffs against the City; it was not the type of contract to which §82 applied.

Irrespective, the 1976 Settlement Agreement still satisfied §82. That section permits enumerated persons to execute City contracts, including "the head of the department, the board or agency or the officer involved." *Id.* Here, the law *department* managed the 1976 litigation; the City attorney, as the City's representative appearing on its behalf, had every right to execute the settlement agreement or to have his agent, an assistant city attorney, do so. Section 82 only required the director of finance's certificate if the contract was imposing a financial obligation upon the City. *Id.* Here, the 1976 Settlement Agreement City never obligated the City to pay money. The City could, in its discretion, ***elect*** to make cash payments in lieu trash collection services; however, it could also perform the entire contract by providing waste collection alone or terminate the program altogether on a city-wide basis. LF90-92. As there was no absolute financial obligation, such as would exist with a purchase contract, and thus no requirement for the director of finance to certify the agreement.

The City's separate settlement with HAA makes this clear. LF42-48. There the City agreed to continue its Trash Rebate Program, waste collection or cash payments in lieu thereof, for certain owners of multi-dwelling buildings who had the political clout to demand that from the City, but not for less influential owners who operated the exact same type of buildings. Just like the 1976 Settlement Agreement, the HAA contract was

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Charter provision requiring the City comptroller to execute ***all*** contracts related to City affairs. This is not the case here.

not certified by the director of finance (LF42-48), despite the fact that the City's current Charter contains a similar provision. Charter of the City of Kansas City §1211. Contracts (b). (A45). The City's conduct as to HAA confirms, once again, that settlement agreements such as the 1976 Stipulation are not the type of contracts for which the director of finance's certification is required.[4]

Moreover, it is important for the Court to consider the nature of the contract at issue in determining whether it complies with §432.070. The 1976 Settlement Agreement, thus, satisfies §432.070 because:

> Keeping in mind the purpose of the statute and the type of contract at issue, we note that the concerns that the legislature sought to address by section 432.070 are not present in this case. (citation omitted). This is not a contract for services performed for the city.

Kindred, 292 S.W.3d at 428.

d. The City Ratified the Agreement with the Passage of an Ordinance that Adopted the Agreement's Terms

Though the notion that the City's attorney could not bind it in litigation finds no root in the law or the City's ordinances or charter, if the Court believes that the city attorney representing the City and resolving the litigation had no authority to do so, the City nonetheless affirmatively ratified the Settlement Agreement (a) by the passage of its ordinance and (b) its conduct for 30+ years.

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[4] Because §82 is not applicable or is otherwise satisfied, §95 likewise does not apply.

The City bargained for a resolution of this case. It does not challenge the sufficiency of the consideration it received to enter the Settlement Agreement. That consideration included the dismissal of all appeals, the adoption of an option in the City to either collect refuse or make payments in lieu collecting refuse, and a limitation on its exposure for violations of the equal protection clause.

"A person may not, by ratifying an act, obtain its economic benefits without bearing the legal consequences that accompany the act." Restatement (Third) of Agency § 4.07 (2006). The City argues here that the dismissal of the 1976 case appeals and the other consideration it obtained is for naught because it now wants to avoid the burden of its then bargained-for gain. The law does not countenance this result.

There is no serious dispute, but that Settlement Agreement was signed by an agent who had acted on the City's behalf throughout the litigation and who purported to act on the City's behalf to resolve litigation. That Agreement met all of the requirements of §432.070 in terms of its writing, specificity and the presence of consideration.

When the City passed an ordinance adopting the essential (and now challenged) provisions of the Settlement Agreement/Modified Judgment, it ratified the Agreement by an express and intended act. And this is so even if the city attorney could not bind the City. The City bound itself by the adopting ordinance. The ordinance showed "knowledge of the terms and material facts of the contract." *State ex rel. Mut. Life Ins. Co. of Baltimore v. Shain*, 339 Mo. 621, 98 S.W.2d 690, 692 (1936).

"Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority. A person ratifies an act by

manifesting assent that the act shall affect the person's [the City's] legal relations,…." Restatement (Third) of Agency § 4.01 (2006).

Even without that ordinance, the City conduct over more than three decades served to ratify the Agreement. Ratification occurs in the presence of "conduct that justifies a reasonable assumption that the person [the City] so consents." *Id.* Indeed,

> When an agent lacks actual authority to agree on behalf of the principal, the principal may still be bound if it acquiesces in the agent's action or fails promptly to disavow the unauthorized conduct after acquiring knowledge of the material facts. The subsequent affirmance by a principal of a contract made on its behalf by one who had at the time neither actual nor apparent authority constitutes a ratification, which relates back and supplies original authority to execute the contract.

12 WILLISTON ON CONTRACTS § 35:22 (4th ed.)

Conclusion

Point V should be denied.

VI. No Substantial Evidence/Failure of Class Performance.

A. Standard of Review

The City argues that substantial evidence did not support the trial court's contempt judgment because owners of multi-dwelling buildings and trailer parks do not dispose of waste pursuant to a two bag per week limit like other single-family residential owners do. "Substantial evidence is evidence that, if believed, has some probative force on each fact that is necessary to sustain the circuit court's judgment." *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo.2014). "[A]ppellate courts view the evidence in the light most favorable to the circuit court's judgment and defer to the circuit court's credibility determinations." *Id*. at 200.

B. The Class met the Requirements of the 1976 Modified Judgment

The City is quite right that the second of four elements of a breach of contract action is proof of the plaintiff's performance "pursuant to the contract." *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 104. The Agreement itself establishes the consideration. "[I]f the statement in a written contract in relation to the consideration shows upon its face that the expressed consideration is a part of the terms of the contract itself, then that part of the writing stands as any other part, and it cannot be contradicted…."*Pile v. Bright*, 137 S.W. 1017, 1018 (Mo.1911).

The Settlement Agreement indicates that the consideration flowing from the original Plaintiffs is: the end of the litigation; an agreement not to appeal; and the acceptance of the City's promises as sufficient to ameliorate the equal protection violation going forward. The 1976 Plaintiffs performed. The case ended. Only the City

had performance requirements after the Modified Judgment became final. The affected owners, including all those similarly situated to the named plaintiffs, received and accepted the City's performance and relied on it to continue until the City terminated its obligation under the provisions of the Modified Judgment/Agreement.

Now the City argues that the Class Plaintiffs – and those whose pecuniary interest is protected by the 1976 Modified Judgment – failed to perform. This argument is based on the claim that they do not dispose of waste pursuant to a two bag per week limit.

Nothing in that 1976 Modified Judgment or the Settlement Agreement limits those benefitting from the judgment to 2 bags per week. The performance required of the original 15 plaintiffs was to cease litigation against the City, not to adhere to any limit on the amount of waste they could dispose of each week. The Agreement defined "Services" to mean "residential refuse collection and disposal services which meet or exceed criteria ***now*** established by the provisions of Chapter 16 of the Code of General Ordinances of Kansas City, or which meet or exceed criteria hereinafter established by ordinance of city-wide application." LF91 (emphasis added). The Agreement thus did not require the City to do more for the owners covered by the Modified Judgment than it did for others in the City. And if a building owner received the payments in lieu of service, the owner provided services to each dwelling unit and could meet or exceed the services the City directly provided.

The Agreement never required any owner of a multi-dwelling building or trailer park to limit their residents to two bags per week. In fact, the 2-bag per week requirement did not even exist until 28 years after the parties executed the 1976 contract.

The contract also declared that the City could ***exceed*** any such requirement if it choose to do so. LF91. So could the building owners.

Thus, even if multi-dwelling units were required to limit their residents to two bags per week as opposed to disposing of all waste collectively in a dumpster, the City, consistent with its police power, retained the authority to exceed that requirement if it so chose. The City may not now convert the fact that it collected waste from dumpsters at multi-dwelling units (as opposed to two bags at the curb) for thirty years without complaint into a failure of performance that would justify it in disobeying the 1976 court's judgment or in breaching the 1976 Settlement Agreement.

The 2-bag limit would apply, in any event, only if the City collected the refuse and did not choose to make payments in lieu of collection. The City could always decide to make the payments and forego actual collection. The City's argument denies the terms of the Modified Judgment.

As the Western District correctly concluded:

> There are at least two problems with the City's argument. First, the definition of "services" in the Stipulation states that the required services must meet or exceed "criteria now [*i.e.*, in 1976] established by the provisions of Chapter 16 of the Code of General Ordinances of Kansas City," <u>or</u> "criteria hereafter established by any ordinance of city-wide application, by state law or by other lawful regulation issued pursuant thereto." " 'The disjunctive "or" ... in its ordinary sense marks an alternative which generally corresponds to the word "either." ' " *State v. Hardin*, 429 S.W.3d 417, 419 (Mo. banc 2014) (citation omitted); *see also, e.g., Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm'n*, 555 S.W.3d 469, 472 (Mo. banc 2018) (according significance to legislature's use of the disjunctive "or" in a statute). Thus, it appears from the wording of the Stipulation that building owners could provide qualifying "services"

> *either* by providing a level of service that complied with standards in effect when the Stipulation was adopted in 1976, *or* by providing the level of service required by current law.

Slip Op. at 11.

Again, the HAA contract is telling. It did not impose the 2-bag limit on members of the HAA, even after the City passed the 2-bag ordinance. The HAA Agreement provided:

> 2. **Continuation of Trash Rebate Program**. Notwithstanding the adoption of Ordinance No. 080935, as amended, repealing City Code §§ 62-41(a)(3) and 62-42, the City shall administratively continue in full force and effect and without protracted interruption the Trash Rebate Program ***as provided by the Stipulation and as mandated by the Modified Judgment*** solely with regard to those members of the HAA identified in the list attached to the Settlement Agreement….

LF44 (emphasis added). The City freed HAA of any obligation under its ordinance! One wonders how a City can ignore its own law, and in so doing, render the ordinance inapplicable for a select group, while applying it to identically situated Class Plaintiffs.

In its Point VII, the City argues "The City cannot find a single case in Missouri jurisprudence which orders a city or municipality to violate an ordinance that has not been held unconstitutional." App.Sup.Br.70. Perhaps not, but this is a case where a city has violated its own ordinance to favor the well-to-do and politically influential.

Conclusion

The Court should deny Point VI.

VII. The Trial Court Properly Ordered Specific Performance -- Separation of Powers Revisited.

The City next contends the trial court's order of specific performance infringed upon its legislative functions and thus violated the constitutional mandate of separation of powers. The City cites no authority supporting such a proposition; and indeed, Missouri law mandates the opposite conclusion. *Point IV addresses separation of powers more fully.*

A. Standard of Review

Respondents' accept the City's standard of review standard.

B. Specific Performance is the proper remedy for the City's breach of its Agreement

"[T]he general rule of the law of contracts is well settled that in certain cases a breach of contract may give rise to two remedies." *Magruder v. Pauley*, 411 S.W.3d 323, 331 (Mo.App.2013). "One is an action at law for damages for the breach, the other is a suit in equity for the specific performance of the contract."[5] *Id.* "[I]n an action for specific performance, the right to sue is triggered by the failure of a party to do that which is contracted for, in accordance with the procedure established by the contract." *K-O Enterprises, Inc. v. O'Brien*, 166 S.W.3d 122, 127 (Mo.App.2005). Moreover, specific performance is available as a remedy when a City breaches a contract. *Kindred*, 292 S.W.3d at 422, affirms specific performance as a remedy in a contract between a City

[5] A Court sitting in equity may award monetary compensation in addition to specific performance to effectuate full and complete relief. *Id.* at 332.

and private landowner). Indeed, a City's contracts are just like other contracts, "measured by the same tests and subject to the same rights and liabilities." *City of Columbia*, 512 S.W.3d at 793.

The City mischaracterizes the issue as one in which the trial court's order of specific performance precluded the City from enacting an ordinance. It did not. The Modified Judgment did not require the City to provide refuse collection services, or a monetary equivalent, to the owners of multi-unit buildings or trailer parks. Instead, under the Modified Judgment, the City remained fully entitled to discontinue refuse collection services, and the trash rebate program, or to alter the level of trash collection services it provides. All that the Modified Judgment requires is that the City provide refuse collection services to all similarly situated persons on an equal basis. The circuit court imposed that obligation on the City based on the court's interpretation of the constitutional provisions requiring the City to treat similarly situated persons equally.

The trial court's order of specific performance simply enforced the 1976 Agreement and 1976 Modified Judgment. Requiring parties to adhere to their contracts, and to respect court orders, is something which is exclusively within the province of the judicial branch of government. A circuit court has the inherent authority to enforce its own judgments, including by way of civil contempt proceedings. *Deane v. Mo. Employers Mut. Ins. Co.*, 437 S.W.3d 321, 326 (Mo. App. W.D. 2014); *State ex rel. Abdullah v. Roldan*, 207 S.W.3d 642, 646 (Mo. App. W.D. 2006). *See also Katz Drug Co. v. Kansas City Power & Light Co.*, 303 S.W.2d 672, 680 (Mo.App.1957)(recognizing

that the power to construe and enforce contracts to be a judicial power) A judge performing his or her judicial functions does not usurp the legislative power of a city.

"The City cannot find a single case in Missouri jurisprudence which orders a city or municipality to violate an ordinance that has not been held unconstitutional." App.Sup.Br.70. Even if there was such a case, that has not happened here. But more important, no case exists that permits a City to adopt a new ordinance and by that adoption erase a final judicial judgment finding a legally indistinguishable, previous ordinance unconstitutional. And this is particularly so when the new ordinance is legally indistinguishable from an ordinance previously and finally determined to violate equal protection.

The City's deliberate breach of contract subjected it to the consequences (damages and specific performance) the law recognizes for such conduct. The trial court's award of specific performance was simply the natural consequence of those acts.

Conclusion

The Court should deny Point VII.

VIII. Attorneys' Fees.

A. Standard of Review

> The trial court is considered to be an expert on the question of attorney fees; the court that "tries a case and is acquainted with all the issues involved may 'fix the amount of attorneys' fees without the aid of evidence.'" ... The setting of such a fee is in the sound discretion of the trial court and should not be reversed unless the amount awarded is arbitrarily arrived at or is so unreasonable as to indicate indifference and a lack of proper judicial consideration.

Essex Contracting, Inc. v. Jefferson City, 277 S.W.3d 647, 656–57 (Mo.2009)(internal citations omitted).

B. The City did not Preserve its Claim that Sovereign Immunity Bars an Award of Attorneys' Fees Against It

At no point in the trial record did the City assert that sovereign immunity protected it from liability for attorneys' fees in a contempt action. The City's brief notes that it preserved "arguments concerning the American Rule, the lack of special circumstances, and shedding light on the lack of evidentiary support for costs and fees to be awarded. LF 489-507." App.Sup.Br.71. This list, which the City has now abandoned on transfer, does not (and did not) include sovereign immunity.

On this basis alone, Point VIII must be denied.

C. *Ex Gratia* Review of this Unpreserved Point Requires Affirmance

In its contumacious behavior, the City did not enjoy complete sovereign immunity.

> "Under the common law, only the State and its entities were entitled to complete sovereign immunity from all tort liability." *Junior College*

> *Dist. of St. Louis v. City of St. Louis*, 149 S.W.3d 442, 447 (Mo. banc 2004). "Municipal corporations traditionally have had immunity, however, for those actions they undertake as a part of the municipality's governmental functions—actions benefiting the general public." *Junior College*, 149 S.W.3d at 447; *State ex rel. Trimble v. Ryan*, 745 S.W.2d 672, 673–74 (Mo. banc 1988). Municipalities have no immunity for torts while performing proprietary functions—actions benefiting or profiting the municipality in its corporate capacity. *Junior College*, 149 S.W.3d at 447.

Kunzie v. City of Olivette, 184 S.W.3d 570, 573–74 (Mo. 2006).

The City may be quick to point out (too late) that refuse collection is a governmental function performed by a city that is entitled to sovereign immunity. The City's acts at issue here are not refuse collection. Rather, the City's willful refusal to obey a final judicial order is the issue.

Contumacious behavior toward the judicial branch is not a governmental function. If the Court's distinction between acts benefiting the public (governmental acts) and acts benefiting the City (proprietary acts) remains the law, the City's willful disobedience of the Modified Judgment is an act designed to benefit itself. It is not immune from the consequences of that contempt, or even from the payment of attorneys' fees that arise because of the special circumstances present here.

First, "[u]nder its inherent powers, [t]he circuit court has authority to assess attorney's fees in civil contempt cases for willful disobedience of a court order." *LaBarca v. LaBarca*, 534 S.W.3d 329, 336 (Mo. Ct. App. 2017). The inherent judicial power in a civil contempt case may be used both to coerce a defendant into compliance with a court's order, and to compensate the complainant for the cost of bringing the case. *Frantz v. Frantz*, 488 S.W.3d 167, 172 (Mo.App.E.D.2016).

Second, Missouri law recognizes certain exceptions to the "American Rule" – that litigants bear the expense of their own attorney fees. "The exceptional situations in which Missouri permits the award of attorney's fees as part of costs or damages include: …where a court of equity, in very unusual circumstances, finds an award of attorney's fees necessary in order to balance benefits." Id. at 338. These special circumstances run against a political subdivision as well. *Tupper v. City of St. Louis*, 468 S.W.3d 360, 374 (Mo. 2015).

"Intentional misconduct is a 'special circumstance' that may justify an award of attorney's fees." *Id.* 374. *See also K.C. Air Cargo Services, Inc. v. City of Kansas City*, 523 S.W.3d 1 (Mo.App.W.D.2017)(same and permitting an award of attorney fees on remand if special circumstances exist).

Here, the City intentionally and contumaciously chose to ignore the 1976 Court's authority and judgment. For 33 years the City followed the terms of the Modified Judgment by providing trash collection services or made cash payments to Owners of buildings and trailer parks. Undisputed evidence was presented that City officials, including the City's law department, recommended that the City seek a modification of the 1976 Judgment. City Manager Troy Schulte testified that it was his recommendation that the City's legal department seek Court approval on the legality of eliminating the Court-mandated program. Trial Tr.349:3-18; LF277-280. Jack Schrimsher, an assistant city attorney, warned the City that it faced contempt if it eliminated the Trash Rebate Program without first seeking judicial relief. LF312-316. Stan Harris, the Director of Public Works, informed the Finance and Audit Committee in 2009 that the ordinance

eliminating the Trash Rebate Program would not go into effect until May of 2010 in order to give the City's law department sufficient time to go to court to get the necessary approval. [SLF 271, at 31:10-20; SLF 95-96]. Attorney Bowers, representing HAA, advised the City that eliminating the Trash Rebate Program would violate the 1976 Modified Judgment. SLF 95-96 (video clips); SLF 212, at 88:2-25; 89:1-2. City Manager Schulte testified that the City's knowing violation of the Mandatory Injunction was a calculated risk and that the City would be sued. Tr.at356:21-25; 357:1-2.

This contumacious behavior justifies a finding of "special circumstances" supporting the award of attorney's fees against the City.

At stake here is the judiciary's authority to enforce its orders, even against a city. Sovereign immunity does not extend shield the City from the consequences of its contumacious acts.

Conclusion

Point VIII should be denied.

CONCLUSION

For the reasons expressed, the Judgment of the trial court should be affirmed in all respects.

Dated: June 11, 2019

Respectfully submitted,

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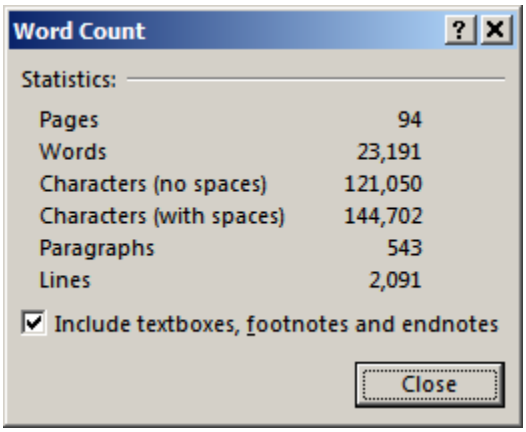
CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Mo. S. Ct. Rule 84.06(c), this brief (1) contains the information required by Mo. S. Ct. Rule 55.03; (2) complies with the limitations in Mo. S. Ct Rule 84.06(b); and (3) contains 23,191 words, exclusive of the sections exempted by Mo. S. Ct. Rule 84.06(b), determined using the word count program in Microsoft Word.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Respondents' Substitute Brief and Appendix was served via e-filing on the 11th day of June, 2019, to all counsel of record.

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